ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – SPRING 2021

CONTENTS

Chairman's Introduction

Welcome to the Spring 2021 Edition of the ARDL Quarterly Bulletin.

Two timely articles in this edition consider the interplay of regulation with privacy and/or confidentiality rights in spheres of activity currently under the judicial spotlight. Alisdair Williamson QC writes on the subject of "Beckwith v. SRA: lack of integrity, what does it mean and when does it apply?" considering Beckwith v. Solicitors Regulation Authority [2020] EWHC 3231 (Admin) (in which he appeared for the appellant) and the limits to regulatory intervention in cases of consensual sexual conduct between a supervising and junior professional. Kenneth Hamer writes on the subject of "Social Media and Professional Conduct" considering the leading and recent case law grappling with the protective reach of Art 8 and 10 rights in cases concerned with action taken against professionals with respect to their social media activity.

Roger Henderson QC, who is a very distinguished former - and indeed the first - Chair of ARDL (2002 - 2011) reviews the new first edition of "The Practical Guide to Public Inquiries" (Hart Publishing). As a veteran of public inquires, including as counsel to the Kings Cross Inquiry, he is well-placed to express a view. His review extends to providing a valuable insight into the most significant problems that he personally faced in the Inquiries in which he was involved.

Our full seminar programme continues to be rolled out remotely. As and when we can return to real world seminars, we will (although the remote facility, now that we have all become accustomed to it and discovered some of its advantages, will no doubt remain with us in some form for the foreseeable future). Details of future events are posted on the website and members will receive invitations by email.

The annual dinner remains scheduled for Friday 24 Sep 2021 at the Guildhall in London, which happily presently looks like a realistic possibility.

The Inaugural ARDL Conference has been rescheduled for Friday 1 October 2021, at the Museum of London. We hope to be in a position by then to host an informative day of talks and discussions across a range of regulatory and professional disciplinary topics. There will also be an opportunity to chat over drinks at the end of the day. Please

keep an eye out for further details, which will be provided by email and on the website. Tickets will go on sale by the end of July.

Backup dates have been obtained for all our external venue events. Should the need arise to switch to a backup date, we will inform members by email and amend the relevant notice on the website.

In my introduction to the last edition of this bulletin, I set out the arrangements for members to gain access to the members section of the website. We emailed members in the New Year inviting them to renew their membership. If you still need to renew your membership (or to apply for new membership), you can do so by going to the membership page on the website (which is accessed by clicking the menu symbol on the top right of the home page).

We hope that you are all keeping well and thriving in times that continue to be challenging both professionally and personally in so many respects. To make our own small contribution to that objective, I am pleased to announce that the Committee is presently planning to put on a series of 'wellbeing' events and seminars, addressing, amongst other things, the challenges faced by those working in the regulatory and professional disciplinary sector.

Paul Ozin QC
23 Essex Street

Beckwith v. SRA: lack of integrity, what does it mean and when does it apply? By Alisdair Williamson QC

Acting with integrity is a common requirement in professional codes of conduct but what does it mean and when does it apply? In *Beckwith*[1] the High Court has said that while disciplinary tribunals are able to identify an absence of integrity, they can only do so by reference to standards of behaviour derived from legally recognised sources. When faced with an allegation of lack of integrity that is wider than a simple lack of honesty, a tribunal has to identify by reference to existing guidance for the profession whether the conduct alleged infringes any ethical standards. Nor can the ambit of professional integrity be extended into private lives simply by writing more rules – the rules have to be demonstrably relevant to the practise of the profession or its standing.

The facts of the case may be simply stated: Person A had resigned from the Firm and was working out her Notice period when she went to the pub for drinks on a Friday evening in July 2016. There were partners and associates of the Firm present. The evening progressed and the group whittled down to three – Person A, Witness C, and Mr Beckwith (who had been Person A's supervising and appraisal partner). The group had been drinking heavily. Witness C left after Person A and Mr Beckwith disappeared for some time. Although disputed by Person A, the Tribunal was to find that a kiss had taken place between her and Mr Beckwith downstairs by the toilets. After Witness C had left, Person A and Mr Beckwith shared a taxi. When it arrived outside Person A's address, Mr Beckwith asked whether he could use her bathroom and she allowed him in to do so. A sexual encounter in her bedroom followed. He left in the early hours of the morning. Some months later, Person A, having had therapy, complained to the Firm that she had been too drunk to decide to engage in sexual activity. The Firm investigated and Mr Beckwith accepted a Final Written Warning on the basis that his behaviour had fallen below the standards expected of a Partner. Person A was not happy with this outcome and complained to the SRA. The SDT found that his conduct had breached Principles 2 and 6 of the 2011 SRA Principles, fined him £35,000 and ordered him to pay £200,000 of the £343,957 costs sought.[2]

At heart, the case was about the standards that can be expected of professionals outside the conduct of their practices. Admission to the professions has always been at the cost that high standards of behaviour were expected. Historically, the professions had only been concerned with private conduct that was disgraceful and brought the profession into disrepute, or some similar formulation. However, at the same time as some regulators moved to principle based regulation and lowered the standard of proof required in disciplinary hearings, there has been a greater willingness to intervene in private behaviour (in some cases justified by

[1] *Beckwith v. Solicitors Regulation Authority* [2020] EWHC 3231 (Admin)

[2] Principle 2 (you must act with integrity). Principle 6 (you must behave in a way that maintains the trust the public places in you and in the provision of legal services).

the introduction of a greater range of sanctions less serious than expulsion or suspension from the profession). The SRA Principles 2011 explicitly set out that Principles 2 (act with integrity) and 6 (maintain public trust) applied at all times. But why should a solicitor be expected at all times to display the same level of integrity as they would, for example, in court, and what would the content of that requirement be when applied to sexual behaviour? Unlike dishonesty, which is a concept fairly readily understood by reference to shared norms, integrity is, as the courts have observed, a more nebulous concept. The courts have struggled to define it, saying that a lack of integrity is capable of being identified by an informed tribunal by reference to the facts of a particular case[3]. The difficulty with this approach is that while professionals may share an understanding of what integrity means with respect to their professional duties, what guidance or common understanding is there with respect to integrity in private behaviour?

Wingate[4] had offered the guidance that integrity meant adherence to the ethical standards of one's profession, which may be higher than society's generally, but that nevertheless professionals were not required to be paragons of virtue. This offered no assistance to private behaviour. Even though the case presented a novel situation, the SRA, in an approach that the SDT accepted, had argued that integrity was something that it was simply open to the Tribunal to define and they could be fortified in their conclusion that there was a common understanding as to the ethical standards to be applied in private life by having regard to the Firm's decision to impose a Final Written Warning, which Mr Beckwith had accepted.

There was no other reasoning presented by the Tribunal on this central issue. Although superficially attractive, this approach (i) still leaves an individual without any clear guidance as to how and when their private behaviour may be subject to regulatory intervention; (ii) conflates the duties that a firm may impose on its employees and partners with the duties that are imposed on individuals *qua* professional.

The High Court during argument made clear its dissatisfaction with the proposition that the ethical standards of the profession could be derived from the standards of individual law firms. In the judgment it emphasised that, while the Tribunal can act as a professional jury in identifying want of integrity, it does not have *carte blanche* to define integrity [§33]. The ethical standards must be derived from the Handbook which is the legitimate source for regulation of the profession. In this way members of the professions can be held to higher standards in some matters without being required to be 'paragons of virtue'.

The Court also fired a warning shot, "Yet the approach we have taken in this case is not any form of permission to expand the scope of the obligation to act with integrity simply by making rules that extend ever further into personal life. Rules… cannot extend beyond what is necessary to regulate profession conduct and fitness to practise and maintain discipline with the profession." [§39] This sentiment found echoes within the Court's analysis of the Article 8 arguments. The Court accepted that the requirements to act with integrity and to act so as to maintain public trust in the provision of legal services, are requirements which will, on occasion require the SRA or the Tribunal to adjudicate on a professional person's private life. Such cases must and will arise. However, the Court was at pains to emphasise the circumscription of the regulatory ambit: "It is one thing to accept that any person who exercises a profession may need, for the purposes of the proper regulation of that profession in the public interest, to permit some scrutiny of his private affairs; to suggest that any or all aspects of that person's private life must be subject to regulatory scrutiny is something of an entirely different order" [§50]

Having considered the Handbook for itself, the Court determined that the relevant obligation in the circumstances of the case would have been the duty not to take unfair advantage of others. This would seem to accord also with a general notion of what integrity entails and can be seen in other codes of conduct (e.g. GMC Good Medical Practice – 36 "You must treat colleagues fairly and with respect"; ICAEW 111.1 A1 Code of Ethics 2020 "Integrity implies fair dealing and truthfulness").

[3] SRA v Chan [2015] EWHC 2659 (Admin)

[4] *Wingate and Evans v. SRA; SRA v. Malins* [2018] EWCA Civ 366

This sense of fairness integrity could have been touched on by Person A's impaired judgment through alcohol. While the position may have been different had the Tribunal come to a conclusion on the facts that Person A was vulnerable through her alcohol consumption (which it did not), or if Mr Beckwith had been sober, the High Court had little truck with the proposition that her alcohol consumption was relevant, "Put more directly both had had too much to drink, and this impaired the judgment of each of them." There was no allegation that the activity was not consensual and therefore the Tribunal was required to proceed on the basis that it was.

The SRA had sought to argue that this was not really private behaviour. The activity had taken place following drinks attended by, and paid for by, senior members of the Firm. This argument seemed to gain little traction with the SDT who throughout the judgment regarded themselves as regulating Mr Beckwith's private behaviour.

Given then that this was private, consensual, mutually drunken behaviour, how was this said to be an abuse of position? Such a finding would have been central to both the fairness sense of integrity and the maintenance of public trust. As Person A was not alleging that she felt obliged to comply by reason of Mr Beckwith's position, or that he had intimated it would affect her prospects if she didn't engage in sexual activity with him, or any similar misuse of his position, the answer was not obvious. The SRA's solution was to argue that senior members of a profession have a duty to set an example and that failing to do so amounted to an abuse of position. In supporting the Tribunal's determination ("the allegation that [Mr Beckwith's] conduct was an abuse of his position of seniority or authority was not sustainable" SDT Judgment at 25.183) as 'clearly correct' on this 'critical conclusion' [§45], the High Court has lent no weight to this as an avenue of future argument.

That is not to say that the public does not have a right to expect senior members of a profession to treat juniors with respect, "Seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally" [§44]

The Tribunal's conclusion on abuse of position should have been determinative of the case but instead they found that 'inappropriate' behaviour was sufficient to ground a breach of both Principles 2 and 6. The lack of reasoning in respect of Principle 2 is dealt with above; in respect of Principle 6, the position was no better. Having simply stated that Mr Beckwith's conduct affected the reputation of the profession, and that interference with a regulated person's private life was not novel, the Tribunal asserted that it 'was clear' that Mr Beckwith had failed to maintain the public's trust and that the public would not expect him to conduct himself in that way, so Principle 6 was breached.

The failure to find that there had been an abuse of position or to provide any reasoning was fatal to this conclusion, but the Court observed further that a standard such as 'inappropriate' is insufficient, "There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned disgraceful" [§43]. The availability of a range of sanctions short of expulsion does not in itself justify the expansion of the regulatory ambit into private lives.

The whole tenor of the High Court's judgment was that regulated persons had not, by joining a profession, permitted unfettered supervision of their private lives. In a different context, this judgment may have consequences for regulatory intervention in, for example, social media posting. How much is the public's trust in a profession undermined by one member posting something inappropriate in a private capacity? The mere fact that someone can be identified as a professional should not mean that they are always susceptible to regulation.

The extent to which the requirement to act with integrity can be extended to a duty to act fairly in sexual relationships, or in other aspects of private life, will be determined by whether that conduct realistically touches on one's practise of the profession or the standing of the profession as a whole in ways that are demonstrably relevant to standards of behaviour properly derived from

the legally recognised source for regulation of the profession. Consensual, drunken behaviour between seniors and juniors does not seem straightforwardly to fall foul of this requirement.

Alisdair Williamson QC

3 Raymond Buildings

Social Media and Professional Conduct by Kenneth Hamer

Social media describes web-based applications that allow people to create and exchange content and includes blogs such as Twitter, content communications such as YouTube, social networking sites such as Facebook and LinkedIn, and internet forums. Most regulatory bodies have published guidance for registrants on the use of social media and online forums. The guidance will often set out the professional standards expected of registrants when using social media, as well as providing advice on good practice, how to protect privacy and maintain client or patient confidentiality.

Guidance

The GMC's *Doctors' use of social media* (March 2013, updated November 2020) states that the standards expected of doctors do not change because they are communicating through social media rather than face to face or through other traditional media. Using social media has blurred the boundaries between public and private life, and online information can be easily accessed by others. Doctors should therefore be aware of the limitations of privacy online and should regularly review the privacy settings for each of their social media profiles. Social media sites cannot guarantee confidentiality whatever privacy settings are in place, and once information is published online it can be difficult to remove as other users may distribute it further or comment on it.

The GDC's *Guidance on using social media* (June 2016) provides that as a dental professional you have a responsibility to behave professionally and responsibly both online and offline. The *Guidance* draws attention to the GDC's Professional standards, and in particular paragraph 4.2.3 of the Standards for the Dental Team which states that "You must not post any information or comments about patients on social networking or blogging sites. If you use professional social media to discuss anonymised cases for the purpose of discussing best practice you must be careful that the patient or patients cannot be identified". The *Guidance* makes clear that a dental professional must not instigate or take part in any form of cyber bullying, intimidation, or the use of offensive language online. If you share any such content posted by someone else, you can still be held responsible even though you did not create it.

The NMC has published guidance in the form of a booklet entitled *Guidance on using social media responsibly.* Other health care regulators have also published guidance. The HCPC's document says in bold type: **Think before you post.** The BSB's Handbook under the heading *Social Media Guidance* reminds barristers that at all times they are bound by Core Duty (CD) 5 not to behave in a way which is likely to diminish the trust and confidence which the public places in them or the profession (emphasis in the original). The *Guidance* states that comments designed to demean or insult are likely to diminish public trust and confidence in the profession (CD5). It is also advisable to avoid getting drawn into heated debates or arguments. Such behaviour could compromise the requirements for barristers to act with honesty and integrity (CD3) and not to unlawfully discriminate against any person (CD8). The Law Society, the Institute of Chartered Accountants in England and Wales and the Royal Institution of Chartered Surveyors are among other regulators that have issued guidance to individuals and practices engaged in social media activity.

Case law

There has been a series of recent cases where the courts have had to balance the need of the regulator to promote and maintain public confidence in the profession against the rights of the registrant to express views on social media consistent with the Human Rights Act 1998, in particular articles 8 and 10 of the European Convention on Human Rights.

In 2017, the Pharmacists' Defence Association sought to challenge the GPhC's *Standards for Pharmacy Professionals* that contained social media guidance for pharmacists on the ground that the guidance criticised freedom of speech. Application for judicial review was refused; see *R (Pitt and Tyas) v. General Pharmaceutical*

Council [2017] EWHC 809 (Admin). Singh J (as he then was) said that the Council's Standards are intended to guide the conduct of pharmacy professionals and the relevant obligation in the Standards is to behave appropriately at all times. There may be occasions that occur outside normal working hours and perhaps in a context that is completely unrelated to the professional work of a pharmacist that may be relevant to the safe and effective care that will be provided to patients. For example, if a pharmacy professional were to engage in a racist tirade on Twitter, that may well shed light on how they might provide professional services to a person from an ethnic minority. Article 51(4) of the Pharmacy Order 2010 expressly states that fitness to practise may be impaired as a result of matters arising 'at any time'. The new Standards were not ultra vires the Pharmacy Order 2010 or contrary to Articles 8 and 10 of the Convention and the claimants could not be regarded as victims of alleged violations of articles 8 and 10. The new Standards were not inherently and necessarily incompatible with the right to respect of private life in article 8 or the right to freedom of expression in article 10. At [69] – [74], the learned judge said that whether their application to any particular case will breach those rights will depend on the facts of that case. In particular, there is likely to be an intensely fact-sensitive assessment which will be required when applying the principle of proportionality.

Turning to specific cases, in *Khan v. BSB* [2018] EWHC 2184 (Admin), the appellant contacted a fellow barrister's wife via LinkedIn in which he made references to issues concerning her husband. Warby J (as he then was) said that it was a brief, private exchange of communication. It was not malicious, and may indeed have been intended to be sympathetic. However, the appellant chose to rely on information he had received in confidence to write to the barrister's wife. These were matters that were very personal and private, and which would have been upsetting for her. He used a professional website to do this. He did not know her, other than as someone with whom he had connected via that website. He wrote to her uninvited, without prompting from her; the only prompt was an automated one, generated by the website because he had linked with her. There was a strong probability that she would object to such intrusion, as she evidently did by referring the matter to the BSB. K had failed to offer any justification or even any explanation of why he did so. This was not just indiscreet and ill-judged. It was, as the tribunal evidently concluded, a serious failure of standards. It was a significant failure to separate the professional from the personal. It was conduct likely to lower public confidence in the professional standards of the Bar.

In *Diggins v. BSB* [2020] EWHC 467 (Admin), D, an unregistered (i.e. non-practising) barrister, posted through Twitter a racist and sexually explicit response to an "open letter" from a young black female university student in the English Faculty about reading lists alongside the existing curriculum. D was charged with using racist and sexist language contrary to CD5. A disciplinary tribunal found the charge proved. D's appeal to the High Court was dismissed by Warby J. The tweet was in the public domain and as a public tweet was accessible to anybody. Did the tribunal ignore or err in its approach to D's human rights under the ECHR? The learned judge, at [74], said that D's tweet was speech protected by article 10(1) of the Convention, which extends to cover speech which offends, shocks or disturbs, or which is painful or distasteful satire. The imposition of sanctions in respect of the tweet would interfere with D's right to freedom of expression. It therefore requires justification pursuant to article 10(2). Whether or not the tweet was "correspondence" within the meaning of article 8(1), his conduct in posting it was an aspect of his private life, respect for which is guaranteed by article 8(1). The interference requires justification pursuant to article 8(2). The legitimate aims specified in articles 8(2) and 10(2) are to be construed strictly. The word "necessary" in articles 8(2) and 10(2) and test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a "pressing social need". At [75] the judge said that the essential issues (as will normally be the case where a barrister faces disciplinary proceedings over speech) are those of necessity and proportionality. In the instant case, the tribunal addressed those factors and did not err in its approach or its regard to D's right to freedom of expression. The tweet in the instant case was a grossly offensive and inappropriate message, worthy of disciplinary measures.

In *Thilakawardhana v. Office of the Independent Adjudicator and University of Leicester (Interested Party)* [2018] EWCA Civ 13, the claimant, having completed three years of a course leading to a degree in medicine at the University of Leicester, posted a threatening message on the Facebook page of a fellow student, PS. The posting, known as a meme, was viewable by the Facebook friends of PS. At the same time, the claimant wrote a private message to PS on Facebook containing about 170 words, some of which were offensive and when taken in conjunction with the meme, could be construed as threatening. PS complained to the university, who instigated disciplinary proceedings. A panel of the university, consisting of three lay members, including two doctors, decided that the claimant was not fit to practise and that his registration as a medical student should be terminated. That decision was upheld by an appeal panel of the University. Judicial review proceedings failed at first instance and in the Court of Appeal.

R (Ngole) v. University of Sheffield [2019] EWCA Civ 1127, concerned expression of religious view on social medial. N, a devout Christian, enrolled as a mature student on a university course. During the second year of his course, N posted a series of comments on his Facebook account in which he expressed religious views and comments disapproving of same sex marriage and homosexuality. The posts were brought anonymously to the attention of the university whose Fitness to Practise Committee excluded N from continuing his university course. His appeal to the Appeals Committee and subsequent complaint to the Office of the Independent Adjudicator were each dismissed. N commenced judicial review proceedings that were also dismissed at first instance. The Court of Appeal allowed N's appeal on the ground that the university's disciplinary proceedings were flawed in a number of respects. The court agreed with the deputy judge that there had been a prima facie interference by the university with N's freedom of expression under article 10 ECHR. At issue was the lawfulness of the interference with N's Convention rights to freedom of expression. The right to freedom of expression was not an unqualified right: professional bodies and organisations are entitled to place reasonable and proportionate professional restrictions on those subject to their professional codes; and just because a belief is said to be a religious belief, does not give a person subject to professional regulation the right to express such beliefs in any way he or she sees fit.

BC and others v. Livingston, Chief Constable of the Police Service of Scotland and others

[2020] CSIH 61 concerned alleged sexist and degrading WhatsApp messages shared amongst police officers, and whether disciplinary proceedings would be a breach of the petitioner's rights under article 8 of ECHR. The WhatsApp messages were contained in group chats shared amongst the petitioners that a reasonable person would conclude were sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and included a flagrant disregard of police procedures. The petitioners claimed that evidence of the WhatsApp messages in disciplinary proceedings would infringe their common law right of privacy in Scotland and article 8 of ECHR. Dismissing the motion, the Inner House of the Court of Session said that the case turned to a significant extent on the question whether the petitioners had a reasonable expectation of privacy. Whether there is a reasonable expectation of privacy is a question requiring an objective assessment of all the facts. In the present case, the petitioners did not have a reasonable expectation of privacy, sometimes described as a legitimate expectation of protection, in respect of the messages and photographs forwarded to their colleagues. Disclosure for the purposes of possible disciplinary proceedings would not offend the officers' private lives or their correspondence and the values of autonomy, dignity, and personal integrity which article 8 was designed to protect and promote.

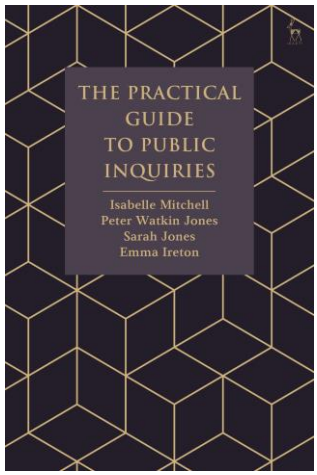
Beyond professional conduct proceedings, in *Scottow v. Crown Prosecution Service* [2020] EWHC 3421 (Admin), the Divisional Court allowed an appeal against a conviction brought under the Communications Act 2003 relating to 17 messages posted on social media. Bean LJ observed that if the prosecution argument were correct, it would create a curious anomaly under which messages whose content are intended to annoy, but which are not grossly offensive, menacing, indecent or obscene, nor known to be false, would be criminal if sent in a tweet or otherwise placed on an electronic network but not if conveyed orally or in print.

Summary

The overarching statutory objective and rules of most regulators include a need to promote and maintain public confidence in the profession, and to set standards of conduct that registrants are expected to follow, whether in their professional or private lives. The case of the *Pitt and Tyas v. GPhC* shows that a challenge to standards or guidance on the use of social media on the ground that it is ultra vires is unlikely to succeed. The use of social media by practitioners may give rise to a breach of professional conduct, and the courts have inevitably been drawn into consideration of articles 8 and 10 of the Convention. Ultimately each case is fact sensitive and the issue for any panel is likely to be whether the conduct concerned amounts to serious misconduct.

Kenneth Hamer
Henderson Chambers

The Practical Guide to Public Inquires. Book review by Roger Henderson QC



This will become a standard guide to all concerned with Public Inquiries. It is very useful and provides helpful guidance upon the issues which are likely to arise and sensible commentary about the pros and cons of different approaches to most of the considerations which should be taken into account.

The prose is clear and concise and the coverage is commendable. Would-be chairs of Public Inquiries as much as their counsel, and support staff and parties to and press involved in Inquiries, whether statutory or not, will be able to find the answer to or guidance in respect of points which are likely to arise. I commend the authors upon their work and its lucidity.
What follows should not be taken to detract from that overall assessment.

One of the problems which I encountered in the course of some 25 years dealing with Public Inquiries was the interplay between the Inquiry and potential criminal proceedings. The latter can scupper much needed speed in discovering and applying lessons to be learned in the aftermath of a fatal disaster and it would be helpful in any future edition to focus upon the problems. But it is not only potential criminal proceedings which can cause delay. The best can be the enemy of the good when it comes to learning lessons. Whether an accident caused multiple or no or few fatalities, compare Kings Cross and Grenfell Tower on the one hand and Buncefield and Southall on the other, there may be a need to take immediate action to prevent what is a fairly obvious gravely dangerous problem arising again.

It could be helpful to have a staged approach to an Inquiry to permit immediate and relatively broad brush lessons to be learned from a very quick consideration of available evidence. This is touched on but not addressed in the same depth as other matters. I would also make a tangential suggestion, namely that the moment a Public Inquiry is announced and a chair chosen, the appointment of counsel to the Inquiry should follow almost immediately. It can be very helpful to be able to visit the scene of a disaster in its immediate aftermath. As counsel to the Kings Cross Inquiry, I was able to visit the scene and arrived when the last of the bodies were being removed. Photographs were, of course, taken of the site and its grim circumstances but I learned more from my visit than could be learned from photographs. One of the few comments with which I would disagree is that the "announcement of the chair has typically been carried out in alarming haste". Inquiries sometimes deserve to be announced in very great haste and their inception may likewise need to be implemented most immediately. In a similar vein, I would add to the Key steps to be taken by a chair on appointment listed in chapter 2, consideration of whether to visit the site, if one exists, and also the taking of steps to secure relevant evidence.

The proper securing of evidence was a problem which arose in almost all the railway Inquiries with which I was concerned. It was generally managed by British Transport Police but in every case the work was imperfectly carried out and some vital evidence was omitted or ignored or destroyed or lost. A newly appointed chair may be able to do little more than rely upon the appropriate authorities for the proper carrying out of their relevant

duties but he or she should know that there is a proper process in the hands of an identified competent authority and that if the chair is immediately concerned about the preservation of transient or other evidence, that authority must be alerted to the concern. There can be difficulties when potential criminal proceedings arise as between police and other responsible authorities may have control or partial control of a "crime scene". A chair can try to ensure that there is a resolution of such areas of conflict. This aspect of Inquiries may deserve mention in any new edition, particularly in the checklist.

One of the quotations from a QC speaks of the "huge numbers of victims". In all the Inquiries in which I was involved, I eschewed the use of the word "victim". Many things underlay that aversion but I am glad to have done so and perhaps it is permissible to tell a relevant short story. During the Kings Cross Inquiry I made a point of being available to anyone who wanted to speak to me, especially the press when wanting to check that they had correctly understood the meaning and effect of evidence. The quality of reporting was in the event very high, with that of The Times and of Private Eye, whose rapporteur never knowingly approached me, being the most reliably accurate. One man who came up to me at lunchtime, who was seriously injured in the disaster with permanent disfigurement and disability, said to me that he had noticed that I never described people in his position as victims and thanked me for this. He said words to the effect that he saw himself as a survivor and not as a victim. For me the connotation of culpability of others implicit in the concept of victimhood is better avoided where possible.

The problems of Salmon letters, of Maxwellisation and of Rule 13 letters, all of whose underlying purposes are the achievement of fairness, are well ventilated. I am in no doubt that Rule 13 needs to be replaced. It has become the enemy of public fairness, because it involves inordinate time, excessive expense and delay in the outcome. It is to be hoped that this running sore will be cauterised before too long but I would not hold my breath for it.

Perhaps there should be one more chapter bearing the title "Avoiding a Public Inquiry". Such is their expense and time-consuming nature that any sensible admission of error or of causation at an early stage may avoid years of public damage to a good reputation. This strategy worked to the great benefit of certain railway operators, when it would undoubtedly have been of public benefit to know more of the dangers in question. Of course, the insurers, if any, must be consulted before any admissions are made public but the time of senior executives and the removal of the grave strains imposed on all concerned can be of inestimable benefit. Even if a Public Inquiry goes ahead the sting may have been removed or reduced.

Roger Henderson QC

Published December 2020. RSP: £85. Discount price £68. Copies may be obtained online at www.hartpublishing.co.uk. Use the code UG7 at the checkout to get 20% discount.

Legal Update

***R (Short and ors) v. Police Misconduct Tribunal and ors* [2020] EWHC 385 (Admin)**

Bias – legally qualified chair – prejudicial material sent to chair – application for recusal refused by tribunal – panel comprising legally qualified chair, police officer and magistrate – application for judicial review – no exceptional circumstances for judicial review – no apparent bias by chair – legally qualified chair able to disregard irrelevant material

The claimants were six police officers who faced serious allegations of gross misconduct arising from the detention and restraint of a suspect who later died. There were no allegations that the officers caused and/or contributed to the death of the suspect or that their treatment of him was in a different manner due to his ethnicity or race. The misconduct hearing arose from an investigation by the Independent Office for Police Conduct who directed misconduct proceedings pursuant to para 27(4) of schedule 3 of the Police Reform Act 2002. Prior to the hearing a large number of unredacted documents were sent to the chair pursuant to regulation 21(1)(c) of the Police Conduct Regulations 2012. The documents included the IOPC report, a bundle of medical evidence, witness statements and a report of the chief inspector which the claimants contended contained highly prejudicial material which should not have been

put before the chair. The claimants believed that material had been provided which was irrelevant and inadmissible. An application for recusal was in due course refused by the whole tribunal with written reasons.

The claimants sought judicial review. Dismissing the claim, Saini J said that the Police Appeals Tribunals Rules 2012 included a designated avenue of appeal and that the availability of a statutory process which includes an appeal process was, on the facts of this particular case, fatal to this claim. There was nothing exceptional about the present case. Dealing with apparent bias, the judge, at [73] – [96], said that when deciding whether the tribunal was right not to recuse itself, it is not for the court to assess the tribunal's reasons on some form of *Wednesbury* or rationality basis. Rather it was appropriate for the court to decide (as the hypothetical fair minded and informed observer) and on the basis of the same materials as were before the tribunal/chair whether they/he should have recused themselves; see *AWG Group Limited v. Morrison* [2006] EWCA Civ 6, [2006] 1 WLR 1163, per Mummery LJ at [19]-[20]. Having read the material in respect of which complaint was made, Saini J said that it was clear that opinions were expressed by a number of people (with varying degrees of emphasis), and that those opinions did on occasion go into areas where there were no allegations of misconduct against the claimant officers. The core bundle for the tribunal now did not include this material. However, even when it was obvious that a tribunal had seen prejudicial material, there is no absolute rule that such material is fatal to the fairness of the proceedings; see *R (Mahfouz) v. Professional Conduct Committee of the GMC* [2004] EWCA Civ 233, and *Subramanian v. General Medical Council* [2003] UKPC 64. The nature of the tribunal is relevant. The position of the tribunal in this case is directly analogous to that of the panels in *Mahfouz* and *Subramanian.* The chair was a legally qualified non-practising solicitor who, for many years, sat as a judge; one member of the tribunal is an experienced magistrate, the other an experienced police officer; and everyone of them is well-placed to identify and ignore irrelevant and inadmissible material.

AB, a barrister v. Bar Standards Board **[2020] EWHC 3285 (Admin)**

Evidence - prejudicial and irrelevant material included in tribunal's papers – whether fair trial

The appellant barrister did not attend the tribunal hearing. Included in the bundle before the tribunal was an email from an officer of the Metropolitan Police to the BSB which tended to suggest that its author thought there was a credible case that the appellant had perverted the course of justice in some unspecified way. The appellant had not been charged with any such matter. In dismissing the appellant's appeal, Bourne J said, at [197]-[198], that if a document of that kind went before a jury in a criminal trial, objection might well be taken to the fairness of the proceedings. In this case, however, the document went before an expert tribunal chaired by a retired judge. Such a tribunal can be trusted to make a proper assessment of information of that kind, and not to attach weight to irrelevant information or inappropriate weight to incomplete information. There was no indication that the tribunal was influenced by the document. Its judgment made no reference to the document or to the matters referred to in it. The appellant's credibility was directly relevant to the charges, and the tribunal's findings in that regard consisted, and consisted only, of a careful and convincing analysis of the relevant evidence before the tribunal.

Martin v. Solicitors Regulation Authority **[2020] EWHC 3525 (Admin)**

Failure by regulator to obtain evidence – absence of bank paying-in slip – whether duty on SRA to obtain evidence – whether absence of evidence a serious procedural error/failing – whether proceedings as a whole are fair

The appellant, Ms M, a solicitor dealing with probate and estate administration, was found guilty of two allegations of dishonesty and struck off the roll. The allegations concerned the winding up of an estate and the two charges found proved were that Ms M misappropriated client money in relation to a cheque for £4,700 made payable to the appellant, and that she misled the SRA's forensic investigator in relation to the cheque. The appellant claimed that she did not pay the cheque into her own account and that others would pay cheques into her bank account without reference to her. The appellant

contended that the SRA failed to follow all reasonable lines of enquiry available (in line with the decision in *R (McCarthy) v. The Visitors to the Inns of Court* [2015] EWCA Civ 12) to establish who might have paid the cheque into her account. The appellant submitted that the paying-in slip was an important document that should have been obtained by the SRA, and that by reason of the passage of time and the bank having ceased to hold a copy of the paying-in slip, she was at a substantial and unfair disadvantage and there was an inequality of arms. In reply the SRA submitted that the question whether a regulator is under a duty to follow all reasonable lines of enquiry was considered in *R (Johnson) Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 at [61 to 69] where Beatson J rejected an analogy between criminal and regulatory proceedings in this context and held that there is no general duty to investigate all reasonable lines of enquiry. Dismissing the appellant's appeal the Divisional Court (Simler LJ and Picken J) said, at [70]:

> Moreover, it was unnecessary for the purposes of determining this ground of appeal to resolve the question whether or not there is a duty on a regulator in proceedings of this kind, owed to a registrant, to pursue all reasonable lines of enquiry or to determine when such a duty arises. There is no doubt [as counsel for the SRA agreed] that the SRA have a duty to act fairly in prosecuting allegations of disciplinary misconduct, and if the SRA have the ability to obtain relevant, material evidence, fairness quite obviously demands that they should do what is reasonable in order to do so. Ultimately, it seems to us that the real question is whether the proceedings as a whole are fair, and that requires consideration of (at least) the particular context, the nature of the missing evidence and whether or not there was sufficient credible evidence apart from what is said to have been missing, to support the conclusions reached. But, in any event, even if [counsel for the appellant] is correct in relation to the duty on the SRA for which she contended, we do not consider that this ground is made out on the facts.

***Sarker v. General Medical Council; Professional Standards Authority v. GMC and Sarkar* [2020] EWHC 1896 (Admin)**

Costs - costs of PSA in bringing statutory appeal – PSA successful in bringing appeal against decision of tribunal on sanction – regulator statutory body for tribunal – regulator adopting neutral position – regulator akin to body responsible for inferior court or tribunal in judicial review proceedings – no order for costs unless appeal actively opposed

On 14 September 2018, the MPT imposed a four month suspension on the registration of Dr S as a result of its finding of impaired fitness to practise by reason of misconduct. The misconduct related to Dr S's admission to covertly administering risperidone (an anti-psychotic medication) to his wife via her tea intermittently over a 15 month period. The tribunal did not consider that a review was required. Dr S issued an appeal against the sanction under section 40 of the Medical Act 1983 (the first appeal).The Professional Standards Authority appealed the sanction under section 29 of the National Health Service Reform and Health Care Professions Act 2002, on the basis that the tribunal erred in not providing for a review hearing and not giving sufficient reasons for the sanction it imposed (the second appeal). By a consent order sealed on 9 May 2019, both appeals were allowed and the matter of sanction was remitted to a differently constituted tribunal. Costs were ordered to be determined by the court. On 11 October 2019, a differently constituted tribunal suspended Dr S's registration for three months, with no review. In a judgment dated 20 July 2020 Tipples J dealt with the issue of costs of the first and second appeals. Dr S sought an order that there should be no order for costs in both appeals. The GMC agreed. The PSA sought an order for costs against the GMC in respect of the second appeal. It did not seek an order for costs against Dr S. Tipples J disagreed with the PSA and held that the appropriate order for costs of the first and second appeals was that there should be no order for costs. The second appeal was linked to the first appeal and could not be considered in isolation from the first appeal. There was no evidence to show that it was unreasonable on the part of the GMC not to pursue an appeal against the decision of the original tribunal under section 40A of the 1983 Act. Moreover the outcome of the proceedings

after they were remitted shows that the GMC's decision not to appeal the original sanction was justified. The GMC was a respondent to the second appeal in its capacity as the statutory body responsible for the tribunal. The GMC had taken a neutral position in relation to the second appeal. The party opposing the second appeal was Dr S. As the statutory body responsible for the tribunal, the position of the GMC is no different to the position of an inferior court or tribunal in a judicial review. It is well established in those cases that the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal; see *R (Davies) v. Birmingham Deputy Coroner* [2004] 1 WLR 2739 at [47].

***Professional Standards Authority for Health and Social Care v. General Medical Council and Dighton* [2021] EWHC 32 (Admin)**

Costs - appeal by PSA – GMC adopting neutral position – no order as to costs against regulator

Following the court's decision to quash the tribunal's sanction of 12 months' suspension and to substitute an order for erasure: [2020] EWHC 3122 (Admin), the PSA applied for costs against the GMC and the second respondent. The PSA launched its appeal on 3 January 2020 seeking an order from the court that the second respondent's name be erased from the medical register. By email dated 21 January 2020, the GMC's solicitor replied saying that the GMC was minded to take a neutral stance on the appeal and would not be actively defending the appeal. On 27 February 2020, the GMC's case examiners decided to allow the second respondent's application for voluntary erasure, and following objection from the PSA the GMC informed the parties that the decision to permit voluntary erasure would (in effect) be stayed pending the determination of the PSA's appeal. The GMC had submitted to the tribunal that suspension was the appropriate sanction but that the appropriate sanction was a matter of the tribunal's discretion and it had the power to impose erasure. The GMC's view, expressed at the appeal hearing, was that voluntary erasure would protect the public interest. However, the GMC did not actively oppose the appeal. It did not file a skeleton argument. It filed a bundle of authorities relating to voluntary erasure but that bundle was not deployed by any of the parties and was not mentioned at the appeal hearing. The GMC instructed counsel to appear at the appeal hearing. Counsel made no submissions in opposition to the appeal and answered questions from the court. Counsel's approach was consistent with the GMC's willingness to sign a consent order. In her judgment, Farbey J said that the second respondent was unsuccessful and should pay the PSA's costs summarily assessed by the court. Standing back, and applying CPR 44.2, the GMC was a neutral party and as such should not be treated as an unsuccessful party. If that was wrong, then the GMC's general position justified a departure from the general rule that an unsuccessful party should be ordered to pay costs. There should be no order costs against the GMC. On the established case law, the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal; see *Sarkar v. General Medical Council; Professional Standards Authority v. GMC and Sarkar* [2020] EWHC 1896 (Admin) at para 64, citing *R (Davies) v. Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739.

Kenneth Hamer
Henderson Chambers

Marion Simmons QC Prize 2021

The annual Marion Simmons QC prize is still open to entrants, with a closing date of Friday 23 April at 17:00.

You are invited to submit an essay or article on a regulatory law or disciplinary law topic of your choice.

The first prize is £2,000, the second £1,000 and the third £500.

The competition was set up in memory of the late Marion Simmons QC, who sadly died on May 2, 2008, aged 59. Marion was a barrister, recorder, arbitrator and, latterly, chairman of the Competition Appeal Tribunal. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on ARDL's Committee for two years and was committed in her support of young lawyers.

Competition Terms and Conditions:

To be eligible, an entrant must fall into at least one of the following categories (subject to the discretion of the competition organisers to extend eligibility on a case by case basis as they see fit):

- undergraduates or postgraduates in study at a recognised educational establishment in the United Kingdom;
- trainee solicitors in the UK;
- pupil barristers in the UK;
- those training in the UK as part of a Chartered Institute of Legal Executives' approved training programme;
- solicitors who qualified in the UK and who have been so qualified for fewer than three years;
- barristers called in the UK fewer than three years ago;
- those who qualified with Cilex in the UK and who have been so qualified for fewer than three years;
- those who are taking a period of up to sixteen months as a sabbatical or "gap year" within their undergraduate or postgraduate study or after such study and before starting a confirmed place as a pupil barrister in the UK, trainee solicitor in the UK or Cilex training in the UK.

Entries must be no longer than **1,500 words** (word count includes footnotes but excludes bibliography) and should be type-written in the English language. The judges' decision will be final. Entries must be submitted so as to be received by **5pm on Friday 23 April 2021** by email to:
Nicole Curtis c/o **ARDL@blakemorgan.co.uk**

Request for Comments and Contributions

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact either of the joint editors with your suggestions. The joint editors are:

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