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## **GROUNDS FOR EXPULSION OF HEALTH AND SOCIAL CARE STUDENTS AT A UNIVERSITY STUDENT FITNESS TO PRACTISE COMMITTEE MEETING**

**Timothy J David and Sarah Ellson**

Health and social care undergraduate students who exhibit severe behaviour problems are dealt with by a University-run Fitness to Practise (FTP) Committee<sup>1</sup>. These Committees are either profession-specific (e.g. for medical students) or deal with students of more than one profession. Each University has its own FTP regulations, which always specify the powers of the Committee, but these regulations tend not to provide guidance on the use of sanctions. This article considers what kind of problems might justify expulsion of a student.

<sup>1</sup> The exception is optometry students, who are regulated by the General Optical Council, which deals with student FTP matters.

## **DOES EXPULSION INEVITABLY TERMINATE A STUDENT'S CAREER?**

In theory, a student who has been expelled by a university by an FTP committee could apply to train in the same or another healthcare profession at a university in the UK or abroad. There is no data on the likelihood of such an application being successful. Previously expelled students often conceal adverse information about their past in their university application form, sometimes coupled with changing their name and/or date of birth.

The General Pharmaceutical Council (GPhC) requires that pharmacy schools inform the Council if a pharmacy student is expelled. The General Medical Council (GMC) collects some anonymised FTP data from medical schools, and the Medical Schools Council is embarking on a central database of expelled medical students, but as yet there is no central databases of student FTP outcomes.

## **OTHER REASONS FOR EXPULSION**

Referral to an FTP committee is rare, and expulsion by an FTP committee even rarer<sup>2</sup>. More common reasons for expulsion are academic (repeated failure of examinations, or poor attendance) or disciplinary (academic misconduct such as cheating in examinations or plagiarism), or dishonesty during the application process (usually deemed sufficient to justify expulsion whenever it is discovered).

## **OTHER LESSER SANCTIONS THAT ARE AVAILABLE**

Sanctions that are short of expulsion include extra support and supervision, warnings, conditions or undertakings, repeating part or parts of the programme and suspension for a defined period of time. The emphasis generally is on support. Suspension is unlikely to be favoured in most cases because it is essentially counter-educational, but it may on rare occasions be needed to protect another student or member of staff (for example in a harassment case) or

<sup>2</sup> David TJ, Ellson SE. Fitness to practise procedures for medical students. *British Journal of Hospital Medicine*, submitted March 2015.

as a last resort as a way of sending a message just short of expulsion that says that a student's behaviour is unacceptable and must change.

### **THE NEED FOR CLEAR WELL DOCUMENTED WARNINGS**

A proportion of student FTP cases concern repeated misconduct rather than a single particularly serious event. It is axiomatic that students must be given clear (and well documented) warnings, reserving the most serious sanctions for repeated problem behaviours. The two ingredients one would hope to see included in a written warning would be a statement as to what specifically had been wrong with the students' behaviour, coupled with an indication of what could happen to the student if the warning is not heeded. Nevertheless there may be single episodes of misconduct that are so serious that expulsion is required.

### **STANDARDS TO BE APPLIED TO STUDENT FTP CASES**

Unanswered questions are whether students should be treated more leniently or more harshly than registrants, and the extent to which the way registrants are treated by their regulator can be a guide as to the management of student problems.

Whilst views differ, it is clear that the regulators have not provided the answers. The GMC summed up the matter when discussing the threshold for refusal to grant provisional registration to newly graduated doctors<sup>3</sup> thus:

"We will also consider the consistency of the thresholds we apply at provisional registration when compared with those applied within fitness to practise and also those used by medical schools themselves. In particular we may wish to look at the role of remediation and insight as assessed by the GMC at the point of registration. This debate can be quite polarised. One argument is that the system should encourage remediation and recognise that graduates, who are usually young and still maturing, need sympathetic and appropriate treatment with a second chance, where necessary, especially as substantial public funds will have been invested in their medical education (and in future, with fees of £9000 pa in England, substantial personal funds too). The contrary argument is that the threshold for entry to the register should be set high, consistent with fairness,

<sup>3</sup> General Medical Council. Undergraduate Board, 30 October 2012. Paper on "Fitness to practise issues arising from UK graduate applications (summer 2012)".

particularly as we know a proportion of graduates struggle once in Foundation training and there is good international evidence that struggling students are more likely to become struggling doctors. Where should the regulator strike a balance?"

One major difficulty in comparing student and registrant FTP cases is that registrants can call in their support a number of years in clinical practice and this may result in a similar problem (such as dishonesty) being dealt with differently when comparing students with registrants. An illustration would be the case of a surgeon who over a period of 5 months submitted 12 pieces of coursework for a higher degree, the pieces of work actually having been written by a previous student. The GMC noted that no patients had been put at risk, took into account testimonials to the effect that this was a well respected, competent and skilled surgeon, and suspended the surgeon's registration for 4 months. Yet if this had been a medical student who had been grossly dishonest 12 times over a 5 month period, it is questionable whether continuation would have been permitted.

### **DIFFERING VIEWS ABOUT THE SERIOUSNESS AND SIGNIFICANCE OF DISHONESTY**

Whilst the health and social care regulators all agree (in their guidance for professionals and students) on the need to act honestly and with integrity, they give insufficient attention to the reason why honesty is so important. In the context of future health professionals, we would point out that dishonesty can endanger and kill patients. Mistakes are commonplace, and the priority is to recognise, report and correct errors (such as having given an incorrect medication). As the General Medical Council states in its guidance to new medical students<sup>4</sup> "Lying about a problem will actually make it worse than admitting it and finding a way to deal with it".

### **THE PUBLIC INTEREST**

The three components, patient safety, maintaining public confidence in the profession, and declaring and upholding proper standards, and likely to be the main drivers when considering whether or not to expel a healthcare student. Most regulators include members of the public on their FTP panels, sometimes in the majority, whereas university FTP committees mostly comprise university staff and one or more health professionals, and this means that university FTP

<sup>4</sup> General Medical Council. Welcome to medicine. London, General Medical Council, 2011.

committees need to ensure that they consider the viewpoint of the public. Would the public, for example, be happy to be treated by a nurse who as a student repeatedly forged signatures?

## THE FUNDAMENTAL INCOMPATIBILITY TEST

The regulators of the medical, dental and pharmacy professions have each published their own guidance on student fitness to practise<sup>5,6,7</sup>, and all agree that expulsion, the most severe sanction, should be applied if the student's behaviour is fundamentally incompatible with continuing on the course. In the case of medicine and dentistry the regulators explicitly refer also to fundamental incompatibility with future practise as a doctor or a dentist, whereas the pharmacy regulator makes no reference to future practise as a pharmacist. The regulators have all offered guidance as to examples of behaviour that might justify expulsion, but these examples are very broad and to some extent circular. The examples include showing a reckless disregard for the safety of patients or others, causing harm either through incompetence or deliberately, abuse of a position of trust, offences involving violence or of a sexual nature, dishonesty, and a persistent lack of insight.

The health and social care regulators have provided no guidance as to what kind of criminal activities should result in expulsion of a student so university FTP committees must consider the broader test of incompatibility.

The only regulator that makes reference to the possibility that a student's health can be fundamentally incompatible with continuing on a course is the GPhC. This obviously contradicts with the usual approach of regulators that removal from the register is usually impermissible solely on health grounds (certainly until there has been an extended period of suspension).

Approximately one third of student cases coming to an FTP committee concern mental health problems, including problems with drugs or alcohol. In a significant proportion of cases, the problem is not so much the illness itself but the failure to co-operate with information-sharing, assessment, treatment and

<sup>5</sup> General Medical Council. Medical students: professional values and fitness to practise. London, General Medical Council, 2009.

<sup>6</sup> General Dental Council. Student Fitness to Practise. London, General Dental Council, 2010.

<sup>7</sup> General Pharmaceutical Council. Guidance on student fitness to practise procedures in schools of pharmacy. London, General Pharmaceutical Council, 2010.

monitoring. Whilst these failures to co-operate may render a student's FTP impaired, the ever-present possibility that the behaviour might improve in most cases means that expulsion may not be justified.

One of the practical difficulties are cases where mental illness has resulted in prolonged (for example 3-5 years) interruption of studies. There is a lack of guidance as to what extent such students, if permitted to return, should repeat part or all of the course. The problem is linked to challenges for universities and regulators in setting a maximum permitted duration for qualifying courses.

The regulators of the medical, dental and pharmacy professions have each stated that a student can be expelled if this is the only way to protect patients, carers, relatives, colleagues or the public. Panellists are advised however to approach the issue of sanction proportionately.

## DIFFERENT PROFESSIONAL VALUES BETWEEN THE PROFESSIONS

Trying to maintain a consistency of approach when dealing with students of different health professions provides the same challenges as have been observed amongst the regulators, with the differing professional values of the different health professions, and with some professions taking a firmer line than others when dealing with student misconduct.

## CONCLUSIONS

"You'll know it when you see it" is not a useful answer to the question "when should a health or social care student be expelled?".

As with the regulators, other than the seriousness of a student's problem behaviours, the following are factors that are likely to be relevant to making a decision about expulsion:

**nothing less will do:** a lesser sanction will not address the public interest concerns legitimately raised by the case.

**lack of insight:** deflection of blame on to others and failing to recognise and take ownership and responsibility for one's own actions and omissions, not following advice given by university or treating doctors, a failure to declare an issue, treating their own health condition, poor understanding into why a health or misconduct issue might affect their ability to practise, repeated pattern of unprofessional behaviour, and not understanding the seriousness of their actions.

**lack of honesty and integrity:** falsification of documents and forging signatures, providing misleading and untruthful information to university, deliberately concealing an issue when there is a duty to be honest, dishonesty about convictions.

**lack of remorse:** showing insufficient remorse when shown to be responsible for unprofessional behaviour or actions, being unwilling to accept responsibility for one's failings, being unwilling to respond to advice and guidance.

**lack of remediation:** failure to take measures that will protect against recurrence of the problem behaviour or that will put matters right.

**health issues that pose a risk to patients:** inability to maintain (or show sufficient evidence that they have maintained) their health for a sufficient period of time, failure to provide evidence of sustained period of abstinence from addiction or failure to comply with a programme of support and supervision, failure to understand that one's own health issue poses a risk for patients, failing to provide evidence on health issue, failure to co-operate with assessment and/or treatment, and failure to share information about health.

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## **DISHONESTY CASES: GHOSH, TWINSECTRA OR UDDIN?**

**Paul Ozin**

Heated debate and some confusion followed in the wake of the *obiter* observations of Singh J in *Uddin v GMC* [2012] EWHC 2669 (Admin) on the approach that should be taken by the GMC in dishonesty cases. Up until that decision, the usual approach in most disciplinary cases was routinely to give a direction based on the criminal case of *Ghosh* and/or the civil case of *Twinsectra* whenever an issue of dishonesty arose. *Uddin* threw that practice into doubt, without offering much in the way of guidance on how to tell when the conventional direction should still be given. No subsequent case has fully filled the vacuum. In addition, recent case law has raised two critical questions in disciplinary dishonesty cases: first, whether the *Twinsectra* test should apply at all; and,

secondly, whether the *Ghosh* test requires modification in important respects. This article attempts to answer those questions and to identify when the *Ghosh/ Twinsectra* test should be applied and when it should be avoided.

### **THE GHOSH AND TWINSECTRA TESTS**

In *R. v. Ghosh* [1982] QB 1053 (CA), Lord Lane CJ gave the judgment of the Court of Appeal in a criminal appeal concerning the test for dishonesty in the Theft Act 1968. He set out the two-stage test that applied<sup>8</sup>:

"In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest ..."

In *Twinsectra v Yardley* [2002] UKHL 12, the House of Lords considered whether the *Ghosh* test applied to the element of dishonesty required for liability as an accessory to a breach of trust; or, alternatively, whether mere objective dishonesty sufficed. In opting for the former (Lord Millett dissenting), the test was described, in the words of Lord Hutton, in these terms<sup>9</sup>:

"... dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

### **THREE RECENT WRINKLES IN THE TEST**

#### **(a) *Twinsectra* (wrongly) said not to apply to disciplinary proceedings (PSA v HPCA, David)**

There was no material difference between the *Twinsectra* test as originally articulated (above) and the *Ghosh* test, save that the *Ghosh* test is expressed in a form that tends to anchor it to the criminal standard of proof.

<sup>8</sup> p.1064. Helpful illustrations are given in the judgment, which repays reading in full.

<sup>9</sup> at para 35.

However, developments in the accessory liability cases subsequently complicated the position and rendered the *Twinsectra* test virtually unrecognisable. They held that it was sufficient to establish dishonesty if the accessory knew the facts which made his conduct objectively dishonest but that the test did not require proof of subjective or conscious dishonesty: *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2005] UKPC 37, *Abou-Rahmah v Abacha* [2007] Bus LR 220; [2007] 1 All ER (Comm) 827.

Drawing upon those authorities, Popplewell J, in the recent case of *Professional Standards Authority for Health and Social Care v Health and Care Professions Council, David* [2014] EWHC 4657 (Admin), proceeded on the assumption (without deciding) that the *Twinsectra* test involved a lower threshold than the *Ghosh* test: one that did not need to establish conscious dishonesty<sup>10</sup>.

It is respectfully submitted that Popplewell J erred in concluding that the *Twinsectra* test involved a lower threshold than the *Ghosh* test. He failed to take account of the case law specific to disciplinary proceedings which had grappled with the different turn taken in the accessory liability cases and concluded that, in the context of disciplinary proceedings, the original unbridled *Twinsectra* test continued to apply: *Bryant v Law Society* [2007] EWHC 3043 (Admin)<sup>11</sup>. In *Bryant*, the Divisional Court (Richards LJ, Aikens J) held that the Court of Appeal's decision (Kennedy, Laws, Arden LJ) in *Bultitude v Law Society* [2004] EWCA Civ 1853 was binding authority as to the test to be applied. In *Bultitude*, Kennedy LJ described the application of the test to the facts of the case concisely in these terms:

“... first, did Mr Bultitude act dishonestly by the ordinary standards of reasonable and honest people, and if so; secondly, was he aware that by those standards he was acting dishonestly.”

Accordingly, both the *Ghosh* test and the *Twinsectra* test may be used as models for determining issues of dishonesty in disciplinary cases<sup>12</sup>. They are,

<sup>10</sup> See paras 39-45.

<sup>11</sup> It appears that *Bryant* was not drawn to his attention.

<sup>12</sup> In the recent decision of the Commercial Court, *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm), Flaux J accepted that in a case involving allegations that a solicitor dishonestly deliberately misled the court, the appropriate test for the court to apply is the two stage test set out by the Divisional Court in *Bryant*.

effectively, the same test. The *Bultitude* formulation is a pithy and attractive articulation of the essence of both.

**(b) the (questionable) substitution of the ‘honest professional’ for the ‘honest person’ as the appropriate comparator (Hussain v GMC)**

In *Hussain v GMC* [2014] EWCA Civ 2246, Longmore LJ agreed with the two judgments that preceded his and added this *obiter dictum*<sup>13</sup>:

“...I am a little troubled about the Ghosh direction given by the legal assessor in this case. It would have been standard in a criminal case. But this was a professional disciplinary hearing and it seems to me that in future it would be right and proper for the first part of the direction to be adapted to read that the panel should decide “whether according to the standard of reasonable and honest doctors [not people] what was done was dishonest”. There may be a not unimportant difference between the two ...”

In *PSA v HCPC, David*, supra, Popplewell J noted this and acknowledged that the *Ghosh* test, as a result, “may require some further modification in its application to disciplinary proceedings, in that the objective standards of honesty which are to be applied may not be those of the public at large but merely those of a more limited cohort of professionals from whom the person comes”<sup>14</sup>.

It is respectfully submitted that the justification for the substitution of the appropriate comparator is slight. The essential point underlying the observations of Longmore LJ was, no doubt, that the assessment of honesty must be made in context and from an informed perspective. However, the existing test was well able to accommodate that necessary adjustment. It could not seriously be suggested in a disciplinary case that the application of the “standards of reasonable and honest people” imports a standard stripped of knowledge and understanding of the professional context. Further, once it is acknowledged that knowledge and understanding of the professional context is an integral part of the test as it applies to professional disciplinary cases, the standard of an

<sup>13</sup> Although this pronouncement has been hailed by some commentators as if it was part of the ratio of the case, in fact, Longmore LJ went last and his comments were not adopted in either of the two judgments that preceded his (Bean LJ and Ouseley J). Nor is it a necessary part of the reasoning that led to the decision of the court.

<sup>14</sup> para 45.

honest person should in fact be identical to the standard of an honest professional person<sup>15</sup>.

**(c) the modification of Ghosh to remove the traces of the criminal standard**

This is a development which, in part, flows from the observations in *Uddin* and is considered below in the discussion of the first *Uddin* observation.

**THE UDDIN OBSERVATIONS**

In *Uddin*, Singh J allowed an appeal against the decision of a Fitness to Practise Panel to erase U’s name from the register. The focus of the appeal was on the Panel’s multiple findings of dishonesty, all of which Singh J quashed. In doing so, Singh J made general observations for the future consideration by the GMC on the approach to cases that may raise issues of dishonesty, albeit that he noted that he had not heard full argument on the points. He made two observations<sup>16</sup>:

- (1) “... care needs to be taken about applying a test which was devised in the context of criminal law ...” where the standard of proof applicable is the civil standard.
- (2) “...even in the criminal context it is not general practice to give the so-called Ghosh two-part direction. In many cases, the advice which is given now by the Judicial College to judges who sit in the Crown Court is that no direction is required on the meaning of dishonesty. One context in which the twofold Ghosh direction may be required is where, on behalf of a defendant in criminal proceedings, an issue is raised whether he or she realised that the conduct charged was dishonest by the standards of reasonable and honest people. In many cases, there will be no such issue of fact raised. It will be perfectly apparent that if the

<sup>15</sup> There is perhaps an echo of the principles developed in the law of negligence, and adopted in disciplinary proceedings, for calibrating the duty of care owed by specialists: the line of cases starting with *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582. There, the yardstick of a responsible body of fellow professionals is employed. However, that is because what constitutes an acceptable clinical practice is generally a highly technical issue wholly outwith the experience of lay people, whereas honesty is a universal standard uncomplicated in its application to most contexts. *Hussain* itself was concerned with alleged dishonesty in relation to false entries in a CV, plagiarism, and false representations in a feedback form. Doctors do not have a monopoly on the understanding of what is dishonest in those contexts.  
<sup>16</sup> paras 30 and 31.

*conduct alleged did take place then it clearly was dishonest. The real issue in many cases may be whether the conduct took place and with what state of mind. For example, was a false representation made? But even if it was, was it done knowing that it was false or may it have been, for example, innocent or even a negligent mistake?”*

**THE FIRST UDDIN OBSERVATION: SPECIAL CARE REQUIRED IN APPLYING THE GHOSH TEST TO PROCEEDINGS IN WHICH THE CIVIL STANDARD APPLIES**

This observation is somewhat Delphic. It doesn’t condescend to state why there is a need for special care in civil standard disciplinary proceedings or what kind of care is needed. It can be interpreted in two different ways: first, as questioning whether the test should apply at all; and, secondly, as suggesting that special care is required in its application.

Commentators have questioned whether the different standard of proof has any relevance to the question of whether caution is required in the application of the *Ghosh* test to civil standard disciplinary proceedings, observing that the *Twinside* test applicable to civil proceedings is identical to the *Ghosh* test<sup>17</sup>. It is submitted that they are right but that may be to miss the point that was being made, which was almost certainly more to do with the language used in the *Ghosh* test than the need for diffidence in applying the test.

As for the question of whether the test should apply at all, the judgments in both *Twinside* and *Bryant* specifically address and explain why a two-part test with a distinct subjective element is demanded in relation to allegations made against professional people: because of the particularly grave consequences facing a professional person against whom a finding of dishonesty is made<sup>18</sup>. As those passages make clear, the choice of test is essentially a policy one made for those cogent reasons<sup>19</sup>.

The more convincing rationale for a need for special care is that modification of the *Ghosh* test is needed in applying it to civil standard disciplinary proceedings. That is because the language used by Lord Lane CJ in *Ghosh* tends to anchor the test to criminal proceedings;

<sup>17</sup> *The Regulation of Healthcare Professionals, 2<sup>nd</sup> Ed, Glynn & Gomez*, at p.955 footnote 16.

<sup>18</sup> See Lord Hutton at para 36 in *Twinside* and para 154 of *Bryant*.

<sup>19</sup> In *Boreh v Republic of Djibouti*, supra, Flaux J adopted the test for similar reasons: see para 5.

and, hence, it may impose an inappropriately high threshold. That was precisely the conclusion of Popplewell J in *PSA v HCPC, David*, supra. He stated that the *Ghosh* test<sup>20</sup>:

“... gives rise to a difficulty because the subjective element formulated in Ghosh is expressed in the language of the criminal standard of proof: “The person must have realised” that what he was doing was by ordinary standards dishonest.”

He went on to conclude that a “*modified Ghosh test*” should be applied, one which he described in these terms<sup>21</sup>:

“...the disciplinary tribunal must be persuaded on the balance of probabilities first that what was done was dishonest by the standards of reasonable and honest people, and secondly, that the person in fact realised that what he or she was doing was dishonest by those standards. That is the test in Ghosh modified to remove the criminal standard of proof which is embedded in the formulation of the subjective element in that case.”

Whether the original unmodified *Ghosh* direction was in fact routinely liable to cause error in disciplinary cases is perhaps debatable<sup>22</sup>. In applying the test, most tribunals were accustomed to taking account of the need to make the kind of adjustment articulated by Popplewell J. (Another way of approaching the matter might be to interpret the word “*must*” in the *Ghosh* test as requiring a disciplinary tribunal to ask itself whether it is driven to the conclusion, on the appropriate standard of proof applicable to the proceedings, that the registrant realised that what he was doing was dishonest by the ordinary standards of reasonable and honest people.)

However, it is submitted that the “*modified Ghosh test*” set out above has the virtue of clarity and can be usefully employed in civil standard disciplinary proceedings. Another good reason for modifying the test in that way is that use of the word “*must*” risks a heightening of the civil standard of proof in a way that has been deprecated by the House of Lords. In

<sup>20</sup> Para 41.

<sup>21</sup> Paras 43 and 45.

<sup>22</sup> However, it must be conceded that it appears to have done so in *Uddin*. It is notable that in *Uddin* the legal advice was put in terms of “*must Dr Uddin have realised that what she was doing would be regarded ...?*”. Apparently, this was without reference to the need to apply the civil standard. See para 29.

dishonesty cases, a Panel should give appropriately careful consideration to the allegations but a single unvarying civil standard of proof applies<sup>23</sup>.

One could, however, arrive at the same position by adopting the *Bultitude* formulation of the *Twinspectra* test and adding (lest there be any uncertainty) that the matters stated are to be proved to the civil standard.

### THE SECOND UDDIN OBSERVATION: A NUANCED APPROACH TO THE QUESTION OF WHEN TO APPLY THE GHOSH [OR TWINSECTRA] TEST

The approach in *Uddin* in this respect has been followed in subsequent cases, although none of them greatly advance the jurisprudence on the subject<sup>24</sup>.

Taking in to account, in particular, the criminal cases that Singh J drew upon in making this observation, the following practical guidance can be derived as to when the test should be applied.

- (1) There is an example in the cases following *Ghosh* of the Court of Appeal going so far as to say that the giving of a *Ghosh* direction would have been “*unnecessary and potentially misleading*”: *R. v Price (Ronald William)* (1990) 90 Cr. App. R. 409; [1990] Crim. L.R. 200 (CA)<sup>25</sup>.
- (2) However, the criminal cases invariably involve, as did *Price* itself, the Court of Appeal considering retrospectively the argument that a *Ghosh* direction was not given when it should have been. The conclusion that the test was not demanded meant that the appeal was dismissed. (Similar dynamics were in play in the recent decision of *Mills v GDC* [2014] EWHC 89 (Admin). Patterson J concluded that a decision in which the *Ghosh* test had not been set out could not properly be challenged where, applying the guidance in *Uddin*, the *Ghosh* direction was not needed.) Accordingly, the case law is not necessarily the best guide to

<sup>23</sup> See *In re Doherty* [2008] UKHL 33; *In re B* [2008] UKHL 35; *R (IPCC) v AC Hayman* [2008] EWHC 2191 (Admin). See article, Ozin, Griffin, Campbell “*Applying the civil standard of proof in disciplinary proceedings following the House of Lords decisions in In Re Doherty and In re B*”, The Regulator, November 2008.

<sup>24</sup> In addition to the cases cited above, see *Mills v GDC* [2014] EWHC 89 (Admin) (24 January 2014); *Moseka v NMC* [2014] EWHC 846 (Admin) (26 March 2014); *Lavis v NMC* [2014] EWHC 4083 (Admin) (5 December 2014).

<sup>25</sup> at p.411, per Lord Lane CJ.

good practice in considering whether to give a **Ghosh** direction at first instance. There is no decision, civil or criminal, in which the converse applies and a decision has been successfully appealed on the basis that a **Ghosh** direction was given when it should not have been.

- (3) Further, the problem is less likely to arise in a disciplinary tribunal. It is difficult to conceive of a case in which the application of the **Ghosh/Twinsectra** test by a disciplinary tribunal without any obvious error could lead to a successful challenge on the basis that it should not have been given at all. Unlike juries, disciplinary tribunals give reasons, which serve to demonstrate whether they have been led into error by any test of law they apply. Accordingly, the former conventional approach adopted by many disciplinary tribunals of applying the **Ghosh/Twinsectra** test whenever an issue of dishonesty arose, on the basis that it could do no harm and may do some good, still has some attraction. On the other hand, the application of the test with obvious error will give rise to a good ground of appeal.<sup>26</sup>
- (4) That said, there are cases in which the balance is plainly tipped towards not applying the **Ghosh/Twinsectra** test, provided that both parties are in agreement with that course: where the facts alleged objectively amount to dishonesty and the registrant disputes those facts (without advancing some alternative explanation which suggests the relevance of, or distinctly raises, the issue of subjective honesty). A classic example is a registrant accused of stealing money who denies that he took it. In such a case, it is sufficient and far simpler to determine the factual question – did he take it? – without reference to the **Ghosh/Twinsectra** test.<sup>27</sup>

<sup>26</sup> *Lavis v NMC* is a good example of this. Cobb J concluded that the Committee had imported a subjective element in to the objective limb and then misstated the subjective limb and that, all in all, “*may have been better advised*” to have considered the approach in *Uddin*. See paras 55 to 59.

<sup>27</sup> The criminal cases of *R v Price*, supra, and *R v Jouman* [2012] EWCA Crim 1850 provide good examples. No direction was required in those cases because there was a simple factual dispute to be determined: respectively, whether Price had a genuine expectation of funds, where he ran up debts claiming that he expected £100,000 as the beneficiary of a trust; and whether the sums paid to Jouman by a vulnerable elderly woman were, as he maintained, gifts. *Mills v GDC*, supra, would appear to fall within the same category: if M knew, as the Committee found, that he was making claims for activities that were not eligible for claims, he must have been dishonest. The facts of *Hussain v GMC*, supra, at paras 37-38, provide another example: plagiarising a book review as a description

- (5) Conversely, the cases point to some circumstances in which the **Ghosh/Twinsectra** test should be given.

- a. Where the issue of subjective dishonesty is distinctly raised by the registrant (even if what is alleged objectively looks dishonest)<sup>28</sup>.
  - b. ‘Borderline’ cases which feature a mixture of facts, some objectively suggesting dishonesty and some suggesting honest conduct or the registrant’s belief that his conduct was honest. In those circumstances, even where the issue is not distinctly raised by the registrant, it is better to give a direction (provided that the registrant agrees).<sup>29</sup>
- (6) The ‘borderline’ category is the more controversial and problematical one but it is also the most common. It is rare for a registrant to raise subjective honesty: for the simple reason that it looks like a concession of objective dishonesty. It is far more common for the registrant to continue to assert that the conduct is honest even where the facts strongly suggest otherwise. In those circumstances, there is something of a dilemma for the defence: do you get a **Ghosh** direction and suffer the implication of objective dishonesty or do you forego one and lose the possibility of escaping an adverse finding on the basis that the registrant might have had an idiosyncratic notion of honesty? In criminal jury trials, the defence tend to avoid the direction to prevent the unsavoury implication. Arguably, in front of a disciplinary Panel, a registrant might be better off with one. In the final analysis, however, if the defence do not

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of what H had learned from a book he had not in fact read could only be dishonest.

<sup>28</sup> In *R. v Roberts (William)* (1987) 84 Cr. App. R. 117; [1986] Crim. L.R. 188 (CA), R was charged with handling stolen goods when he was arrested after trying to sell stolen paintings for a fee to an insurance loss adjuster. The Court of Appeal concluded that an assertion of subjective honesty was not possible on those facts. In addition, in concluding that no **Ghosh** direction was required, the court placed reliance on the fact that no issue of subjective honesty had been raised.

<sup>29</sup> In *Ghosh*, Lord Lane CJ, At p.1064 at G-H, referred to the case of *Boggeln v. Williams* [1978] 1 W.L.R. 873 as such a “borderline” case. B reconnected his disconnected electricity supply but acted in some respects that suggested an intention to pay for what he had used. The Divisional Court held that it was open to him to claim, as he did, subjective honesty. It is submitted that it is prudent to give a direction in those circumstances regardless of whether the issue is raised by the registrant.

want a direction in such a case, it should not be given.

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## INDIVIDUAL ACCOUNTABILITY IN BANKING AND INSURANCE

**Tom Ogg**

### INTRODUCTION

On 7 March 2016, new regimes for the regulation of senior individuals in the banking and insurance sectors will come into force.<sup>30</sup> The new regimes are designed to make it easier for the regulators to hold senior individuals to account for the regulatory failures of insurers and, in particular, banks. This article summarises those regimes and associated proposals.<sup>31</sup>

The new regime for individuals seeks to address public anger at the perceived lack of accountability of individuals at the top of financial firms during the banking crisis of 2008 and the scandals that followed, particularly in relation to LIBOR and PPI. Most infamously, whilst Fred Goodwin was stripped of his knighthood after the failure of the Royal Bank of Scotland (and prevented from joining the golf club at St Andrews), the Financial Services Authority was forced to conclude that Mr Goodwin had not broken any of its rules.

Consequently, new rules were recommended by the Parliamentary Commission on Banking Standards, the framework for which was enacted in the Financial Regulation (Banking Reform) Act 2013 (the “**Banking Reform Act**”) by amending Part V of the Financial Services and Markets Act 2000 (“**FSMA**”).

The result is a ‘Senior Managers Regime’ (“**SMR**”) for the most senior individuals in banking, and a ‘Certification Regime’ for less senior individuals (together, the “**SM&CR**”). The regulators, the Prudential Regulation Authority (“**PRA**”) and Financial Conduct Authority (“**FCA**”) have also extended certain aspects of the SMR to the insurance industry: the ‘Senior Insurance Managers Regime’ or “**SIMR**”. The SM&CRs replaces, for banks only, the ‘Approved Persons’ regime that currently applies to

<sup>30</sup> The commencement date was announced on 3 March 2015 by the Economic Secretary to the Treasury Andrea Leadsom.

<sup>31</sup> Unfortunately, a slew of acronyms litters this field and consequently this article: to assist, a glossary may be found at the rear.

individuals working in the financial services industry; a modified version applies to insurers.<sup>32</sup>

The SMR and SIMR aims to achieve greater levels of individual accountability by ensuring that it is clear who is responsible for what at the top of banks and insurers. This is achieved by means of ‘statements of responsibility’ for senior managers, a ‘responsibilities / governance map’ for the firm as a whole, and by requiring firms to allocate certain ‘prescribed responsibilities’ to individual senior managers. There are also new ‘Conduct Rules’, and new rules relating to whistleblowing.

In the banking SMR (only), senior managers also face a ‘presumption of responsibility’ or reverse burden of proof in relation to failures by the firm within an individual senior manager’s area of responsibility. Senior bankers also face a new criminal offence of ‘causing a financial institution to fail’ and stringent rules on remuneration. In the banking SMR, the Conduct Rules also apply to a far wider body of employees than under the present regime.

I discuss the new regimes as follows:

- Scope of the SMR and SIMR: firms;
- Scope of the SMR and SIMR individuals;
- The Senior Insurance Managers Regime;
- The allocation of responsibility;
- The presumption of responsibility;
- The criminal offence;
- Handovers between senior managers;
- Certification regime;
- The Conduct Rules;
- Whistleblowing;
- Remuneration;
- Conclusion;
- Glossary.

### SCOPE OF THE SMR AND SIMR: FIRMS

The SM&CRs apply to banks or ‘relevant authorised persons’ (“**RAPs**”) as defined by section 71A FSMA. In short, RAPs are deposit-takers – *i.e.* banks, building societies and credit unions<sup>33</sup> – or PRA-regulated

<sup>32</sup> The PRA have implemented a SIMR to replace its approved persons regime, but the FCA opted to merely modify their approved persons regime. For convenience, I refer to the new PRA and FCA regime for insurers by the shorthand of the SIMR.

<sup>33</sup> There are special rules under the SMR for credit unions.

investment banks<sup>34</sup>. Insurers are specifically excluded (but see the SIMR below).<sup>35</sup> I use the term ‘banks’ and RAPs interchangeably in this article.

The RAPs definition bites on the legal entity, with consequent opportunities for avoiding the new regime by re-organising activities not caught by the RAP definition to be undertaken by other companies in a group. Initially, only UK-incorporated firms could be RAPs,<sup>36</sup> which meant that UK subsidiaries of global banks were caught but branches of non-UK incorporated banks were not. However, following a Treasury consultation,<sup>37</sup> the regulators propose<sup>38</sup> to extend a tailored version of the SM&CRs to UK branches of non-EEA banks and (more limitedly) to UK branches of EEA banks, pursuant to a power under section 71A(4) FSMA (there are similar proposals for insurers).

The SIMR applies to insurance and re-insurance firms, including third-country branch undertakings, within the scope of Solvency II Directive (2009/138/EC) (“**Solvency II**”), as well as to the Society of Lloyd’s and managing agents (collectively referred to as “**insurers**”).<sup>39</sup> The regulators are also currently consulting on extending a ‘streamlined’ version of the SIMR to insurers who are too small to be subject to Solvency II.<sup>40</sup>

## **SCOPE OF THE SMR AND SIMR: INDIVIDUALS**

The SMR and SIMR applies to executive directors of banks, and certain non-executive directors (see below). Each will be a ‘Senior Manager’ or “**SM**”. For larger banks, the level of management below the board will also be SMs: the key test is whether an individual has overall responsibility for a ‘key function’ and reports to the board in respect of that function.<sup>41</sup> Examples of

<sup>34</sup> There are nine PRA-regulated investment banks, including for example Goldman Sachs International and Merrill Lynch International.

<sup>35</sup> Section 71A(1)(b) FSMA.

<sup>36</sup> Section 71A(6)(a) FSMA.

<sup>37</sup> ‘Regulating individual conduct in banking: UK branches of foreign banks, response to consultation’, 2 March 2015.

<sup>38</sup> FCA CP15/10 and PRA CP9/15 ‘Strengthening accountability in banking: UK branches of foreign banks’.

<sup>39</sup> See paragraph 1.1 of PRA CP26/14 and also FCA CP14/25.

<sup>40</sup> PRA CP12/15 and FCA CP15/15.

<sup>41</sup> Paragraphs 1.18 and 2.45 of FCA CP14/13 – PRA CP14/14. As with the approved persons regime, there are also other specific roles that will be SMs, such as the ‘money laundering reporting’ function. The FCA is not proposing to expand its approved persons regime for insurers: CP14/25 at paragraph 2.8.

key functions include responsibility for wholesale sales; for customer service; and for business continuity.

The FCA initially proposed to specify ‘standard’ non-executive directors (NEDs) as SMs, but it changed its mind following feedback from the industry that (*inter alia*) their inclusion might encourage NEDs to take on executive roles out of fear they might be disciplined by the regulators under the presumption of responsibility.<sup>42</sup> Instead, the regulators now propose that only NEDs with specific responsibilities will be SMs: the chairman, senior NED, and the chairs of the risk, remuneration, audit and nomination committees of the board.<sup>43</sup> So-called ‘standard’ NEDs will not be SMs. The regulators also made clear that the presumption of responsibility will only be applied to NEDs in very limited circumstances relating to their specific duties.

## **THE SENIOR INSURANCE MANAGERS REGIME**

Before getting into the detail of the new regimes, to avoid confusion, it should be made clear that only a small number of the regulatory requirements discussed below will apply to insurers.

Specifically, SMs in insurers will be required to allocate a set of prescribed responsibilities amongst themselves; each SM will have a statement of responsibilities; and the firm must produce a ‘governance map’ (similar to the ‘responsibilities maps’ for banks).

The Conduct Rules will apply to individuals within insurers, as will the proposals on whistleblowing. There are also new requirements relating to the fitness and propriety of SMs in insurers which arise from Solvency II.

However, unlike the banking regime:

- the presumption of responsibility and criminal offence will not apply to SMs in insurance;
- there is no certification regime, or remuneration code for insurers, and the requirements relating to handover arrangements do not apply; and,
- the conduct rules apply only to the small number of approved persons in insurers (rather than ‘nearly all employees’ as with banks), and without the

<sup>42</sup> PRA CP7/15 and FCA CP15/5.

<sup>43</sup> *Ibid.*

rigorous reporting and training requirements faced by banks.

Consequently, it is banks that face the most invasive regulatory changes. Nevertheless, the PRA in particular treats the SIMR and the SMR as two aspects of the same regime, as evidenced by the fact that it published its final rules on the SIMR and SMR in a single document.<sup>44</sup> So far as the SIMR and SMR overlap, then, it is appropriate to consider those regimes together.

## THE ALLOCATION OF RESPONSIBILITIES

The allocation of responsibilities is fundamental to the SMR, because of the nature of the ‘presumption of responsibility’ (see below). As the FCA puts it, that allocation “*underpin[s] the presumption of responsibility by clearly delineating who is presumed to be responsible for what*”.<sup>45</sup> (That clarity also, the regulators might add, should encourage greater regulatory compliance by firms, and so lessen the need for disciplinary proceedings in the first place.) Although the SIMR does not have a presumption of responsibility, a clearer allocation of responsibilities will make it easier for the regulators to hold senior individuals accountable in insurers also.

The allocation of responsibilities operates at two levels in the SMR and SIMR.

First, certain required roles in firms have inherent responsibilities attached to them, or allocated to them by the regulators. An example of an inherent responsibility is that the head of internal audit function (SMF5) is the function of “*having responsibility for management of the internal audit function of a firm and for reporting directly to the governing body of the firm on the internal audit function*”.<sup>46</sup> An example of an allocated responsibility is that the PRA states that the chairman should play a leading role in relation to PRA prescribed responsibility 14 (“*responsibility for leading the development of the firm’s culture by the governing body as a whole*”).<sup>47</sup>

Second, the regulators have set out a series of ‘prescribed responsibilities’ that firms must allocate to a single SM.<sup>48</sup> The PRA has specified 19 prescribed responsibilities to be shared amongst SMs. The FCA’s

system is more flexible, with 12 prescribed responsibilities (most of which overlap with the PRA’s), and 27 ‘key functions’<sup>49</sup> that, if they exist in a particular firm, should also be allocated amongst SMs.

The prescribed responsibilities include, for example:

- Responsibility for the firm’s treasury management functions;
- Responsibility for the allocation of prescribed responsibilities;
- Responsibility for firm’s performance of its obligations under the certification rules;
- Responsibility for the firm’s remuneration policies.

Following consultation, the regulators now propose to permitted prescribed responsibilities to be shared (*i.e.* allocated to more than one individual), but with the proviso that all SMs allocated that prescribed responsibility will be “*in principle... deemed wholly responsible*” for all aspects of the prescribed responsibility.<sup>50</sup>

The responsibilities allocated to SMs must be reflected in two types of document: statements of responsibilities, and a ‘map’ (entitled ‘responsibilities maps’ for banks, and ‘governance maps’ for insurers).

SMs are required to have a statement of responsibilities (“**SoR**”) for each legal entity in which the individual is a SM. The regulators consulted on a template SoR in December 2014.<sup>51</sup> In that consultation, the regulators proposed that the SoR must be self-contained, and cannot refer to any other documents. It must set out the prescribed responsibilities allocated to the SM in no more than 300 words, and cannot “*dilute, qualify or undermine the responsibilities prescribed or required by the regulators.*”

<sup>44</sup> PRA PS3/15.

<sup>45</sup> FCA CP15/9 at paragraph 2.12, in respect of SoR.

<sup>46</sup> See PRA PS3/15 appendix 1: paragraph 3.5 of the ‘Senior Management Functions’ chapter of the PRA Rulebook.

<sup>47</sup> Paragraph 2.28 of PRA-PS3/15.

<sup>48</sup> See below as to sharing prescribed responsibilities.

<sup>49</sup> Examples of key functions were provided above in the section ‘Scope of the SMR and SIMR: individuals’.

<sup>50</sup> See PRA PS3/15 at paragraph 2.22. Although this is the position in principle, the PRA promised to “*consider how the responsibility was discharged in practice*” when considering the presumption of responsibility. The regulators have tinkered with the list of prescribed responsibilities (*e.g.* the FCA has added a prescribed responsibility relating to financial crime), and the PRA has re-formatted its list to make clear that certain prescribed responsibilities may only be held by NEDs, and others need only been allocated if the firm undertakes specific types of business or is not a ‘small firm’: paragraph 2.14 of PRA PS3/15.

<sup>51</sup> FCA-CP14/31 / PRA-CP28/14.

The regulators also state, rather threateningly, that additional text should serve a “*useful regulatory purpose*”. They note that one SM will be allocated the prescribed responsibility of allocating the prescribed responsibilities to other SMs, and if the resulting SoRs are too long or complex, that SM may be “*asked to justify the rationale for the length and complexity of the statement.*”

The second document relating to the allocation of responsibilities is the ‘responsibilities map’ in the SMR, or ‘governance map’ in the SIMR. Originally, like the SoR, the regulators proposed to require the responsibilities/governance map to be a single, self-contained document. Following consultation, they are content for the map to be composed of several documents, so long as it is clear how those documents link together.<sup>52</sup>

The regulators have shown little patience for accommodating problems arising from complex legal structures and matrix management arrangements, the FCA stating that: “*if a firm’s structure is preventing it from clearly allocating responsibilities, this in itself suggests a regulatory risk which we would wish the firm to mitigate.*”<sup>53</sup>

In the coming months, the regulators’ imposition of requirements relating to the allocation of responsibilities is likely to lead to SMs negotiating with one-another as to who will take on which prescribed responsibility. As a result, and possibly in any event, the contracts of employment for individual SMs may have to be amended. It is also possible that the re-organisation of responsibilities at the top of banks and insurers may lead to re-organisations of the underlying businesses. The real source of worry for SMs, however, is the presumption of responsibility.

## **THE PRESUMPTION OF RESPONSIBILITY**

The presumption of responsibility is perhaps the central measure in the SMR, and applies only to SMs in banks.

Previously, it was for the regulators to show that an individual had breached a Statement of Principle, or was ‘knowingly concerned’ in a firm’s breach of a regulatory requirement: section 66 FSMA.

By contrast, under the SMR, a SM is guilty of misconduct without more if the regulators are able to

show that there was a failure by the firm in an area for which that SM was responsible.

This is, however, subject to a ‘reasonable steps defence’, whereby a SM in the circumstances described above will not be guilty of misconduct if the SM:

*satisfies the [FCA/PRA] that [the SM] had taken such steps as a person in [the SM’s] position could reasonable be expected to take to avoid the contravention occurring or continuing.*<sup>54</sup>

The presumption of responsibility is therefore said to ‘reverse the burden of proof’. It should be noted, however, that the regulators will still bear the burden of proving that there was a firm contravention by the firm, and that the SM was responsible for the area in which that contravention occurred. Furthermore, the relevant test – whether the individual took reasonable steps – is much the same as that which often applies in enforcement action against individuals today. What is important, however, is that it will not be the enforcement divisions of the FCA or PRA trawling through millions of emails relating to the SM (at least initially), but the SM themselves in attempt to make out the ‘reasonable steps’ defence. To that extent, a real and financially costly burden has been transferred from the regulators to individual SMs.

The potential impact of the presumption of responsibility is wide-ranging. For example, it may well provoke individual SMs to demand greater compensation from the bank to compensate them for the greater risk of disciplinary action by the regulators, and many SMs will seek re-assurances that the firm will support them in that eventuality. That ‘support’ may range from paying the legal expenses of SMs to merely allowing former SMs access to the firm’s documents in the aid their defence; and it may take the form of contractual guarantees or bank policies.

Perhaps unsurprisingly, many if not most of the responses to the regulators’ initial consultation on the SMR in July 2014 requested greater clarity on when, and how, the presumption of responsibility would be utilised by the regulators.

In respect of ‘when’, the regulators have both set out lists of factors that they will consider whether deciding what would have constituted ‘reasonable steps’ for the SM to take in the circumstances, and in assessing whether the SM in fact took reasonable steps. Relevant

<sup>52</sup> FCA-CP15/9 at paragraph 2.12.

<sup>53</sup> Paragraph 2.13 of FCA-CP15/9.

<sup>54</sup> Sections 66A(6) and 66B(6) of FSMA, in respect of FCA and PRA enforcement powers respectively.

factors cited by the regulators include the size, complexity and scale of the firm; the SM's due diligence upon taking up the role; the nature of the SM's delegation to subordinates; whether expert advice was sought appropriately by the SM; and whether the SM ensured that specific areas of the business were adequately resourced.

As regards the issue of 'how', there were a number of inter-linked procedural issues for the regulators to resolve. This requires a little background to explain.

At present, the FCA's model for enforcement actions relies on the great majority of enforcement proceedings settling prior to being litigated through the FCA's Regulatory Decisions Committee and the Upper Tribunal. In other words, the factual determinations arising from the much-publicised settlements with firms are not those of an independent and impartial tribunal, but what the parties to the enforcement proceedings are willing to agree to. Firms are generally keen to settle enforcement cases as soon as possible, because they wish to move on from the contravention and associated problems.<sup>55</sup> Regulatory fines are also, it should be noted, a source of significant revenue for the Treasury; only a proportion of the half-a-billion pounds in LIBOR fines have been earmarked for specific causes.<sup>56</sup>

Individuals, however, cannot 'move on' from regulatory action against them in the way firms do. Successful enforcement action against an individual usually entails the end of that individual's career, and often a substantial loss of wealth. Individuals are therefore far less likely to settle at an early stage than firms, and are far more likely to enter into drawn-out litigation against the regulators.

The procedural issue, then, concerned the order in which the regulators would discipline firms and individuals. At present, the FCA disciplines firms, and then where appropriate, subsequently disciplines individuals. The question was: would the regulators seek to discipline firms, and rely on settlements with those firms for the purposes of the presumption of responsibility?

There were at least two problems with that approach. First, as hinted at above, firms generally regard settlement with the FCA/PRA as a commercial matter. Could such a 'commercial' settlement form the basis of action under the presumption of responsibility against a SM (or at any rate, compatibly with article 6

<sup>55</sup> Settlement also buys the firm some influence over how the 'enforcement outcome' will be publicised, and when.

<sup>56</sup> See <http://www.bbc.co.uk/news/business-25214567>

of the Convention<sup>57</sup>)? Probably not. Second, such an approach would introduce clear conflicts of interest between firms and their senior management, such that firms might be far less willing than previously to settle with the regulator for fear of automatically creating a regulatory liability for some of its SMs.

Following consultation, the regulators have now stated in effect that they will not rely on previously settled cases against firms as a basis for applying the presumption of responsibility.<sup>58</sup> In other words, the regulators have accepted that they must establish the firm's contravention in proceedings against the individual SM, and consequently, that the individual SM may contest that issue even if the firm has previously accepted that the contravention took place by means of a settlement agreement. This is, it is suggested, the right outcome.

Further points of note relating to the presumption of responsibility are as follows. The PRA has stated what the individual SM was responsible for remains a question of fact; it will not necessarily be bound to the statements of responsibility and responsibilities maps. The PRA and FCA have also stated (perhaps surprisingly) that the presumption of responsibility may be applied to individual(s) in respect of decisions taken collectively, if there is reason to question the individual's contribution to that collective decision-making process.

The practical consequences of the SMR may include SMs being defensive about their areas of responsibility, and a rather rigorous approach to record-keeping so as to support a future 'reasonable steps' defence. Some commentators have gone so far as to suggest that it will create paralysis and fear in the boardrooms of banks, and may even deter good candidates from taking up senior roles in banks. We shall see if any of those fears are well-founded in the years to come.

## THE CRIMINAL OFFENCE

Section 36 of the Banking Reform Act creates a criminal offence relating to a decision that causes a bank to fail. The offence applies only to SMs in banks, and sanctions include imprisonment for seven years, an unlimited fine, or both.

The elements of the offence include:

<sup>57</sup> The European Convention on Human Rights.

<sup>58</sup> The PRA says so explicitly (PRA PS3/15 at 3.14 of annex 2); the FCA says that a SM must be a party to proceedings in which the firm's contravention is established (chapter 5 of FCA-CP15/9).

- the SM takes a decision that causes a bank to become insolvent;
- the SM is aware at the time of the decision that there was a risk that the implementation of the decision might cause the bank to fail; and,
- the SM's conduct "*falls far below what could reasonably be expected of a person*" in the SM's position.

It is generally accepted that the criminal offence is unlikely to be utilised, even in circumstances where a bank fails, because the elements are difficult to satisfy.

First, on causation: it is rare that a single decision will cause a bank to fail. Usually a wide range of factors are cause the failure of a bank. Second, the requirement to prove that the action of a SM fell 'far below' expectations would be a difficult burden for any prosecution to discharge. Consequently, it is suggested that regulatory sanctions under the presumption of responsibility are likely to be much more common than criminal convictions under this enactment.

## HANDOVERS BETWEEN SMS

For banks (but not insurers), the FCA has introduced more formal requirements relating to handovers. Banks will have an obligation to ensure that in-coming SMs have all the information and material that they could reasonably expect to have to perform those responsibilities effectively. The FCA states that this: "*should be a practical and helpful document and not just a record... should include an assessment of what issues should be prioritised [and] should include judgement and opinion, not just facts and figures.*"<sup>59</sup> Banks will also be required to have a policy on, and keep adequate records relating to, handovers.

The original proposals appeared to endorse the idea that an departing SM should be required to produce a 'handover certificate'. This raised concerns as to whether this would be practical for SMs leaving in difficult circumstances. Following consultation, the FCA has shifted its emphasis to the firm taking reasonable steps to ensure the predecessor provides sufficient information to the firm, so that the firm may comply with its handover obligations. Handover certificates are referred to as one way of achieving that outcome, but it is explicitly recognised that there may

<sup>59</sup> See the proposed rules at SYSC 4.9.7G of FCA CP14/13.

be circumstances in which it is impractical to expect such a certificate to be produced by a departing SM.

## CERTIFICATION REGIME

The SMR is designed to focus regulatory resources on the most senior individuals in banks. Consequently, the regime for more junior employees of banks, the 'certification regime' is in some respects less exacting than the approved persons regime it replaces.

The certification regime requires that certain<sup>60</sup> employees at banks who could cause significant harm to the bank or any of its customers must be certified by the bank as fit and proper persons to carry on the function in question.<sup>61</sup> This must occur before a candidate begins employment, and annually thereafter. The crucial difference as compared with today's regime is that there will be no regulatory pre-approval process for those individuals: it will be for the bank rather than the regulator to vet candidates.

Whilst in principle this may make it easier for individuals with poor conduct records to take up roles in banks under the SM&CR, there are a number of safeguards built into the certification process. First, a SM will have a prescribed responsibility for the integrity of the certification process, who will therefore have a personal interest in preventing individuals with poor conduct records from being or continuing to be employed by banks. Second, there are new requirements for banks to undertake criminal records checks, and take up 'regulatory references' in respect of the last five years of a candidate's employment. The regulators are currently considering how the system of regulatory references will work in practice.<sup>62</sup> (The obligation to take up regulatory references also applies to SMs.)

## THE CONDUCT RULES

On 7 March 2016, for both banks and insurers (but not other firms), new 'Conduct Rules' will replace the Statements of Principle for Approved Persons known as "APER".<sup>63</sup>

<sup>60</sup> The PRA has aligned the scope of its certification regime to the population of 'material risk takers'. The scope of the FCA's certification regime is somewhat wider.

<sup>61</sup> Section 63E(5) FSMA.

<sup>62</sup> FCA CP15/9 at 3.5; PRA PS3/15 at 2.41.

<sup>63</sup> The power to make statements of principle under section 64 and 65 FSMA will be revoked from 7 March 2016. For banks and insurers, the new Conduct Rules (made under sections 64A and 64B FSMA) will replace APER, but for all other firms, the substance of APER will remain in force (re-labeled as 'conduct rules').

APER sets out a series of standards that ‘approved persons’<sup>64</sup> are required to meet. Failure to meet those standards could lead to disciplinary action by the regulators under section 66 FSMA.

The new Conduct Rules under the SMR and SIMR will apply to:

- SMs in banks and insurers;
- Approved persons within insurers;
- Certified persons in banks; and,
- Most other employees in banks (see below).

The last bullet point is significant. Currently, APER applies to only some 10% of bankers, which became a particular problem in the LIBOR investigations.<sup>65</sup> Under the SMR, the new Conduct Rules apply to all bank employees save for a short list of ‘excepted employees’ who fulfil non-banking, axillary functions.

For the most part, the Conduct Rules are in substance identical to those under APER, with the following important exceptions.

First, there is a new rule providing that: “*you must pay due regard to the interests of customers and treat them fairly*” (Conduct Rule 4). This rule should be understood in the context of the PPI misselling scandal, and is no doubt designed to encourage whistleblowing by junior bank employees. There has never previously been an obligation placed on individuals to treat customers fairly.

Second, SMs face a new rule relating to the delegation of responsibilities (SM3). SMs must delegate only to ‘an appropriate person’, and the SM must ‘oversee the discharge of the delegated responsibility effectively’.

Third, in the SIMR, there is an additional PRA conduct rule relating to paying “*due regard to the interests of current and potential future policyholders in ensuring the provision by the firm of an appropriate degree of protection for their insured benefits*”.

Fourth, the regulators have placed a clearer duty on SMs to “*disclose appropriately any information of which the FCA or PRA would reasonably expect notice*” (SM4). This arguably amounts, in effect, to

<sup>64</sup> Approved persons are individuals who require prior regulatory approval from the regulators to take-up their role.

<sup>65</sup> See the PCBS Report ‘Changing Banking for Good’ at paragraphs 549 and 551. The Conduct Rules also apply to unregulated activities, which again was a problem in relation to LIBOR.

placing a duty on SMs to whistleblow to the regulators.

For banks (only), there are also new stringent reporting requirements in circumstances in which a firm suspects an individual has breached a Conduct Rule.<sup>66</sup> There are also significant obligations for banks under section 64B FSMA to provide training for bank employees regarding the Conduct Rules, the financial burden of which will be significant.

## WHISTLEBLOWING

The regulators are currently consulting<sup>67</sup> on wide-ranging requirements for banks and insurers relating to whistleblowing.

The most striking proposal is effectively that *any* person should be entitled to blow the whistle to banks and insurers in relation to nearly *any* matter,<sup>68</sup> and be entitled (so far as the bank’s policy is concerned) to the same protections as workers entitled to whistleblowing protection under the Public Interest Disclosure Act 1998. The driving force for this proposal is the PPI scandal: the Parliamentary Commission on Banking Standards referred to evidence that there is no public record of any banking employee whistleblowing in respect of PPI.<sup>69</sup>

Under the proposals, banks and insurers would also be required to have a dedicated ‘whistleblowing function’, that was able to ensure whistleblower confidentiality; track whistleblowers to ensure they are not victimised; escalate concerns; and to deal with anonymous disclosures.

The regulators also propose that a NED, ideally the chairman, should be a ‘whistleblowing champion’ (*i.e.* hold the prescribed responsibility relating to whistleblowing), who annually provide a report to the board and have access to appropriate resources.

Finally, the regulators propose that employment contracts and settlement agreements should contain an explicit written clause to the effect that nothing shall

<sup>66</sup> See section 64C FSMA. The regulators are, however, considering what steps may be taken to mitigate the problems this will create for banks: FCA CP15/9 at paragraph 4.5.

<sup>67</sup> FCA CP15/4; PRA CP6/15.

<sup>68</sup> The proposed rules require only that the disclosure relates to a ‘reportable concern’; that is, either it (a) would be a protected disclosure, (b) relates to a breach of the firm’s policies, or (c) relates to behaviour likely to harm reputation or finances of firm.

<sup>69</sup> PCBS at 132.

prevent an employee from making a protected disclosure to the PRA or FCA. The purpose of doing so is primarily to ensure that employees are aware of these rights; as a matter of law, workers have such a right regardless of the inclusion of that clause.

## REMUNERATION

In July 2014 the FCA and PRA described the financial incentives for excessive risk-taking as a ‘key driver’ of both the financial crisis and the LIBOR / PPI scandals.<sup>70</sup> Control over pay is seen as going hand-in-hand with the new powers outlined above.

Currently, banks must defer at least 40% of awards for all ‘material risk takers’, and at least 60% of awards for directors and other high-earners (total variable remuneration of £500,000 or more) for a minimum of 3–5 years, with awards vesting no faster than on a *pro rata* basis. The July 2014 proposals<sup>71</sup> are that deferral periods for senior managers should be at least seven years in length, with the first vesting on the 3<sup>rd</sup> anniversary of the award, and *pro rata* thereafter. The regulators also consulted on controlling ‘buy-outs’, whereby a new employer pays all an employee’s deferred remuneration in a lump-sum upon joining the firm.

Prior to vesting, awards are currently subject to ‘malus’, that is, the award not vesting if (among other things) there is reasonable evidence of employee misbehaviour. But even once an award has vested, awards made after 1 January 2015 are subject to ‘clawback’ – that is, a contractual requirement to repay a bonus if certain conditions are fulfilled. The July 2014 proposals, if implemented, would provide an option for firms to extend the clawback period to 10 years where an investigation has begun that could lead to clawback.

The regulators are expected to publish final rules on remuneration this summer.

## CONCLUSION

The new regulatory regime for individuals working in the banking and insurance sectors are stringent and are likely to lead to significant re-organisations at the top of firms. Banks and insurers should start preparations for their implementation now, even before the final versions of the rules are published by the regulators: 7 March 2016 remains a relatively tight deadline to implement these wide-ranging proposals.

<sup>70</sup> PRA CP15/14; FCA CP14/14.

<sup>71</sup> PRA CP15/14; FCA CP14/14.

The regulators are actively considering the extension of the SMR and related changes to the rest of the financial services industry, following vigorous encouragement from the Treasury Select Committee and the former members of the Parliamentary Commission on Banking Standards. It is, it seems, only a matter of time before the SMR is extended again.

## GLOSSARY OF DEFINED TERMS AND ACRONYMS

APER – the Statements of Principle for Approved Persons.

Approved person – a person who has permission from the PRA or FCA to carry on a ‘controlled function’ within a firm under section 59 FSMA.

Banks – RAPs. See also the section entitled ‘Scope of the SMR and SIMR: firms’.

FSMA – Financial Services and Markets Act 2000.

Insurers – see the section entitled ‘Scope of the SMR and SIMR: firms’.

LIBOR – London Inter-Bank Offered Rate.

NEDs- non-executive directors.

PPI – payment protection insurance.

RAPs – relevant authorised persons as defined by section 71A of FSMA. The SM&CRs apply will apply to RAPs.

SIMR – the senior insurance managers regime. See the section entitled ‘the Senior Insurance Managers Regime’.

SM&CRs – senior manager and certification regimes that applies to banks.

SMs – senior managers performing a ‘senior management function’ within the meaning of section 59ZA FSMA. See further the section entitled ‘Scope of the SMR and SIMR: individuals’.

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## LEGAL UPDATE

Kenneth Hamer

### ***Ward v. Nursing and Midwifery Council* [2014] EWHC 1158 (Admin)**

In proceeding with W’s appeal to the High Court in her absence, “on the basis that it would not result in any unfairness to the Appellant and it was in the interests of justice to do so”, per Hickinbottom J at [8], the court said:

- (i) It is open to the court to proceed in an appellant’s absence, if it is in the interests of justice to do so.
- (ii) The Appellant is clearly on notice of the hearing, and on notice that her solicitors were no longer acting for her. She does not appear to have made any attempt to contact the court at all.
- (iii) No formal application to adjourn has been made, and no evidence has been submitted in support of an adjournment in the form of medical evidence concerning either the Appellant’s father or, if appropriate, the Appellant herself.
- (iv) The events underlying this appeal occurred over three years ago. The NMC are entitled to finality, and it is in the best interests of all parties, including the Appellant herself, that this appeal is determined promptly.
- (v) No communication has been received from the Appellant, her solicitor’s letter was very late, the NMC have appeared, and an adjournment would result in costs being thrown away.
- (vi) I have had the benefit of very full grounds of appeal lodged on the Appellant’s behalf, which I have taken fully into account.
- (vii) The Appellant did not appear at the hearing before the Panel, who found that she had voluntarily absented herself. In my view, it is likely that, even if the appeal hearing were adjourned, the Appellant would not attend any hearing fixed in the future. If there are good grounds for her non-attendance today, it is in any event open to her to apply to set aside any order made on that basis.

### ***R (Peters) v. Chief Constable of West Yorkshire Police* [2014] EWHC 1458 (Admin)**

At about 2.30 a.m. on the morning of 2<sup>nd</sup> March 2012, the claimant was arrested at a lap-dancing club in Leeds following a call from staff to the police. The claimant was arrested for a racially aggravated public order offence. Between 3<sup>rd</sup> and 6<sup>th</sup> December 2012 the

claimant was tried for the alleged offence at Leeds Crown Court, and was acquitted. The claimant thereafter made a complaint to the Independent Police Complaints Commission against a number of police officers including the arresting officers. Under its standing procedures, the IPCC referred the complaints to the force. The complaint was not upheld and the Chief Constable of West Yorkshire Police refused an appeal by the claimant against the decision rejecting the claimant’s complaint against the police officers. In dismissing the claimant’s claim for judicial review, Blair J said that there were a number of authorities on judicial review as regards complaints of misconduct against police officers: *R (Dennis) v. IPCC* [2008] EWHC 1158 (Admin); *R (Crosby) v. IPCC* [2009] EWHC 2515 (Admin); *Muldoon v. IPCC* [2009] EWHC 3633 (Admin); *R (Erenbilge) v. IPCC* [2013] EWHC 1397 (Admin); and *R (Ramsden) v. IPCC* [2013] EWHC 3969 (Admin). The learned judge said that the latter case contained a useful summary. Those cases involved the IPCC, whereas in the present case under the statutory scheme the investigation and subsequent appeal was carried out within the police force itself. Whereas *Muldoon* makes clear that the court allows the IPCC “a discretionary area of judgment”, the claimant submitted that this was predicated on the IPCC as an independent statutory body, which did not apply where the investigation was carried out by the force in question. The defendant, on the other hand, submitted that the regulatory system put in place a balanced system of investigations and appeals in relation to alleged misconduct by officers which Parliament had determined was a fair one. Blair J said the fact that under the system some acts are undertaken by the police, and in the present case were referred by the IPCC to the police, makes no difference to the legal analysis. The learned judge said that whilst it is true the IPCC is established as an independent body, and that independence is an important attribute in this regard, the element of independent consideration can and should also be present when the complaint is dealt with within the police force in question. The court did not consider that merely because it is so dealt with, the process should be accorded less respect than that of the IPCC.

### ***Professional Standards Authority for Health and Social Care v. General Medical Council* [2014] EWHC 1903 (Admin)**

N, a psychiatrist, set up a website under which he described himself as “The neuro-therapist”. N had a blog and provided one-to-one sessions and free advice as an online psychiatrist. Patient A made a complaint about answers given and N faced an allegation before the fitness to practise panel. The panel determined that

N's online psychiatrist blog was not medical practice and dismissed the charge. Allowing the appeal of the Professional Standards Authority for Health and Social Care, supported by the GMC, Ouseley J said that the question asked by the panel was too limited a question to ask in relation to an issue of misconduct. The panel had to ask itself whether the conduct was in the exercise of professional practice, going to fitness to practise. Even if it did not arise in the context of a clinical practice, it had to be asked whether it was in the exercise of the doctor's medical calling. A related way of putting it is whether the registrant had assumed any responsibility for medical care. Those questions were not asked by the panel. It cannot be the case that when, as here, a qualified psychiatrist sets out to offer advice as a qualified psychiatrist, although it is described as help and assistance, in response to those who write questions seeking advice and help as to what to do, that person is not engaged in medical practice. It is not conventional, in the sense that because it is done online there are certain limitations as to what can be done. But even on the basis of what the registrant did here, he clearly offered advice and forms of treatment, even if just reading a book, which showed that he was engaged in a form of medical practice.

***Fajemisin v. General Dental Council* [2014] 1 WLR 1169**

In 2009 disciplinary proceedings were commenced against F in respect of allegations that he had submitted fraudulent claims for the treatment of elderly residents at nursing homes. A hearing before the Professional Conduct Committee of the GDC was due to start on 12<sup>th</sup> September 2011. It was adjourned because F had been admitted to hospital and was relisted again on 30<sup>th</sup> October 2012. In the meantime, F had failed to complete his CPD hours. On 13<sup>th</sup> April 2012 he was notified that the registrar had decided that his name would be removed from the register on 11<sup>th</sup> May 2012. In error an employee dealing with fitness to practise proceedings informed the registrar's office who dealt with dentists' compliance with the CPD rules that F had been involved in fitness to practise proceedings, but the case had been marked "closed". Although the decision had been made to remove F's name from the register on 11<sup>th</sup> May 2012 unless he appealed in the meantime, his name was not removed from the register on that date. Instead, a final check was made with the FTP team that day and the previous mistake was discovered. Once the true position was known, no steps were taken to remove F's name from the register. At the resumed hearing on 30<sup>th</sup> October 2012, F's counsel argued, amongst other things, that since the decision had previously been made that F's

name would be removed from the register on 11<sup>th</sup> May 2012, the PCC had no jurisdiction to embark on the hearing. The committee rejected that submission and went on to hear the case and order F's name be removed as a result of his misconduct. On appeal, Keith J said that the critical question was: can a regulatory body revoke a decision it made if by mistake that decision was made in ignorance of the true facts? After reviewing *Akewuschola v. Secretary of State for the Home Department* [2000] 1 WLR 2295, *R (On the Application of Jenkinson) v. Nursing and Midwifery Council* [2009] EWHC 1111 (Admin) in *Porteous v. West Dorset District Council* [2004] HLR 30, Keith J said he concluded that the registrar had the power to re-visit the decision that F's name would be removed from the register on 11<sup>th</sup> May 2012. *Porteous* is authority for the proposition that a public body can re-visit a decision which has been made in ignorance of the true facts when the factual basis on which it had proceeded amounted to a fundamental mistake of fact.

***Smith v. Scottish Social Services Council* 2015 SCDUND 23**

The Regulation of Care (Scotland) Act 2001 established the Scottish Social Services Council as the independent regulator for social workers in Scotland. S, a social worker, appealed to the sheriff against the decision of the Council's Conduct Sub-Committee to remove her name from the register. The principal ground on which she based her application was an alleged breach of her right to a fair trial in accordance with article 6(1) of the European Convention on Human Rights. During the course of the proceedings before the sheriff a question arose whether article 6 of the Convention was engaged in the proceedings before the Conduct Sub-Committee. The Sheriff Principal, allowing the appeal of the Council and recalling an earlier sheriff's interlocutor that article 6 was engaged in the hearing before the tribunal, said that the question whether the pursuer's entitlement to a fair trial in terms of article 6 had been satisfied must be judged at the end of the appeal proceedings. The weight of authority particularly *Tehrani v. United Kingdom Central Council for Nursing, Midwifery and Health Visiting* 2001 SC 581 supported the view that there can be no violation of the Convention in proceedings before a tribunal if the tribunal's decision is subject to subsequent control by a court that has full jurisdiction which does provide the guarantees required by article 6(1). The proper question is whether, looking at the proceedings as a whole, including any appeal proceedings, the pursuer's entitlement to an article 6(1) process has been satisfied. That is not to say that the Conduct Sub-Committee can simply ignore article 6 in

the proceedings before it. The court is entitled to expect that the Council will have regard to the pursuer's entitlement to an article 6 compliant process and, while that process includes the right of appeal, it cannot be right that the Council should be careless as to whether its own proceedings are article 6 compliant or not. Accordingly the proper course was to allow the appeal and recall the earlier sheriff's interlocutor insofar as it found that article 6 was engaged throughout the procedure in issue.

***Hunt v. The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 1094 (TC)**

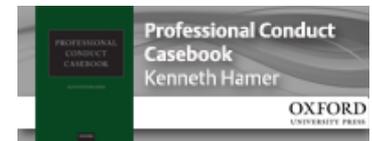
In 1993 H was found guilty and imprisoned for 8 years for conspiracy to defraud and was disqualified from being a company director for 10 years. By a decision dated 5<sup>th</sup> April 2013 HMRC refused an application for registration under the Money Laundering Regulations 2007 of a company controlled by H because he had failed the fit and proper person test. In dismissing H's appeal the First-Tier Tribunal Tax Chamber (chairman Judge Timothy Herrington) said that the starting position is that H's conviction, although a long time ago, was for conspiracy to commit a very serious fraud. There was a very substantial loss to the Revenue over a very long period of time. Between 1975 and 1991 a total of £219,911,823 was extracted from Nissan UK Limited, of which H was a director and the General Manager, causing a loss to HMRC of £97,119,462. The prosecution case was that B, the chairman of Nissan UK, was the moving spirit and that H, the most senior executive after B, was the second in command. The Tribunal was not satisfied that H had been rehabilitated to the extent that is necessary to allow his application. His reluctance until a very late stage to accept any degree of culpability, his attitude to the fraud as being essentially a corporate matter and his lack of openness in a number of respects when taken together with the seriousness of the conviction, the risks posed by the business of H's company and his role as a controlling shareholder led the Tribunal to conclude that he is not a fit and proper person for the purposes of the Money laundering Regulations.

***R (Lonnie) v. National College for Teaching and Leadership* [2014] EWHC 4351 (Admin)**

L, a teacher at a residential school catering for pupils with particular difficulties, admitted that in June 2009 he had used excessive force against a pupil after some ill-discipline by the pupil. L accepted a police caution and was dismissed by the school. At a disciplinary hearing in March 2014 before the National College for Teaching and Leadership the panel recommended to the Secretary of State not to impose a prohibition

order. The Secretary of State did not accept the panel's recommendation and imposed a 2 year prohibition order. In dismissing L's appeal, William Davis J said that the decision-maker is the Secretary of State and he was not satisfied that her view was wrong within CPR 52.11.

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**BOOK REVIEW**

**DISCIPLINARY AND REGULATORY PROCEEDINGS BY GREGORY TREVERTON-JONES QC, ALISON FOSTER QC AND SAIMA HANIF**

The new edition of *Disciplinary and Regulatory Proceedings* published by Jordan Publishing is a major re-write of this well established and respected textbook. Since its first publication more than 20 years ago, written by Brian Harris OBE QC and ably assisted by Andrew Carnes, it has become one of the leading textbooks in its field. With the retirement of Harris and Carnes from authorship, the 8<sup>th</sup> edition, published April 2015, has been fully updated and extensively re-written by a team of specialist barristers from 39 Essex Street Chambers under the expert guidance of Gregory Treverton-Jones QC, Alison Foster QC and Saima Hanif, each acknowledged practitioners in the field of regulatory and disciplinary law. The new edition provides authoritative guidance on all relevant aspects of the law in this field, and has been re-structured in a helpful and clear way to meet the needs of practitioners. The new edition is divided into four major parts: General including the jurisdiction of regulators and the nature of professional misconduct; The Disciplinary Process dealing with the investigation of allegations and the regulator's decision to prosecute, pre-trial issues, a new chapter on disclosure and confidentiality, the hearing itself, the tribunal's decision and the appeals process; an analysis of Specific Regulatory Regimes including up-to-date chapters on the regulation of healthcare, financial services, legal services and other professions; and finally an important section on Data Protection and Freedom of Information. The book surpasses its aim to provide the reader with a comprehensive knowledge of the present state of the law in this ever developing field. Its authors are to be congratulated on this

excellent new edition. Available in hardback price £125 from [customerservice@jordanpublishing.co.uk](mailto:customerservice@jordanpublishing.co.uk) or 0117 918 1492. ISBN 978 1 84661 939 7.

**Kenneth Hamer**  
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**MARION SIMMONS QC ESSAY PRIZE  
2014/2015**

ARDL's congratulations go to the winners of this year's essay prize:

Rebecca Zaman – first prize of £2,000

Jennifer Travers – second prize of £1,000

Juliet Stevens – third prize of £500

This year's title was "Has the regulation of professionals encroached too far into private life?" Rebecca Zaman's winning essay will appear in our next edition of the ARDL bulletin.

The ARDL prize was set up in memory of Marion Simmons QC, 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 the ARDL Committee for two years and was committed in her support of young lawyers.

**REQUEST FOR COMMENTS AND  
CONTRIBUTORS**

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

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