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CHAIRMAN'S WELCOME

For the past 25 years or more there has been a continuous increase in the regulation of businesses and professions of all kinds accompanied by extension of the powers of discipline and broadening of the background of those who exercise those powers. Few fields of human endeavour have been immune. These changes have in turn reflected persistent media pressure to identify victims and villains in business and in the professions. It seems likely that these trends will continue and that lawyers will inevitably continue to be involved to an increasing extent in that work whether as advisers, legal assessors, representatives and advocates or as members of tribunals.

The time was therefore ripe for the creation of an Association of Regulatory and Disciplinary Lawyers (ARDL). The brainchild of Rod Fletcher, his thinking struck a chord with a large number of legal

practitioners, particularly Ian Stern. Many members practise predominantly or exclusively in the field of regulation or of professional discipline. Some work for the regulators, some for the regulated; likewise those involved in professional discipline. Some are sporadically involved. The membership of ARDL represents the spectrum of Regulatory and Disciplinary work, including the Legal, Accounting and Medical professions and those concerned with Financial Services. The list of members now numbers 250 being made up of about 60% solicitors and 40% barristers.

The Lord Chief Justice, Lord Woolf, has kindly agreed to become the first President of ARDL and we have been privileged to prevail upon Sir Andrew Leggatt to deliver our inaugural lecture. Taking the title "Modernising the Regulation of Lawyers", he will consider the Annual Report of the Legal Services Ombudsman and the Government's stated intention to review the regulatory framework, lawyers in the foreground but other professions being considered for illustrative purposes.

I believe that with such an auspicious start ARDL should go from strength to strength. The aims of the Association will be typical of the legal associations; didactic, social, informative and entertaining. But for aficionados of "I'm sorry I haven't a clue" there will be no late arrivals at our Ball, because we will be perfectly regulated and disciplined in our own affairs. Our intention will be not only to inform ourselves of matters of common interest but to be able to make authoritative representations to the powers that be, when changes are proposed. If our membership is the broad church that we intend, even those determined to reform the regulation of industry or the discipline of a profession may be prepared to heed representations from a body which speaks for the tribunals, the businesses and the professions affected and for their advisers and representatives.

ROGER HENDERSON QC

PUBLIC HEARING – WHOSE RIGHT IS IT ANYWAY?

Article 6 of the European Convention on Human Rights provides that

“in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing..”

“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Some disciplinary tribunals provide that the hearings shall be in public. Others provide that they shall be in private. Those that provide for private hearings sometimes give the respondent an opportunity to require that the hearing is in public. Most provide for publication of the judgment, although sometimes only after the time for an appeal has passed or if there is an appeal, only for publication of the judgment of the appeal tribunal.

Those tribunals which sit in private justify this position on the ground that the first sentence of Article 1 gives the person whose “civil rights and obligations” are being determined an entitlement to a fair and public hearing. Thus if that person does not require a public hearing they should be entitled to a hearing in private.

However, the first sentence of Article 1 does not stand alone. It must be read in conjunction with the second sentence, which not only requires that the judgment is pronounced publicly but also alludes to press and public presence during the hearing. It assumes that the press and public will be present unless excluded and the second sentence goes on to provide the circumstances in which the press and public can be excluded.

One of the circumstances in which the press and public can be excluded is if this is required for “the protection of the private life of the parties”. It has been suggested that those who are subject to disciplinary and regulatory proceedings are entitled to a private hearing for the protection of their reputation and the reputation of their business or practice. This is an additional justification relied upon by those tribunals whose rules provide for private hearings.

The European Court of Human Rights in *Hakansson & Stuesson v Sweden* [1990] 13 EHRR 1 emphasised that the public character of court hearings constitutes a fundamental principle enshrined in paragraph (1) of Article 6. Notwithstanding this the European Court of Human Rights in that case went on to recognise that a person's entitlement to have his case heard in public can be waived by him but only if he does so in an unequivocal manner and only if the waiver does not run counter to any important public interest (see paragraph 66 of the judgment). In *Hakansson & Stuesson v Sweden* the Court held there was no violation of the public hearing requirement in Article 6(1) since the proceedings the subject matter of the application normally took place without an oral and therefore without a public hearing, but if there was an oral hearing that hearing would take place in public; the applicant had not requested an oral hearing in circumstances where they could be expected to have so requested if they required it and had thereby waived their entitlement to a public hearing; and the litigation did not involve any questions of public interest making a public hearing necessary.

In *Eurolife Assurance Company Ltd v Financial Services Authority* (hearing 23rd May 2002: judgment not published until 26th July 2002) the Financial Services and Markets Tribunal recently considered whether the Applicant in a hearing before it could successfully apply for a private hearing.

The Financial Services and Markets Tribunal Rules 2001 provide that hearings shall be in public unless the Tribunal directs that all or part of a hearing shall be in private. The Tribunal can only do so on the application of any party. It must be satisfied that a hearing in private is necessary, having regard to

- (1) “the interests of morals, public order, national security or the protection of the private lives of the parties; or
- (2) any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public,”

If it is so satisfied it may then order that the hearing be in private but only if the Tribunal is also satisfied that a hearing in private would not prejudice the interests of justice. The ultimate decision as to whether the hearing should or should not be in private remains with the Tribunal.

In *Eurolife Assurance Company Ltd v Financial Services Authority* the Tribunal had to consider whether reputational risk gives rise to unfairness or not under the second limb. The Tribunal held that the party applying for a private hearing needs to produce cogent evidence of how the unfairness or prejudice may arise from the holding of the hearing in public although he need not demonstrate that such unfairness and prejudice would result. The Tribunal recognised that the concern is likely to be with the effect of publication of allegations or evidence during the hearing itself and in the period up to the publication of the Tribunal's decision. The examples given by the Tribunal of such concerns were because press reporting may not always succeed in being accurate, or because during the hearing the allegations are more prominently reported than the applicant's answers to them, or because a decision by the Tribunal in the applicant's favour after the conclusion of the hearing may not in practice be sufficient to undo the damage done by the publicising of the allegations or because there was unnecessary public disclosure of commercially sensitive or other confidential information.

In the particular case the unfairness was said to arise by a public hearing creating an immediate lack of confidence in the applicant, so that financial advisers would not be able to recommend the applicant's products with the result that new business would dry up and the applicant's business would cease to be viable.

The Tribunal observed that the risk of damage to reputation will not of itself normally be unfair: to be unfair the risk of damage to reputation must be disproportionate. The Tribunal in that case was not satisfied on the evidence before it that this was the position. However, to minimise any potential risk that the press reporting did not succeed in giving a balanced and accurate account of the proceedings at the main hearing, for example because the robust opening of the FSA was reported on the first day and at a time when the rebuttal had not yet been presented, the Tribunal made a direction that there should be an opportunity for the respondent to make a statement in rebuttal at some stage on the first day of the hearing.

Since the tribunal concluded that a hearing in private was not necessary having regard to the reputational risks, it did not go on to consider the question of whether it could be satisfied that a hearing in private

would not prejudice the interests of justice. The Tribunal however commented that if the unfairness or prejudice condition is fulfilled, the interests of justice in the particular case are likely to be better served by the holding of the hearing in private. However, the Tribunal recorded in its decision that

“the tribunal must keep in mind the important public interest in open justice, which goes beyond the considerations arising from the circumstances of the particular case under review, and ... the tribunal must in every case be satisfied also that the interests of justice in this more general sense will not be prejudiced.”

The entitlement to a public hearing protects litigants against the administration of justice in secret with no public scrutiny. A public hearing maintains public confidence in the system. It provides transparency. As was emphasised in *Diennet v France* (1995) 21 EHRR 554 at para 33

“publicity contributes to the achievement of the aim of Article 6(1) namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society within the meaning of the Convention.”

So whose right is it anyway; the parties or the public?

MARION SIMMONS QC, 3/4 SOUTH SQUARE

**Vice-Chairman of the Appeals Committee of the ICAEW
 Member of the Mental Health Review Tribunal
 Panel Member of the Bar Disciplinary Tribunals**

LEGAL UPDATE

***R (on the application of Land) v Executive Council of the Accountants' Joint Disciplinary Scheme* [2002] EWHC:** Ernst & Young ("EY") sought a stay of the investigation by the JDS into EY's work as auditors of Equitable Life Assurance Society until after the conclusion of proceedings against EY following on from Equitable's financial difficulties. EY faced both the JDS investigation, and was involved in the non-statutory public inquiry chaired by Lord Penrose. EY were also defendants to civil

proceedings in the Commercial Court in a claim for up to £2.6 billion and were third parties in Greek proceedings bought by Greek policy holders.

EY contended that the JDS investigation gave rise to a real risk of serious prejudice to EY which outweighed the public interest in the continuation of the investigation at present.

Stanley Burnton J rejected the application. EY had not established that the continuation of the JDS investigation would significantly prejudice their defence of the Commercial Court proceedings or their involvement in the other inquiries; it could be assumed that the Commercial Court, the JDS and Lord Penrose would take into account the competing demands on those involved when giving directions and timetabling. Concurrent proceedings were not inherently unfair; regulatory investigations perform an important function in society and are frequently likely to operate concurrently with claims for damages. Whilst there was always a risk of inconsistent decisions on questions of fact, that was inherent in the system of parallel regulatory and Court proceedings. However, neither tribunal was bound by the other and, in any event, the risk still existed even if the proceedings were sequential.

This is much - considered and much - travelled territory for those who work in the regulatory sector and is another example of the overall reluctance of the Courts to intervene where parallel proceedings and investigations are taking place.

***Gupta v. General Medical Council* [2002] 1 WLR 1691:** the Privy Council held (1) that there was no general duty on the Professional Conduct Committee of the GMC to give reasons for its decisions on matters of fact, but that it was appropriate for the committee to give a general explanation of the basis for their determination on the questions of serious professional misconduct and penalty; and (2) that considerations which would normally weigh in mitigation of punishment are likely to have less effect before a body such as the GMC entrusted with the need to protect the public and the reputation of the profession.

On the question of giving reasons, Lord Rodger of Earlsferry affirmed the existence of a duty to give a

general explanation for the committee's decisions on questions of serious professional misconduct and of penalty, but as to issues of fact "the principle of fairness may require the committee to give reasons for their decision". On the weight to be given to mitigating factors, Lord Rodger said that: "where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned." Accordingly, considerations which would normally weigh in mitigation of punishment were said to have less effect on the exercise of this kind of jurisdiction. Sir Thomas Bingham MR observed that: "The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price."

***Modahl v. British Athletic Federation Limited* [2002] 1 WLR 1192:** the Court of Appeal held that in the case of a challenge to proceedings before a domestic tribunal, the appropriate test is whether, having regard to the course of the proceedings and any appellate process, there has been a fair result. A disciplinary committee appointed by the defendant concluded that the claimant had committed a doping offence and banned her from competitions for four years. The claimant appealed to an independent appeal board panel which allowed the appeal and lifted the ban. The claimant then brought an action against the defendant for breach of contract, and damages, alleging bias against the disciplinary committee.

The Court of Appeal struck out the action, saying that where an apparently sensible appeal structure had been put in place, the Court was entitled to approach the matter on the basis that the parties should be taken to have agreed to accept what in the end was a fair decision. The question in every case, therefore, was the extent to which the alleged deficiency had produced overall fairness.

***Moore's (Wallisdown) Limited v. Pensions Ombudsman* [2002] 1 All ER 737:** Ferris J held that where the Pensions Ombudsman made himself a party to proceedings, he put himself at risk as to an order for costs. Whether such an order was actually made was a matter on which the Court would exercise its discretion in accordance with the principles set out in the CPR, including the general rule that the unsuccessful party would be ordered to pay the costs

of the successful party. In the case of appeals from tribunals there was a settled practice, which applies equally to the Pensions Ombudsman that if the tribunal took no part in the appeal an order for costs would not be made against it, but if it did appear and made representations in support of its decision it made itself at least potentially liable for costs in the event that its decision was reversed.

R (on the application of Morgan Grenfell & Co Limited) v. Special Commissioner of Income Tax [2002] 3 All ER 1: The House of Lords considered whether the Inland Revenue when exercising its statutory investigatory powers was entitled to require disclosure of legal advice a bank had received about a tax scheme operated for clients. The House of Lords held that Section 20(1) of the Taxes Management Act 1970 did not entitle an inspector of taxes to require a taxpayer to deliver to him material that was subject to legal professional privilege. Lord Hoffmann doubted the dicta of Lord Denning MR and Diplock LJ in *Parry-Jones v. Law Society* [1968] 1 All ER 177 where the Law Society had required a solicitor to produce documents to an appointed investigator. Lord Hoffmann stated that he was not saying that on its facts *Parry-Jones'* case was wrongly decided, but where the information was disclosed by the solicitor and not used by the Law Society for any purpose other than its investigation, such limited disclosure did not breach the clients' legal professional privilege or, to the extent that it technically did, it was authorised by the Law Society's statutory powers. Lord Hoffman distinguished the position of a body such as the Law Society, where the information was required for a regulatory or disciplinary purpose, and the Inland Revenue in which information was sought for a use against the person entitled to the privilege.

KENNETH HAMER, HENDERSON CHAMBERS

If any member is aware of any recent cases which they believe would be of interest to other ARDL members, please could they contact Kenneth Hamer of Henderson Chambers, 2 Harcourt Buildings or any member of the editorial committee.

FORTHCOMING EVENTS

26th November, 2002 – Inaugural Seminar by Sir Andrew Leggatt PC: “Modernising the Regulation of Lawyers”

Time: 5:30pm, Tuesday 26th November, 2002

Venue: The Smoking Room, Inner Temple, London EC4

Ticket price: £25.00

THIS EVENT IS NOW FULLY SUBSCRIBED.

20th March, 2003 – First Annual Dinner

Details to be confirmed.

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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