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WINNER OF THE 2009/2010 MARION SIMMONS QC MEMORIAL ESSAY PRIZE: MICHAEL DRY, UNIVERSITY OF SOUTHAMPTON

IS BETTER REGULATION THE WAY TO AVOID FUTURE FINANCIAL CRISIS?

At the outset, it appears necessary to identify the issues which need to be contended with in order to come to a reasoned conclusion on whether increased or improved regulation would prevent future financial crisis. Broadly speaking, financial regulation can be described as the system of supervision, and occasionally intervention, which oversees the financial system, and aims to maintain financial integrity. The question seeks to know whether improving or tightening this system could prevent future financial crises such as that which erupted in 2007, and has subsequently led some of the world's most high profile banking institutions to the verge of collapse, with the likes of Lehman Brothers being consigned to history. This essay will argue the

case for careful and slight changes and tightening of the system, as this could provide added global financial security, but will also outline the risks of going too far for the UK and global economies.

Undoubtedly recent history has shown us how fragile the banking system and the global economy can be when put under intense pressure. The popular view is that the 'credit crunch' which began in 2007 was the result of excessive lending to the 'sub-prime' market in products such as mortgages over the course of several years, which exposed the banks to excess liability, and came home to roost in late 2007 when the first of the major financial institutions collapsed in the USA. The collapse quickly focused attention on other banks which were frantically assessing their asset portfolio, and finding a large gap between what they had insisted they were holding, and what they actually had. Arguably, the subsequent recession and its ramifications can be traced in its entirety back to this sequence of events.

So, it must be asked, why did the regulators (the Financial Standards Authority in the UK) fail to see this coming? And, would a different system prevent such crises?

It is important to note that, by way of example, the FSA works on several principles, one of which is proportionality. This means that the Authority will only seek to restrict where the outcome is proportionate to the aim to be achieved. To put this into context, would it have seemed proportional for the FSA to attempt to implement restrictions upon banking activity in 2006, following more than a decade of stable economic growth, and at a time when the banks had been trading freely and making billions of pounds of profit? Arguably not and therefore it may be necessary to view the FSA (and other financial regulators across the world) as naïve to banking activity, as opposed to responsible for the failure of the system.

So, to take the point that the regulators may have been naïve to the reasons behind the ever-increasing profits of the banks, namely the excessive lending to those without the ability to pay it back at high rates of interest, which had the effect of creating high profits in the short run and exposing the system to huge risks in the long run, would increased regulation solve the problem?

Arguably it would. If the banks are subject to higher levels of restriction, and are forced to make all available data on levels of risk available to the FSA more frequently, the effect would undoubtedly be greater transparency, and would make it more and more difficult to take on unjustified risk. The regulators could also use a carrot and stick policy. The incentive placed before the bank could be tax breaks for the institutions which are able to frequently show that they are working to limit the level of risk they take on and are able to balance this against the need to make a profit. The likelihood is that such a system, were it to be implemented, would also produce greater efficiency in the companies, as they seek to increase profits. The knock-on effect of this is likely to be greater stability in the sector brought about by greater confidence and willingness to invest in institutions which are seen to be the safest bets. The stick in this example could be a report published by the regulators every six months, or as frequently as is needed to instil confidence in the market, which would rank the banks and financial institutions on the basis of safety, much in the same way as schools and universities are placed in league tables based on success. In the abstract this represents a valuable idea. It would mean that the banks would have no choice but to conform to a safety first approach, or risk being at the bottom of a league table which would be widely available in the public domain, which could in turn lead to investors in certain banks moving their assets to those banks which were meeting objectives.

However, there are reasons why this works in economic theory and not in practice. Theory allows for variables and important facts to be disregarded in the search for a one size fits all approach to the market economy. The theory itself forgoes the intertwined reality of the modern economy and sees the situation thus: if X performs more efficiently and soundly than Y, and is seen to do so, then the market will use the 'perfect information' garnered to it, and reward the more efficient supplier by moving its assets to that supplier, forcing the inefficient supplier from the market. However, the reality in this instance would be very different were it not to be controlled. In the light of the 'credit crunch' and the failure of several banks, the system is especially weak. In the event of such information being put in the public domain, without sufficient explanation of it, the likely effect is to be that panicked investors remove their assets. As they do, and the bank becomes more and more fragile, it is likely to fail to honour large loans made by other banks, hence weakening them, and once again causing the system to be put under more intense pressure. This simple example serves to illustrate two things. Firstly that the banking system is so intertwined, that any attempt at what might be deemed aggressive regulation could

cause yet more harm to the system, and hence any such implementation must be carefully thought out. Secondly, that the system itself can never place theory above the practical human reactions, which arguably cause the huge profits, and huge losses which the banks have been known to make, when devising new systems of regulation.

A possible alternative to this has been voiced by Mervyn King, the current Governor of the Bank of England. In light of the recent crisis which has led to Government bail-outs to the tune of billions of pounds, which have been imitated around the world, he believes that the natural result has been to create a 'too big to fail' culture in the industry, which in turn may lead to further crises in the future as the banks are now aware that they can rely on Government support if they have difficulties. This is especially so now that Governments around the world have bought into the major banks on a huge scale. What he proposes is not increased regulation, but a complete overhaul of the banking system, whereby banks would separate their everyday humdrum business which is low risk, from their highly risky ventures. In such a scenario, it can be presumed that the 'everyday' element of the business would be the portion which would be 'too big to fail' and would also be the least likely to do so, hence limiting the risks to the rest of society in the process. This would in essence create a system whereby 'institutions can fail without imposing unacceptable costs on the rest of society'. .¹.

The necessary result of such a programme, if properly and fully implemented, would be that banks could continue their high risk activities, in which they would essentially only be able to stake the money of those willing to take the risk. Meanwhile the ordinary member of the public would know that their money was safer than it had previously been. Also, a somewhat unconsidered by-product of such action would be that regulating the industry would be likely to get easier. In effect, the regulators would know exactly where the riskiest capital was being held at any one time, and would also know, from audits and other measures, whether or not such business was being carried out properly.

Whilst this idea has benefits to the overall stability of the market, it also creates many problems in itself. It is important to remember that banks are, for the most part, global entities. They operate in markets the world over, in fierce competition with each other for market share. Generally speaking such entities thrive in any market where the currency and economy are stable.

¹ Extracted from a recent speech by Mervyn King to Scottish business organisations.

Therefore, it is clear that any action to radically reform the banking sector would have to be done on a truly global stage. If not there could be truly disastrous economic consequences. Looking objectively, and disregarding any pomp or history, what is there to differentiate between doing business and paying tax for the privilege in London, from doing exactly the same in Frankfurt, Toronto or Shanghai? Any move for change which is taken unilaterally could lead the banks to consider their position in that market, and rather abruptly move some or all of their business to a more 'friendly' economy. The effect of this for Britain, which has staked its future in the services, and especially the financial services sector, could be to chip away at the keystone of the national economy, and leave in its place very little with which to compete with the rest of the globe.

It is this need for global harmony which is likely to be the long term problem if any idea with the likely effect of that stated above is likely to be successful. Each country has its own views and its own solutions to the problem, and therefore agreeing to one unified policy is likely to be a huge stumbling block. One only needs to look at the successive rounds of global talks on climate change prevention initiatives to see that, where there are possible economic ramifications, there is likely to be a great deal of heated debate, and very little agreement, especially in the short term. Also, the people who aren't at the discussion table are just as important as those who are. To take what may seem an unrelated example, the American company Berkshire Hathaway, one of the most successful investment companies in history, is not based on Wall Street, or even in New York, but more than a thousand miles away in Nebraska. This illustrates the point that institutions can set up anywhere and not necessarily in the most fashionable financial area. There is in theory nothing to stop any euro-zone city such as Prague becoming Europe's financial hub as a result of lax regulation at the expense of, for example London. Hence, the point must be emphasised that, in order to implement any such strategy, it is necessary to include every potentially viable State which the banks could move business to in the talks.

A point to consider at this stage is whether or not any such intervention is necessary. As is always the case in times of crisis, the need to find those responsible leads to widespread condemnation of the entire sector. In reality, it may be true to say that, due to the crisis, a few bad apples were caught out, and removed from their positions of power. It is likely that some high profile bankers would put this argument forward, were they to have the freedom to speak candidly on the matter.

Or, to look at the issue from a different perspective, it may be true to say that regulating this aspect of banking more heavily would restrict this type of high-stakes gambling, but it has been remarked in this regard that within the banking sector there is a high level of 'creative imagination' when it comes to thinking up new ways of taking risks², which would themselves later have to be regulated.

Arguably though, this argument is weak, as there are clearly discrepancies in the system of checks on the banking sector, which should be addressed so as to provide greater security against this type of problem.

If regulation is the answer to the problem of financial crisis, then how should it be implemented? An important issue here is that of banker's bonuses. It has been argued that the huge pay-outs offered by banks to their employees contributed quite significantly to the recent crisis. It certainly stands to reason that employees of major institutions are more likely to take risks if they know that the likely short-term effect will be positive, which will in turn lead to inflated remuneration at the end of the year. Currently the regulatory position is that there is no express requirement to ensure that a firm's remuneration strategy is consistent with sound risk management³. Reform on this matter is already being discussed by the FSA in recent consultation papers⁴.

One approach which could be taken to regulate the system would be to take the view that the huge bonus culture in the UK, whilst having obvious negative connotations (as considered in brief above), may bring the best talent in this field into London, as opposed to other competing financial centres, which does have a knock-on beneficial effect for the overall economy. On the basis of this, it may be preferable to follow a more subtle approach to regulation as opposed to an outright ban on large bonuses. One way of doing this may be to stagger bonus payments, so that on the one hand, the banker receives part of the bonus payment, with the likelihood that they will receive the rest; but on the other hand, if it is subsequently found that the transactions of the employee in question were dubious, then the remainder of the payment can be withheld. The workability of such a plan requires some consideration, but it may be possible for the staggered portion of the payments to be held by the FSA or equivalent body, in

² Mervyn King, during his recent speech to the Scottish Business Foundation

³ Page 10 of 'Reforming remuneration practices in financial services', FSA, published 18 March 2009. Subject to change following the recent Queen's Speech.

⁴ 'Reforming remuneration practices in financial services', FSA, published 18 March 2009.

much the same way as the deposit protection scheme is used for tenancy deposits. This would also have the somewhat fortuitous knock-on effect, that the sum of the money held by the FSA could be placed in a high interest account, which would in turn earn interest which could be transferred to the treasury. This could fund the scheme and in turn earn substantial rewards for the public purse.

Another approach, tackling regulatory reform generally, is being considered by the G20. Broadly speaking, the approach being considered is one of acceptance of the existence of such risk-driven institutions, but limiting the intrinsic risk of such institutions by requiring them to hold more liquid capital and placing a cap on the amount of debt the bank can be laden with. Several problems with this though are inevitable. As discussed above, there is a real need for the global harmonisation of such matters, as otherwise the measure will immediately face huge obstacles. Secondly, it is very difficult to know how much capital any institution will need to hold at any one time. By way of an example, it is likely that immediately before the onset of the most recent financial crisis most estimates as to how much capital a bank would need to hold in reserve would be far from the true amount. This is an issue which may be overcome by greater transparency between the banks and the regulators. It is unlikely, especially in the current climate, that it would be up to the banks to self regulate the issue, as they have quite clearly failed in spectacular fashion in this regard.

To conclude, there are several potential solutions and safeguards which could be put in place, whether regulatory or otherwise, in order to attempt to mitigate the risk of future financial crises. This essay does not present an exhaustive list of such possibilities but does seek to elucidate a few workable solutions. The ideal position would be to be able to look upon a system whereby success and stability is fully rewarded and encouraged, whilst the type of large scale institutional failure which detrimentally affects the global economy is guarded against and punished fully.

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QUALITY ASSURANCE FOR ADVOCATES - IT IS COMING

A scheme to ensure Quality Assurance of Advocates (QAA) is necessary and will be imposed. The regulators have said so.

The UK Professional Group urged regulatory bodies 'to be more pro-active in maintaining professional standards, rather than merely reacting to complaints'⁵. The Legal Services Act 2007 places a duty on the legal regulators to set and maintain standards, including having in place effective QAA arrangements.

The Legal Services Board (LSB) has imposed a strict deadline for criminal advocates: by June 2012, a QAA scheme covering, initially, all advocates appearing in the criminal courts must be in place. Thereafter, consideration will be given to rolling out the scheme to cover advocates in all courts.

Concern in Crown Courts

There has been increasing concern at the patchy and declining standards of advocacy, particularly in the Crown Courts.

In his 2009 Kalisher lecture, the Lord Chief Justice, Lord Judge, drew attention to the unsatisfactory nature of the present arrangements for the practice of advocacy in the Crown Court due to the 'PYO'⁶ of competency frameworks and a confetti of training and continuing training arrangements'⁷. The Lord Chief also stated at the recent Inner Temple Symposium on the Future of the Bar that he 'strongly believes that the judiciary should be involved in quality assurance for advocates'⁸.

Joint Advocacy Group established

In October 2009, the front-line legal regulators (the Bar Standards Board, the Solicitors Regulation Authority and ILEX Professional Standards) set up the Joint Advocacy Group (JAG) to develop a common QAA scheme for all advocates in all areas of practice across all the three professions, with common standards, common methods of accreditation and a single body monitoring the scheme.

⁵ UK Inter Professional Group: Professional Regulation - A Position Statement (2002).

⁶ Pick Your Own.

⁷ The Kalisher Lecture (2009) (www.judiciary.gov.uk/doct/speeches/lcj-kalisher-lecture-061009.pdf).

⁸ Symposium on *The Future of the Bar*, 10 June 2010, Inner Temple.

The establishment of the principle of a level playing field for all advocates is greatly to be welcomed by the profession.

In view of the size of this task, it was (sensibly) agreed that there should be an incremental approach and JAG has turned its attention, in the first instance, to quality assurance of criminal advocates, given that this is the area of greatest perceived need and concern.

Advocacy criteria

The first step in developing a quality assurance system must be to identify the core competencies, standards and values that are expected.

To this end, JAG issued a consultation paper late last year proposing a set of common advocacy standards or criteria in criminal work. The JAG paper was welcomed and a detailed set of suggestions filed in response by the Council of the Inns of Court (COIC) with advice from the Advocacy Training Council⁹ (ATC) and the Inns and Circuits based on the tried and tested 'Dutton Criteria'¹⁰ (which has been used successfully by the ATC for the last five years in carrying out its constitutional function of the advocacy assessment of pupil barristers)¹¹. JAG acknowledges that its criteria are a 'work in progress' and will need further to take on board COIC's suggestions.

Accreditation and architecture

JAG issued a second consultation paper on 10 August 2010 setting out proposals as to the nature and architecture of the accreditation scheme for advocates in the criminal courts. This followed a detailed advisory paper on these aspects submitted by COIC with input from the ATC and the Inns.

Truths recognised

The JAG paper recognises, and gives effect to, four important truths (pointed out by COIC). The first is that oral advocacy is a performance skill and any system of accreditation must test actual performance of advocacy (rather than rely on paper or 'portfolio' assurances). The second is that judges – who are the daily consumers of advocacy, year in year out - are in the best position to assess the competency of advocates.

⁹ The Advocacy Training Council of the Bar of England & Wales reports to the Council of the Inns of Court (www.advocacytrainingcouncil.org.uk)

¹⁰ Following recommendations of Dutton 2, Report on Assessment of Advocacy (February 2004). (www.advocacytrainingcouncil.org/index.php?option=com_content&view=article&id=69:reports&catid=38:publications)

¹¹ ATC Constitution, (www.advocacytrainingcouncil.org/images/word/constitution_head.ed.doc)

The third is that there is no point in re-inventing the wheel when the CPS 'four-level' system has proved to be very workable. The fourth is that, if any system of QAA is to work, it must be sensible and proportionate in terms of scope and cost.

JAG proposed four-level scheme

The proposed JAG assurance scheme duly comprises four levels, which advocates will be able to move up incrementally, and places judicial evaluation at the core of Levels 3 and 4.

- Level 1 will cover advocacy in the magistrates' court, as well as appeals from cases heard at first instance in the magistrates' court and bail applications before a judge in chambers in the Crown Court and High Court. The current advocacy training standards required in each of the three participating professions will give advocates Level 1 status. Level 1 for the Bar will be achieved by the completion of the vocational course and the first six months in pupillage.
- Level 2 will cover advocacy in the higher courts, as well as appeals from cases heard in these courts in the first instance. Again, current training (in the Bar's case the compulsory element of the New Practitioners Programme, with the addition of a Pass/Fail assessment) will enable advocates to achieve the level.
- Level 3 will cover more complex advocacy in the Crown Court and above.
- Level 4 will cover the most complex Crown Court cases and appeals.

Judicial evaluation

Advocates will be subject to judicial assessment at Levels 3 and 4 based on (simple) forms which judges will be asked to complete attesting to the standard achieved by the advocate in the key relevant disciplines¹². Judges will be giving suitable training as to the implementation of the scheme. The judiciary have a responsibility for ensuring that cases are dealt with 'justly' in accordance with the Overriding Principle in the Civil and Criminal Procedure Rules¹³, which includes ensuring that cases are dealt with 'expeditiously and fairly'¹⁴. Sub-standard advocacy is

¹² *Eg* Skeleton Argument, Examination-in-chief, Cross-Examination, Speech to Jury, etc.

¹³ CPR para. 1.1 and likewise under the Criminal Procedure Rules [ref]

¹⁴ It should be noted that Judges have had the responsibility for the discipline of barristers since Edward I's reign. Judges still retain a disciplinary power (albeit rarely used) over

inimical to this. It is intended that the scheme should be simple and should not be burdensome on judges; but should immeasurably help judges ensure that proper advocacy standards are maintained in their courts, in accordance with their duty to give effect to the Overriding Principle.

Five-yearly re-assessment

Following start-up provisions, JAG proposed five-yearly re-accreditation for all criminal advocates. There will be a healthy debate as to whether this should include QCs.

Traffic lights

JAG also proposes an additional ‘traffic light’ system to pick up under-performing advocates, with judges (and possibly others) able to submit formal reports. If an advocate receives a certain number of reports, then the independent body will make recommendations to their regulator on re-training.

Advocacy Standards Body

JAG proposes the establishment of an independent body (reporting to the three front-line regulators) to implement and operate the scheme accountable to and with oversight from the three advocacy regulators. JAG proposes that the new body will initially be chaired by a senior criminal judge.

Consultation

The JAG proposals deserve a warm welcome and support by the Bar – reflecting as they do the broad thrust of the recommendations of COIC following the detailed research, consultation and advice of the ATC and the Inns.

The Bar, the Bench, and all others interested in high standards of advocacy, now have an opportunity to reflect and to express their views as to the fine detail of the proposed QAA scheme. I would encourage everyone to take the time to consider and (if so moved) to respond to the latest JAG Consultation Paper on the proposed framework for the delivery of the QAA scheme. Comments are invited by 12 November 2010: (www.barstandardsboard.org.uk/assets/documents/QAA_Consultation_Paper%20final%20version%2010-08-10.pdf)

solicitors under s.50 of the Solicitors Act 1974 and they have a duty to maintain standards in their courts through the application of the CPR and the CrPRs, through observation of rules of fairness at common law and under article 6 of the ECHR, and of course to punish contempt.

Excellence in advocacy

The introduction of QAA will amount to a seismic change for advocates in the courts of England & Wales. It is to be hoped that all criminal barristers and solicitor advocates will quickly see this proposed scheme as something they can embrace, aimed as it is at ensuring a level playing field for all and providing the Bar with an opportunity to demonstrate that its hallmark remains 'Excellence in Advocacy'.

A key ATC aim for the coming year will be to ensure that the advocacy training provided by the Inns and Circuits enables practitioners and judges confidently to embrace QAA and to help barristers develop the skills and ability they need to succeed in the new challenging environment ahead.

Charles Haddon-Cave QC
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WHAT NEXT FOR THE REGULATION OF TEACHERS?

In June this year, the Education Secretary, Michael Gove announced his intention to ask Parliament to pass legislation to abolish the General Teaching Council for England.

Whilst no announcement has yet been made about the precise nature of the body that will take its place, early indications are that the Council’s functions in respect of the regulation of teachers will be taken over by another regulatory authority.

In 2000, the General Teaching Council for England (GTCE) was established as the independent professional and regulatory body for teaching in England. It has as its statutory aims the improvement of the standards of teaching and the quality of learning, along with the maintenance and improvement of standards of conduct in the public interest. The GTC now regulates over 500,000 qualified teachers.

Once the GTCE is abolished, England will be the only UK administration not to have a General Teaching Council. The Government considers that the independent regulation of teachers continues to be in the public interest and accordingly, the GTCE’s successor is likely to inherit the regulatory functions exercised by the body in its current form.

For teachers with outstanding cases before the GTCE, for their employers and witnesses, it is hoped that the new face of teacher regulation will be revealed soon. In the meantime, the Department for Education has

confirmed that the GTCE's statutory functions will continue until new primary legislation is enacted by Parliament.

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LEGAL UPDATE

- ***Venton v Solicitors Regulation Authority [2010] EWHC 1377 (Admin)***
- ***R (Mariaddan) v Solicitors Regulation Authority [2009] EWHC 2913(Admin)***
- ***Khan v Solicitors Regulation Authority [2010] EWHC 1555 (Admin)***
- ***Harris v Registrar of Approved Driving Instructors [2010] EWCA Civ 808***

Each of these cases concerned the character and suitability of the appellant. In *Venton*, the Divisional Court (Elias LJ and Keith J) held that the adjudication panel of the Solicitors Regulation Authority was justified in refusing the appellant's admission to the Roll of Solicitors on the basis that he had been reckless in responding to questions concerning his character or suitability. In March 2003, the appellant applied to enrol as a member of the Law Society and failed to disclose that he had previously received a caution for disorderly behaviour and a caution for making off without paying a taxi fare. In October 2003, he was convicted of driving a vehicle with excess alcohol and disqualified from driving for two years and fined. In August 2005, he was given a police penalty notice for being drunk on a highway. In 2009, he applied to be admitted to the Roll of Solicitors and failed to disclose any of these matters. The Solicitors Regulation Authority did not contend that the appellant had been dishonest, but observed that he had been reckless in responding to questions concerning his character and suitability. The court dismissed his appeal from the SRA's refusal of admission to the Roll of Solicitors saying that it was of the greatest concern that the appellant had failed to disclose relevant matters when the opportunity to do so arose. He had been less than frank, had sought to make excuses, his explanations were not particularly attractive, he had sought to minimise responsibility, and had taken a legalistic and defensive line in respect of his failures. The full frankness which ought to have been demonstrated before one could become a member of the practising profession was lacking in the instant case.

In *Mariaddan*, the claimant solicitor failed to disclose the fact of ongoing disciplinary proceedings before the

Solicitors Disciplinary Tribunal when applying for re-accreditation to the Family Law Accreditation Scheme. The application form required the claimant to inform the Law Society of any matter which might have a bearing on his fitness to continue to be a member of the panel, and the undertaking included the sentence 'I understand that such matter may include...an appearance before the Solicitors Disciplinary Tribunal'. The claimant signed the undertaking in January 2007, although at the time he was aware that a hearing before the SDT was fixed to commence in February 2007 to consider five allegations against him of conduct unbecoming a solicitor. The tribunal subsequently found the allegations substantiated and the claimant's application for re-accreditation to the scheme was refused. Charles J in dismissing the claimant's application for judicial review held that the panel's decision was well within the range of decisions fairly open to the panel.

In *Khan*, the Divisional Court (Elias LJ and Keith J) held that the Solicitors Regulation Authority had erred and should have issued a certificate of satisfaction to the appellant to enable his admission to the Roll of Solicitors. The appellant was an advocate admitted in Pakistan in 1992, and in November 2006 he applied for a certificate of eligibility to be admitted to the Roll of Solicitors in England and Wales under the qualified lawyers transfer regulations. The certificate was granted, and about a year later the appellant realised that he had not notified the SRA that he had been convicted in 2002 for driving without due care and attention and for using a vehicle without valid insurance although he had disclosed the matter to the Punjabi Bar Council where he was still in good standing as an advocate. He spoke to an administrative officer at the Law Society who told him he would have to wait until he applied for admission to the Roll to declare the conviction. He completed the required work experience and the necessary assessments and applied for admission to the Roll of Solicitors in February 2009 and notified the SRA of the conviction. In allowing the appellant's appeal, the Divisional Court held that the panel had been fully entitled to conclude that the failure in the original application to disclose the conviction had been a reckless act but on the facts there were a number of features which demonstrated that the appellant recognised the importance of regulatory requirements, and, in particular, he had disclosed matters to the authorities in the Punjab and to the SRA. There were also a number of testimonials as to his character and integrity which lent support to the view that he now fully appreciated the weight of his responsibilities.

In *Harris*, the Court of Appeal dismissed the appellant's appeal against a decision of the Transport

Tribunal dismissing his appeal against the registrar's refusal to extend his registration as an approved driving instructor. The appellant had been an approved driving instructor for 29 years and had no motoring convictions. However, the registrar refused his most recent extension application after discovering that he had failed to disclose numerous criminal convictions in previous extension applications. The convictions had arisen largely from his turbulent domestic circumstances, and included a public order offence and dishonesty offences. The court (Richards, Toulson and Sullivan LJJ) held that the registrar had to be able to carry out his functions of scrutiny effectively; that if an applicant failed to disclose convictions or made a false declaration, it struck at the heart of the registration process and the reliability of the register; and that such conduct was highly relevant to whether an applicant was a fit and proper person.

R (Remedy UK Limited) v General Medical Council [2010] EWHC 1245 (Admin)

In this case the claimant company, which was founded to represent doctors and campaigned on a wide range of medical and professional issues affecting doctors, especially appointments for junior doctors' training posts, sought to subject the Chief Medical Officer for England and the chair of the Department of Health's recruitment and selection steering group, to the General Medical Council's disciplinary processes. The claimant company applied for judicial review of the decision of the GMC not to refer allegations of misconduct to case examiners arising from a number of public investigations which had recognised that the appointments system was a deeply flawed scheme.

The Divisional Court (Elias LJ and Keith J) in dismissing the application for judicial review on the grounds that the allegations against the Chief Medical Officer and the chair of the steering group did not fall within the Medical Act 1983 section 35C(2), held that the concept of fitness to practise was not limited to clinical practice alone and could extend to other aspects of a doctor's calling. There was no reason why a doctor who was seriously deficient in research, or who engaged in teaching students in an incompetent manner, could not properly be subject to the GMC's fitness to practise procedures for those failings. However, the administrative functions being exercised by the Chief Medical Officer and the chair of the steering group could not be described as exercising functions which were part of their medical calling or sufficiently closely linked to the practice of medicine. Their essential skills were not medical. The making and implementation of government health policy was not a medical function, even where the policies in issue directly related to doctors and closely affected the

medical profession. The functions being exercised by the Chief Medical Officer and the chair of the steering group were too remote from the profession of medicine to bring them within the scope of section 35C(2) of the Medical Act 1983. To fall within section 35C the conduct had to be of a kind which justified some kind of moral censure, or involve conduct which would be considered disreputable for a doctor.

R (North Yorkshire Police Authority v Independent Police Complaints Commission) [2010] EWHC 1690 (Admin)

North Yorkshire Police Authority applied for judicial review of the decision of the Independent Police Complaints Commission ('IPCC') upholding a complaint and determining that it related to police conduct rather than to direction and control of a police force. The police authority refused to record a complaint about the 'conduct' of the Chief Constable relating to the investigation of treatment to a patient in a care home prior to her death on the grounds that the complaint related to the direction and control of a police force and was outside the scope of the IPCC.

His Honour Judge Langan QC, sitting as a judge of the High Court, in granting judicial review held that the word 'conduct' did not carry with it the notion that the behaviour must be of a particular quality, whether good or bad and the IPCC was right to treat the complaint as one which related to the conduct of the Chief Constable. The concept of direction and control was essentially concerned with matters which are of a general nature and, on this basis, a decision by a chief officer which is confined to a particular subject falls outside the scope of direction and control. The judge rejected the 'flood-gates argument' that persons dissatisfied with a decision not to commence an investigation, or within a decision after investigation that there should be no prosecution, might overload the system by making pointless requests to chief officers to have the matter reconsidered. The instant case was concerned with the recording of a complaint which was, in essence, a matter of registration. If a complaint is repetitious or an abuse of the complaints procedure, it can be disposed of on an application for dispensation to the IPCC, and the availability of the dispensation procedure mitigates any fear that the system may become clogged up.

Bradshaw v General Medical Council [2010] EWHC 1296 (Admin)

The claimant doctor applied to terminate an order of the General Medical Council's interim orders panel to suspend his registration. The claimant, whilst employed as a medical officer by the Civil Aviation Authority (CAA), had been suspended on full pay

pending an investigation into a number of allegations of misconduct arising out of an alleged affair between him and another employee and doctor. The CAA's disciplinary hearing held that had he not resigned during the investigation, he would have been dismissed without notice. The GMC's interim orders panel subsequently suspended his registration on the grounds that there could be impairment of his fitness to practise that posed a real risk to members of the public or could adversely affect the public interest.

His Honour Judge Roger Kaye QC, sitting as a judge of the High Court, in dismissing the application held that the panel had been correct to order the claimant's suspension. The allegations did not involve a criticism of his clinical competence and note was to be taken of his impressive academic record and positive testimonials, the potential financial and career consequences of suspension, the fact that the full hearing might not take place for some time and the claimant's denial of the charges. An interim suspension would usually be viewed as disproportionate where allegations arose out of an alleged personal intimate relationship and there was absent any suggestion or criticism of clinical performance or abuse of patient safety. In addition, the making of interim suspension orders on public interest grounds in cases of non-clinical allegations would ordinarily expect something that would impinge more directly on members of the public, such as murder, rape or abuse of children.

However, in the instant case, the matters were serious with serious implications as to the appellant's probity and integrity. The allegations went much further than accusation and counter-accusation against and by persons involved in an intimate relationship, and they included allegations of false accusations, fabricating and altering documents and lying to the investigator. Although the allegations involved a colleague and not a patient, a member of the public could ask whether the appellant would seek to cover up or lie or make false accusations to defend himself if a complaint was made against him by a patient. Such factors would likely undermine public confidence in a doctor's core duties and responsibilities of honesty and integrity.

Uruakpa v General Medical Council [2010] EWHC 1202 (Admin)

In this case, Saunders J held that it was for the GMC to decide what was the appropriate test for medical competence and not the High Court. It was not for a doctor to refuse to take an assessment because he did not like its structure. Where a doctor had continually refused to complete an assessment to ascertain his professional performance, the GMC's fitness to

practise panel had been entitled to have found his fitness to practise impaired and to have imposed the sanction of suspending his name from the medical register, given its obligation to ensure the safety of the public.

The appellant doctor appealed against a decision of the panel suspending his name from the medical register for 12 months. He had qualified as a doctor in Nigeria and Australia, came to the United Kingdom and was granted full registration by the GMC in 2003. He practised in the field of obstetrics and gynaecology and worked in a number hospitals. In 2005, his work was referred to the GMC in respect of the issues concerning the conduct of operations, performance on call, poor communication with patients and missed diagnoses. The GMC's fitness to practise panel made an interim order restricting his practice. Before the final hearing of the issue of fitness to practise, the GMC asked the appellant to undergo an assessment of his professional performance. Despite having twice agreed to do so, he ultimately declined to undertake any assessment having criticised the structure of the proposed tests. The panel found that his fitness to practise was impaired and imposed the suspension.

Saunders J held that where a charge against a doctor concerned clinical work, an appellate court had to accord deference to the decision of a panel of doctors. Further, it was for the GMC to decide what was the appropriate test for medical competence and not the High Court, and it was not for a doctor to refuse to take an assessment because he did not like its structure. In the instant case, the panel had been concerned about the appellant's failure to undertake an assessment, and because of the length of time since he had practised it was not possible to decide the extent of his deficiencies. Proper assessment was needed to ascertain his skills, and given his refusal to complete the assessment process, and in the light of the panel's obligation to ensure the safety of the public, the sanction imposed was the correct one.

Loutfi v General Medical Council [2010] EWHC 1762 (Admin)

In this case, the Administrative Court in Manchester (Nicol J) allowed the claimant doctor's application for judicial review of a decision by the investigation committee of the General Medical Council to issue him with a warning in respect of an allegation of gross misconduct involving assault. The court remitted the matter to the GMC for fresh consideration on the basis that the committee had failed to comply with rule 34(9)(c) of the General Medical Council (Fitness to Practise) Rules 2004, with the result that the hearing had not been fair.

At the hearing before the investigating committee the GMC had not called any oral evidence about the incident, which the appellant disputed. Rule 34(9)(c) of the Fitness to Practise Rules provides that unless otherwise agreed between the parties, each party shall not less than 28 days before the date of a hearing require the other party to notify him whether or not he requires any relevant person to attend and give oral evidence in relation to the subject matter. The letter from the GMC to the appellant giving notice of the hearing did not comply with rule 34(9)(c) and the omission by the GMC to comply with this requirement was said by the claimant to be material, because he said he had expected the GMC to call witnesses whom he could question before the investigation committee, and he was taken by surprise because that did not happen. Nicol J whilst recognising that the claimant did not ask for cross-examination of witnesses, or an adjournment to allow witnesses to be called, nevertheless found that a breach of the procedural requirements in the rules did take place, and that that breach did prejudice the claimant so as to give him a hearing which was not compliant with the rules or, for that reason, one that was fair.

Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin)

The Divisional Court (Laws LJ and Coulson J) allowed the appeal of the Solicitors Regulation Authority on sanction from the decision of the Solicitors Disciplinary Tribunal to suspend for three years a solicitor who had been found to be dishonest. The court held that save in exceptional circumstances, findings of dishonesty would lead to striking off, and that the SDT was plainly wrong to conclude that the circumstances of the present case were exceptional such that the usual sanctions should not be applied.

Akodu v Solicitors Regulation Authority [2009] EWHC 3588 (Admin)

In this case the Divisional Court (Moses LJ and Tomlinson J) held that a solicitor could not be found guilty of conduct unbecoming a solicitor on the basis that, as he was a partner in a firm of solicitors, he was thus jointly and severally liable for a failing of his partner. The Solicitors Disciplinary Tribunal had found that, in a series of mortgage transactions in which the appellant solicitor's firm had acted, there had been a failure by the appellant's partner to inform the mortgagee, in regard to various properties, of a difference in purchase prices between the full purchase price and that stated on the mortgage offer. A difference in purchase prices had occurred, as the sellers of the properties had offered discounts or

incentives on the properties, which were new-build developments.

The tribunal had found that the fee earner failed to inform lenders of the discounts and that, whilst he had not acted dishonestly, he had behaved in a reckless way contrary to the Solicitors Practice Rules 1990 by not acting in the interests of his lender clients. The tribunal found that the appellant, as a partner of the firm, was jointly and severally liable for the failing of his partner and thereby guilty of conduct unbecoming a solicitor. The Divisional Court allowed the appeal, Moses LJ saying that it was not open to the tribunal to find the appellant guilty of conduct unbecoming a solicitor on the basis, and the only basis, advanced by the tribunal that he was a partner in the firm. The appellant had not been directly responsible for the fact that financial incentives had not been notified to lender clients. Some degree of personal fault was required before a solicitor can be found guilty of conduct unbecoming his profession.

R (Colman) v General Medical Council; R (Hickey) v General Medical Council [2010] EWHC 1608 (Admin)

In each of these applications for judicial review, the claimants challenged the decision of the Professional Conduct Committee of the General Medical Council that they had been guilty of serious professional misconduct, and that their respective names be erased from the register. Both applications gave rise to the same issue, namely, whether the determination of the committee was in each case rendered unlawful by virtue of apparent bias. Both claimants argued that that was the effect of the involvement of the GMC's deputy registrars in the preparation of the proceedings, in preparing a draft determination in advance of the hearing, and in retiring with the committee when it considered its determination.

Owen J refused both applications, holding that the role of the deputy registrars was not that of a prosecutor but was essentially to assemble the material on which a screening decision would be made. The draft determinations had not influenced the panel. Whilst the deputy registrars were present throughout the deliberations of the panel they played no part in the deliberations and, on the evidence, the cases could not be identified as cases where an outsider had dealings with the panel or could have influenced the panels. The deputy registrars were present as secretaries and the panels were made up of a substantial number of independent medical practitioners, and the integrity of the proceedings was subject to the further safeguard of the presence of the legal assessor who was under a specific duty to inform the panel of any irregularity in

the proceedings. A fair-minded and informed observer would not consider that there was a real possibility that either panel was biased.

Kenneth Hamer
 Henderson Chambers

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REQUEST FOR COMMENTS AND CONTRIBUTORS

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