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‘TRUST, ASSURANCE AND SAFETY’ - REGULATORY PROCEEDINGS FOLLOWING AN ACQUITTAL IN THE CROWN COURT

‘It is often very difficult for highly intelligent people who are not lawyers to understand the difference between a verdict in a criminal trial and a decision on the same subject matter in civil or disciplinary proceedings¹.’

The purpose of this article is to briefly explore the possible approach taken by a statutory professional regulatory body in investigating cases following an acquittal in criminal proceedings. As Wall LJ tersely stated in *Sinha v General Medical Council [2009]*², only ‘[a] moment’s thought will suffice to demonstrate that the mere fact of an acquittal in criminal proceedings cannot be the be all and end all of the matter for other purposes.’ After all, there are many cases where defendants are acquitted in the Crown Court of grievous crimes purely on technicalities.

¹ *Sinha v General Medical Council [2009] EWCA Civ 80 at para 5 per Wall LJ.*

² *ibid*

A common misconception is the failure to differentiate between the purposes of each set of proceedings. Rather, the primary function of regulatory proceedings is public safety by establishing whether a registrant has fallen below the standards of proficiency expected in their profession and/or the standards of conduct, performance and ethics. The key, in relation to health and social care professionals³, is the unique relationship between the professional and the service user – ‘trust, assurance and safety’⁴. The range of professions regulated by the Health Professions Council⁵ highlights the stark differences between ‘health’ and more ‘social’ care professions. Psychologists, in the ‘social’ care group in my opinion, are a good example of the disproportionate vulnerability of a service user and the grave imbalance of power. Needless to say, such examples emphasise the importance of ensuring that the wider public interest considerations are always maintained, namely the deterrent effects to other registrants, the reputation of the profession concerned and the public confidence in the regulatory process⁶.

Take for example, a clinical psychologist who is charged with a sexual offence against a service user, member of the public or colleague⁷. The clinical psychologist may be acquitted in the Crown Court on the basis of doubts about the alleged victim’s consent, but may still face an allegation of professional misconduct based on the inappropriate nature of the relationship with the service user and/or acting beyond the boundaries of a therapeutic relationship.

³ Please note that the focus of this article is on the regulation of health and social care professions.

⁴ Taken from the aptly titled Department of Health White Paper, February 2007: *The White Paper – Trust, assurance and safety: the regulation of health professionals*. 2007 (Department of Health) (Cmnd 7013) London: HMSO.

⁵ Arts therapists, biomedical scientists, chiropractors, clinical scientists, dieticians, hearing aid dispensers, occupational therapists, operating department practitioners, orthoptists, paramedics, physiotherapists, practitioner psychologists, prosthetists and orthotists, radiographers, speech and language therapists.

⁶ In the landmark case of *Cohen v General Medical Council [2008] EWHC 58 (Admin)* the High Court addressed findings of impairment, including the range of issues to be considered and the ‘personal’ and ‘public’ components.

⁷ In my opinion, there is no practical difference between service users and colleagues. Both are members of the public. It would be illogical to suggest anything otherwise and insulting to registrants. The obvious differentiation is that in respect of the former, a registrant is more likely to have abused their position of trust.

Alternatively, consider the case of a band 7 physiotherapist acquitted of eight counts of sexual assault against a physiotherapy student, for whom he acted as a clinical educator. The HPC's Conduct and Competence Committee found that the physiotherapist had, inter alia, knelt behind the student during a plinth 'trigger test' making thrusting movements behind her, pressing her back with his penis and 'cupped' her buttocks – his actions were found to be sexually motivated and misconduct.

These two examples highlight not only the strong public interest in the pursuance of regulatory proceedings despite an acquittal, but also the strong interest in the profession concerned. This principle may apply equally to conduct both during the course of a registrant's practice and events outside his practice.

The most obvious practical difference is in the standard of proof. The problem often perceived by a registrant is that the regulatory proceedings act as a re-hearing of the criminal proceedings and thus they are being 're-tried' for essentially the same 'offence'. Whilst the doctrine of double jeopardy does not extend to parallel, or even subsequent, criminal and civil proceedings, it is always key to remember the principle of fairness to avoid any real risk of prejudice arising or an abuse of process argument being made.

As a general principle, whilst it may be appropriate for a regulator to postpone proceedings if the person concerned is being tried concurrently for related criminal charges, this does not suggest that a potential injustice may arise if the regulatory proceedings continue after the criminal proceedings have concluded. This approach is often taken by regulators to ensure that there is no risk that evidence which has not been admitted at that trial may enter the public domain by being admitted in the course of the regulatory proceedings.

If subsequent regulatory proceedings are pursued, how can we safeguard a registrant's Article 6 right? In the High Court, Dr Sinha argued that no fitness to practise investigation could remedy the flawed police investigation and the possible collusion of witnesses. Dr Sinha's argument was 'If the Crown Court judge thought I could not have a fair trial, how can my professional body conduct such a trial and find me guilty?' Dismissing Dr Sinha's renewed appeal, Wall LJ held that the General Medical Council should not be estopped from re-investigating the matter. Dr Sinha's acquittal was 'plainly a factor...but it was not conclusive in [his] favour.'

A similar argument was made and dismissed earlier this year before Langstaff J in *Bhatt v General Medical*

*Council [2011]*⁸. In addition to arguing that he had been exposed to jeopardy twice, Dr Bhatt also argued that it was unfair to try him again since the Crown Court trial had exposed inconsistencies and possible contamination in the service users' accounts. In respect of the latter, Irwin J in Sinha noted that 'collusion and contamination are the stuff of life in the criminal courts, where sexual allegations are concerned. It cannot be an objection to proceeding in a case'⁹.

Taking these cases in account, what steps can be taken to afford a registrant a fair hearing so that no inherent bias is apparent? If a registrant contends that the witnesses are making inconsistent statements a regulator could assist him in obtaining the transcripts from the Crown Court proceedings. In my experience it would be both prudent and sensible to start an investigation by obtaining full witness statements, relevant exhibits and considering transcripts where a registrant raises questions over the veracity of a witness¹⁰. In cases where a registrant is unrepresented, it is paramount to ensure that assistance is provided wherever necessary and appropriate. Like both *Sinha* and *Bhatt* most of the cases on this point involve inappropriate sexual behaviour towards female service users or colleagues, which may add to the complexity of the case.

In conclusion, regulatory investigations and disciplinary proceedings perform very important functions in our society, including protection of the profession itself – these functions should not be overlooked. Instead, every possible effort should be made to enable a fair, transparent and well-informed process so that a registrant can place faith and confidence in the regulatory process and their regulator.

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⁸ *Bhatt v General Medical Council [2011] EWHC 783 (Admin)*

⁹ *Sinha v General Medical Council [2008] EWHC 1732 (Admin)* at para 59

¹⁰ Please note that I am not proposing an absolute rule that transcripts should be obtained by regulators, particularly given that the duty of disclosure upon a regulator only applies to documents in its possession. Where a registrant makes a request for assistance to obtain the transcripts, or puts a regulator on notice that their case is to undermine the credibility of the regulator's witnesses, for example through previous inconsistent statements, their request should be entertained as far as practically possible.

¹¹ Please note that the views expressed are the views of the author and do not necessarily reflect the views of the HPC.

TO ADJOURN OR NOT TO ADJOURN? THE ADJOURNMENT OR POSTPONEMENT OF DISCIPLINARY AND REGULATORY PROCEEDINGS TO ALLOW THE JUDICIAL REVIEW OF A DECISION

A difficult balance needs to be struck when a regulator or disciplinary tribunal is asked to postpone or adjourn proceedings to allow a party to bring judicial review proceedings to challenge a decision. On the one hand, the adjournment will bring delay and increased costs and may cause considerable distress or inconvenience to witnesses. On the other hand, some challengeable decisions are best corrected early before the proceedings are tainted. This article examines the relevant considerations which ought to inform the decisions of regulators and tribunals when faced with this dilemma; and it suggests some practical guidance.

Mahfouz: the adjournment of hearings underway to allow the judicial review of a decision of the Panel

In the well-known case of *R (Mahfouz) v The Professional Conduct Committee of the General Medical Council [2004] EWCA Civ 233*, the Court of Appeal allowed in part M's appeal, concluding that a GMC Professional Conduct Committee ('PCC') should have allowed M's application to adjourn to apply to the High Court for judicial review. The decision challenged was that of the PCC in declining to discharge themselves after some of their number had seen prejudicial material published in newspapers which revealed that the practitioner had previously been struck off.

The court accepted the GMC's argument that (para 44) 'in general it is preferable for proceedings to be allowed to take their course and for a challenge to their validity to be taken by way of appeal'. The court acknowledged that '[C]onsideration must also be given to the difficulty of organising such proceedings in a complex case and the potential inconvenience to witnesses who may have to make special arrangements to attend the hearing and may be reluctant to repeat the experience'. However, '[t]here can be no inflexible rule' (ibid) and in the 'special circumstances ... justice and the appearance of justice required at least an opportunity to be given for that matter [whether the PCC should have discharged themselves] to be raised before a High Court judge' (para 45).

It is important to note quite how special the circumstances were which caused the Court of Appeal to depart from the general principle on the particular facts of the case. They included that:

- The application was, in the first instance, for an adjournment of no more than 27 hours to permit an

urgent High Court application to be made (para 14). Given that time-frame, in the court's judgement, nobody but M's counsel in the GMC proceedings could realistically make the High Court application and M was left with the invidious choice, if the proceedings continued, of having to choose in which of the two concurrent proceedings he would be represented by counsel (paras 39 to 41). Equally, in those circumstances, the GMC might well have wanted its own counsel to attend the High Court and respond to the application for a stay (para 45). The Court of Appeal noted that the PCC might have guarded against the risk that the contended time frame for obtaining relief was unrealistic by giving 'notice that the adjournment would not extend beyond 27 hours, without a specific order from the court' (para 40).

- M was funding the proceedings himself and would be at risk of paying twice if the proceedings were fundamentally flawed (para 43).
- The issue arose on the second day of an 8 day hearing in a case which was evidently of some complexity, concerning clinical and other allegations in relation to M's practice as a cosmetic surgeon in connection with a number of patients; and the allegations arose from old events going back to 2000 (paras 2, 43 and 45).
- The issue in question of whether the prejudicial publicity required the discharge of the committee was accepted as an important one requiring detailed legal argument and there was a difference of opinion between the PCC and their legal assessor as to the correct test in relation to recusal on the ground of bias (paras 10-13 and 45).

The 'alternative remedy' cases

The Court of Appeal in *Mahfouz* did not consider the case law concerned with the circumstances in which judicial review will be permitted notwithstanding the existence of an alternative remedy. However, at first instance, Davis J did. He held that¹²:

'... in the rather special circumstances of this particular case, an application for judicial review, as made by Dr Mahfouz, was a proper procedure to adopt. The considerations, of course, might be very different if such an application were made at a conclusion of a substantive hearing, when full findings had been made. But that emphatically was not the position here.'

The general principle is that judicial review will not be permitted where there is an alternative remedy except where the initiation of proceedings would cause

¹² [2003] EWHC 1695 Admin at para 35.

unfairness amounting to an abuse of power¹³. That may arise in disciplinary cases where there has been an extreme departure from the regulatory framework or delay¹⁴.

The question should be addressed at the permission stage and requires the High Court to consider all the circumstances in order to determine whether the case is exceptional. In *R v Falmouth and Truro Port Health Authority ex p South West Water Ltd* [2000] 3 WLR 1464 (CA) Simon Brown LJ said (at p1490):

'... The critical decision in an alternative remedy case, certainly one which requires a stay, is that taken at the grant of permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will permission be appropriate in a case concerning public safety. The judge should, however, have regard to all relevant circumstances which typically will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising and (perhaps) the apparent strength of the applicant's substantive challenge.'

That test has been applied in cases concerned with police disciplinary proceedings: *R (on the application of Redgrave) v Commissioner of Police of the Metropolis* [2002] EWHC 1074 (Admin)¹⁵; *R (Wilkinson) v Chief Constable of West Yorkshire* [2002] EWHC 2353 (Admin)¹⁶. In those cases, judicial review was considered to be an appropriate remedy, notwithstanding the existence of a statutory right of appeal, where the targeted decisions were preliminary rulings on whether to dismiss or stay proceedings on the ground that a fair hearing was no longer possible as a result of procedural irregularity and/or delay.

However, the High Court is more inclined to intervene to prevent prospective unfairness. In *R (S) v Knowsley NHS Primary Care Trust* *R (Ghosh) v Northumberland NHS Care Trust* [2006] EWHC 26 (Admin), Toulson J considered that judicial review of the procedures to be adopted in NHS Performers List hearings was appropriate notwithstanding the right of

appeal to the Family Health Services Appeal Authority Tribunal where the decisions in question concerned the prospective fairness of contemplated procedures in relation to the attendance of witnesses, cross examination and legal representation. He concluded (at para 57) that there was jurisdiction in the High Court to intervene in 'first stage' proceedings to 'prevent prospective unfairness' albeit one which would not readily be exercised. He drew a distinction with respect to completed first stage proceedings with respect to which (ibid) 'it makes sense (other things being equal) for the court to require the complainant to pursue his internal remedy'.

Intervention in cases underway

The Court of Appeal in *Mahfouz* rejected the GMC's suggestion that there was a general principle discouraging the High Court from intervening in cases underway. The court held (at para 45) that the cases relied upon by the GMC had distinguishing features: first, schemes in which speed of resolution was essential¹⁷; and, secondly, schemes in which an alternative remedy affords a cheaper and quicker remedy than judicial review¹⁸. Nonetheless, the Court of Appeal's approach in *Mahfouz* makes it plain that considerable weight in the balancing exercise is placed on the fact that proceedings are underway.

The judicial review of decisions not to adjourn

There are cases concerned with the refusal by courts or tribunals to adjourn their proceedings in various circumstances including the non-availability of witnesses and the late service of new evidence. The High Court will only intervene where the decision not to adjourn can be characterised as 'Wednesbury unreasonable'¹⁹.

Screening or referral decisions

As a rule, screening or referral decisions are not amenable to judicial review because intervention by the High Court is regarded as premature where the effect of the decision is merely to place the case before a tribunal vested with the capacity to provide a fair

¹³ *R v Inland Revenue Commissioners, Ex parte Preston*, [1985] AC 835 (HL), per Lord Scarman at p 852 and per Lord Templeman at p 864.

¹⁴ This is well-illustrated in police disciplinary cases: *R v Chief Constable of the Merseyside Police Ex parte Calveley and Others* [1986] Q B 424 (CA); *R v Chief Constable of Merseyside Ex p Merrill* [1989] 1 WLR 1077 (CA).

¹⁵ Moses J at paras 10-14, agreeing with the approach of Elias J in granting permission.

¹⁶ Davis J at para 42.

¹⁷ *R (Hounslow LBC) v School Appeal Panel* [2002] EWCA Civ 900.

¹⁸ *R v Huddersfield Justices ex p D* [1997] COD 27, where the alternative remedy was an appeal to the Crown Court.

¹⁹ See *CPS v Pictou* [2006] EWHC 1108 (Admin) (DC) which contains a helpful review of the relevant authorities and considerations. It was adopted as being applicable to disciplinary proceedings in *R (French) v Chief Cons of W Yorkshire* [2011] EWHC 546 (Admin).

hearing²⁰. There are, however, exceptions: where 'the facts call out for that intervention, for example where irreparable harm or unfairness is likely to occur or justice could only be met by intervention'²¹; and where the referral decision involves the exercise of an exceptional jurisdiction which could not be challenged at the full hearing²².

Suggested guidance

(a) Panels faced with an application by a party for the adjournment of proceedings underway in order to challenge by judicial review the panel's own decision.

(i) There is a presumption against the adjournment of proceedings underway in order to allow a party to seek judicial review of a panel's decision in the sense that exceptional circumstances are required. However, there is no general rule against the judicial review of proceedings underway because exceptional circumstances do exist in which the High Court will intervene both to stay proceedings where an adjournment has not been allowed and to quash decisions under challenge. That said, a panel should not be expected routinely to doubt the correctness of its own decisions in the absence of some objective basis for concluding that there is a particular possibility for error and that to proceed in the face of that possibility carries grave risk.

(ii) A panel considering whether to allow an adjournment should undertake a balancing exercise which takes into account all the circumstances and, in particular, the potential for prejudice to the disciplined person in going ahead, the potential for prejudice to the proceedings in not going ahead and the desirability – other things being equal – of the timely disposal of proceedings.

(iii) Where the potential prejudice in going ahead to the person disciplined is extreme or irremediable and the prejudice to the proceedings in not going ahead limited, provided that the panel can exceptionally discern an objective basis for doubting its own decision, the balance is tipped in favour of an adjournment.

²⁰ *R (Dr Michael Heath) v The Home Office Policy and Advisory Board for Forensic Pathology* [2005] EWHC 1793 (Admin), per Newman J at paras 42-45.

²¹ *R (Aurangzeb) v The Law Society* [2003] EWHC 1286 (Admin), a renewed application for permission; per Newman J at para 5.

²² *R (Peacock) v GMC* [2007] EWHC 585 (Admin), concerning the exercise by the Registrar of the power under the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r 4(5), to waive the time limit for bringing proceedings on the ground of exceptional circumstances.

(iv) Factors militating in favour of an adjournment are where:

- the challenged decision relates to the global fairness of the proceedings, such as whether the proceedings should be stayed as an abuse of process or whether the particular Panel should discharge itself on the ground of bias or lack of impartiality;
- to proceed on the basis that the challenged decision is correct would result in an irremediable step of consequence and would be destructive of the purpose for which judicial review is sought, for example whether sensitive, confidential or private information is ventilated in a public hearing;
- the proceedings are at an early stage and are lengthy and/or complex with the result that there would be a substantial benefit in avoiding protracted proceedings which might be tainted by error;
- a decision by the High Court can be obtained speedily or the adjournment is made conditional upon a speedy response (see (a)(vi) below) and only those representing the person disciplined could reasonably be expected to pursue the High Court remedy;
- there are particular reasons why a rehearing would be undesirable for the person disciplined, eg he is privately funding his representation;
- the disciplined person is in jeopardy of a severe sanction or damage to his reputation;
- the challenge is demonstrably arguable eg because there are divided opinions as to the correct legal principles or it concerns a difficult point of law to which the answer is unclear.

(v) Factors militating against an adjournment (often the flip-side of the above) are where:

- the issue cannot reasonably be said to affect the overall fairness of the proceedings;
- the proceedings are short and simple with the result that the judicial review of the final determination of the panel or the pursuit of an alternative remedy (such as a statutory appeal) is more proportionate than the judicial review of proceedings underway (in that the former are comparably speedy, possibly cheaper and, in any event, generally speaking it is more undesirable to delay a short hearing than to risk having to redo it);

- the point arises at a late stage in long and complex proceedings when, similarly, it is more proportionate to challenge the final determination;
- the decision under challenge does not impact with immediacy on the disciplinary proceedings so as to cause prejudice or harm and it is reasonable to expect the legal team of the person disciplined to manage concurrently the disciplinary proceedings and the pursuit of relief in the High Court;
- there are particular reasons why the proceedings would be irremediably prejudiced if they were delayed eg circumstances relating to the availability of witnesses or their vulnerability or the quality of the evidence which they might give or the availability of evidence;
- the disciplined person is not realistically in jeopardy of a severe sanction or damage to his reputation;
- the challenge is manifestly lacking in merit;
- speed of resolution is an essential feature of the particular regulatory scheme.

(vi) It is good practice for a panel to retain a grip on what might otherwise be an open-ended timescale when proceedings are adjourned, eg by directing that the adjournment does not extend beyond a certain number of hours, without a specific order from the High Court (as suggested by the Court of Appeal in *Mahfouz*) or, perhaps, without further order of the panel itself. If relief cannot be obtained within a short period of time, the assessment of whether an adjournment should be allowed may well change and certainly calls for reconsideration.

(b) Representatives of the parties in hearings underway should bear in mind the same principles. There are circumstances in which those representing the person disciplined should be bold and proactive even to the point of absenting themselves from ongoing proceedings. Similarly, those representing the regulator should, in appropriate circumstances, concede that an adjournment (at least one limited in time) is the best option.

(c) Regulators and/or panels in relation to challenges to decisions before the disciplinary hearing is underway.

(i) The question of whether an adjournment or postponement of the proceedings is necessary is only likely to arise where the hearing is imminent.

(ii) The proceedings should not be delayed to allow the aggrieved party to challenge a prehearing procedural determination where the fairness of the

proceedings can properly be evaluated by the panel at the hearing.

(iii) It is only in an exceptional case in which the panel does not have the power to revisit a point relating to the global fairness of the proceedings (such as a jurisdictional point) or where there is a risk of irremediable harm of consequence that delay should be contemplated.

(iv) Where those circumstances arise, the type of balancing exercise described above is equally apposite. In some cases it will be more proportionate to allow the hearing to proceed and leave the disciplined person to seek redress through the prescribed route of regulatory appeal or the judicial review of the final determination. Account should be taken of the possibility that the High Court will be more inclined to intervene to correct prospective unfairness.

This is an extended version of an article that first appeared in the Autumn 2011 edition of The Regulator (www.kingsleynapley.co.uk/assets/files/The_Regulator_Aut2011.pdf), Kingsley Napley LLP's Regulatory Law update.

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LEGAL UPDATE

- ***R (Kaur) v Institute of Legal Executives Appeal Tribunal [2011] EWCA Civ 1168***

The Court of Appeal (Rix, Sullivan and Black LJ) allowed the claimant's appeal to an objection to the presence on the Appeal Tribunal of the Institute of Legal Executives of ILEX's vice-president. The claimant was a student member of the Institute of Legal Executives, and following an investigation and a decision by the investigating committee, she and five other student members were charged with various disciplinary offences relating to ILEX examinations. Following a hearing before the disciplinary tribunal, each of the five were excluded from ILEX for a minimum of five years. Having exhausted the ILEX appeal process, the claimant brought her complaint by way of judicial review, resting on the doctrine of apparent bias because of the presence of an ILEX council member and director of ILEX on the disciplinary tribunal and of the council's vice-president on the appeal tribunal.

Following a review of the leading cases on apparent bias, Rix LJ said that the promotion and achievement of effective self-regulation must be among the most important objects of any professional organisation which follows the route of such self-regulation. It followed to his mind that those principally concerned in governance should not be permitted to move from representative to regulatory functions as members of disciplinary or appeal tribunals. The fact that the charge against the appellant was of 'conduct unbefitting to ILEX or likely to bring ILEX into disrepute' underlined the interest of ILEX and its governance in upholding its professional standards. Accordingly the vice-president, due to her leading role in the body and thereby her interest in its policy of disciplinary regulation, was disqualified from sitting on its disciplinary or appeal tribunal.

- ***Sharp v Nursing and Midwifery Council [2011] EWHC 2174 (Admin)***

Holman J allowed the claimant's appeal against determination of the NMC's Conduct and Competence committee on the grounds that the committee had taken into account allegations of dishonesty amongst the papers which did not form part of the charge and had not been raised during the two day hearing.

The appellant was a registered nurse who claimed to be sick and unable to work during periods. It was subsequently discovered he had worked shifts as a bank nurse for which he was paid. The appellant was charged with two substantive charges. The first charge was to the effect that he had acted dishonestly by working shifts as a bank nurse while claiming to be off sick on three nights in question in December 2006. The second charge was to the effect that in various stated ways he had failed to adhere to his employer's sickness absence policy during the period November 2006 to March 2007. In its decision on fitness to practise, the committee stated that they had noted the registrant had worked four additional shifts as a bank nurse in January 2007 and that this contradicted his assertion that he had only worked the three shifts in December 2006. Holman J, who is allowing the appeal, said that he was left with the clear impression that the committee were or may have been considerably influenced by taking into account the additional known occasions when the registrant had repeated his dishonest behaviour. This was a serious error by the committee in a case which had not been raised with the case presenter or the legal assessor.

- ***Lutton v General Dental Council [2011] CSIH 62; [2001] CSOH 96***

The petitioner, a dental surgeon, successfully appealed to the Court of Session against the decision of the

investigating committee of the General Dental Council to issue a written warning to him in respect of a complaint made by a patient. The allegations were that the petitioner had failed to appraise the patient of the details of her course of treatment, had failed to discuss alternative treatment options with her, and had advised her that the periodontal treatment she required was not available on the NHS.

The Outer House (Lord Doherty) rejected the GDC's preliminary objection that the GDC's decision was not amenable to judicial review, or that the petition should be dismissed for delay, and went on to hold that the investigating committee had failed to give adequate reasons for its decision to issue the petitioner with a warning. The GDC's appeal to the Inner House (Lord Clarke, Lord Bonyon and Lord Brodie) was dismissed. The respondents did not pursue before the Inner House its argument that the decision in question was not amenable to judicial review or that there was no duty, at common law, upon the investigating committee to give reasons for determinations of the kind with which the present proceedings were concerned. The GDC's appeal on the grounds of delay and that adequate reasons had been given by the investigating committee was dismissed. The Inner House said that once it was concluded that the appropriate way forward was to issue a warning letter, the warning letter must convey to its recipient why it was considered necessary and the warning letter should state with some precision, however briefly, what it is that has been identified in the practitioner's conduct that requires to be addressed and why it is thought necessary for him to address such matters as a result of the allegation received.

- ***Fox Hayes v Financial Services Authority 12 May 2011, Fin/2006/0015***

The Upper Tribunal (Tax and Chancery Chamber) Financial Services (Sir Stephen Oliver QC, Colin Senior and Christopher Burbidge) considered the consequence of the judgment of the Court of Appeal in *FSA v Fox Hayes [2009] EWCA Civ 76*. The Court of Appeal had found that Fox Hayes, an FSA-authorized firm of solicitors in Leeds, was in breach of the FSA's Conduct of Business Rules in approving financial promotions that permitted so-called 'boiler room' operations to target UK investors, and the firm was ordered to pay a penalty of £954,770.

The questions for the Upper Tribunal were (a) whether the penalty specified by the Court of Appeal should be diminished by reason of the financial circumstances of the relevant partners who would be liable to pay it; and (b) what that penalty should be. Four of the partners had entered into IVAs, the fifth partner was bankrupt, and the sixth partner informed the tribunal that the

prospect of any substantial recovery by creditors (to include the FSA) was slight. The Upper Tribunal accepted the FSA's submission that the penalty should not be reduced below £454,770, being the amount of the secret profits made by M, one of the partners of the firm. The Upper Tribunal said that the penalty should not in its view be less than the secret profits obtained by M which were to be regarded as assets of the partnership. Those were received because M had arranged for Fox Hayes to approve and to undertake the work done in connection with the financial promotions. In doing so Fox Hayes, through its partners, acted deliberately and recklessly over a long period of time and investors lost very substantial sums of money. To impose a penalty that failed to reflect what the partnership obtained would be wrong. The breach was so severe that it would be inappropriate to reduce the penalty to below the figure of £454,770.

- *Nursing and Midwifery Council v Miller [2011] EWHC 2601 (Admin)*
- *General Medical Council v Kor [2011] EWHC 2825 (Admin)*
- *Nursing and Midwifery Council v Maceda [2011] EWHC 3004 (Admin)*

In each of these three cases the Administrative Court was concerned with an application by the regulatory body for an extension of an interim order. In the *Miller* case, the interim order was made by the NMC in May 2009 suspending the registrant from the register for 18 months pending an investigation into allegations of aggressive conduct, and a dishonest claim that he had worked a shift when he had not. The order was extended by the court in November 2010 for nine months and then by a further short extension pending consideration by the court. In refusing any further extension, Blake J said that there was a duty both upon the Council and the court pursuant to section 6 of the Human Rights Act 1998 to progress matters with expedition to ensure that, as soon as reasonably practicable, hearings are brought to a determinative conclusion. The learned judge said he bore in mind, of course, that what was reasonably practicable was a question of fact in each case and some investigations are complex and required detailed enquiries. However, in his judgment, there had been a failure of the duty to progress the instant case with reasonable expedition.

In *GMC v Kor*, His Honour Judge Pelling QC (sitting as a judge of the High Court) said that the scheme of interim orders is clear. It provides a mechanism by which the regulator can make interim orders for protective purposes until the practitioner concerned can be brought before a fitness to practise panel. It is not a substitute for a final decision or the imposition of a

sanction and it is clear that Parliament was alert to the possibility of injustice if interim orders were permitted to continue indefinitely or even for an over-lengthy period. It was for that reason that section 41A of the Medical Act 1983 prescribes a maximum length of time for which an interim order can apply. Parliament inserted a saving provision to enable the court to grant an extension in accordance with these principles. In his judgment, the learned judge said that if an order made by an Interim Orders Panel expires before an application to extend is made, then (a) the GMC has no power to make a new order, at any rate in relation to the same facts and matters that caused it to make the initial order; and (b) the court has no power to extend such circumstances because the concept of extension cannot apply to an order that has already expired. Where an order expires between the issue of an application for an extension and the determination of the application, the position is different. In such circumstances, the GMC does not have jurisdiction to make a fresh order but the court, on a true construction of the statutory provisions, retains the power to extend. In the instant case, the application for an extension was made before expiry and accordingly the court granted an extension.

In *Nursing and Midwifery Council v Maceda*, an interim order suspending the registrant from practice was made in February 2010, and an extension of three months only was granted by the court in August 2011. No decision had been made on formulating the charges against the registrant and, by the time the matter came before Bean J on 1 November 2011, the Council was in the process of completing its further investigation work and proposed to interview seven witnesses as part of this. The learned judge described the delay as lamentable and said that he took into account that in February 2010 the investigating committee made an order because it considered that it was necessary to protect the public from harm. But that cannot be decisive for all time. If it were, Parliament would have given the investigating committee of the NMC and the corresponding bodies in the GMC and other regulators the power to renew such orders for an indefinite period. In refusing an extension the learned judge noted that the registrant was seriously ill and suffered from serious lack of mobility following a road traffic accident and she was unable to practise her profession for the foreseeable future. The application for an extension was dismissed.

Kenneth Hamer
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BOOK REVIEW

- *Outcomes-Focused Regulation, A Practical Guide*, by Andrew Hopper QC and Gregory Treverton-Jones QC

On 6 October 2011, solicitors and other legal practitioners woke up to a brand new rule book based on principles, outcomes and indicative behaviours rather than rules and guidance.

The Solicitors' Code of Conduct 2007 has been replaced by a new Code, which will transform the regulatory approach to be adopted by the Solicitors Regulation Authority to the profession. The new approach is a change in culture and is built around ten core principles and a series of chapters that contain mandatory 'outcomes' rather than prescriptive rules, and non-mandatory 'indicative behaviours', which are both positive and negative. The new Code of Conduct is not a prescriptive, rule-based Code, but rather one which is focused on ethical principles and their practical application and consequences.

Outcomes-Focused Regulation, a Practical Guide provides a helpful and clear explanation of the practical impact of the new Code and provides useful guidance on what it will mean in practice. The Guide sets out and explains the new SRA Principles and Code of Conduct in a clear and legible way for the reader to follow. It is written by two leading figures in the regulatory and disciplinary field, Andrew Hopper QC, a solicitor silk who has specialised in the field of professional regulation and discipline since 1979, and Gregory Treverton-Jones QC, who has practised in the field of professional discipline and regulation since the early 1990s.

In his Foreword to this new work, Lord Neuberger of Abbotsbury, The Master of the Rolls, says that the publication of this book will provide invaluable help to every solicitor, and to the Solicitors Regulation Authority, as it will assist them in understanding and implementing the new outcome-focused regulatory regime. The Master of the Rolls commends the book.

Published by Law Society Publishing. Price £39.95. Copies can be obtained from all good bookshops or direct (telephone 0870 850 1422, email lawsociety@prolog.uk.com or on line at www.lawsociety.org.uk/bookshop).

Kenneth Hamer
Henderson Chambers

ARDL CHRISTMAS COMPETITION

NAME REGULATORS AND WIN A BOTTLE OF CHAMPAGNE!



Name five regulators, each in a different field of activity, who are neither created by statute nor exercise statutory powers.

Rules

- Email the names of your five regulators and their respective fields to nicole.curtis@penningtons.co.uk before 4pm on Friday 24 December 2011.
- A bottle of champagne will be awarded to the first answer received which, in the opinion of the judge in his absolute discretion, correctly meets the criteria as set out above and below
- A further bottle of champagne will be awarded to the most ingenious and imaginative answer, as determined by the judge in his absolute discretion.
- The definition of a 'field of activity' will be entirely within the discretion of the judge. For example: betting, sport, horse-racing may be one field, where accountancy and health are two fields.
- A regulator operating in two fields can only be named once.
- Entrants must be members of ARDL at the time of first publication of this bulletin.
- The judge will be the Chair of the ARDL Committee and his decision will be final.

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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