

# ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – SPRING 2018



## CONTENTS

- Page 1: Chair's Introduction, Iain Miller of Kingsley Napley LLP
- Page 2: The relationship between dishonesty and lack of integrity: the Court of Appeal's decision in *SRA v Wingate Evans and Malins*: Richard Coleman QC and Chloe Carpenter of Fountain Court Chambers
- Page 3: Stay of proceedings and professional misconduct: Kieran Lee Marshall of King's College London & Durham Law School, University of Durham
- Page 7: Does greater regulation of care homes create better outcomes?: Andrew Katzen and Claire Wallace of Hickman and Rose Solicitors
- Page 9: Legal Update: Kenneth Hamer of Henderson Chambers

### Chair's Introduction

This is my first bulletin as Chair of ARDL, and it is a huge honour to take on this role. The Association's membership now exceeds 820 members. This reflects both the vibrancy of the organisation and the support it provides to those working in regulatory law and professional discipline.

I cannot begin my term of office without thanking Catriona Watt, ARDL's Chair for the last 3 years. Catriona's drive has enabled ARDL to develop significantly during that time. Catriona's achievements make my task in following her all the more daunting. The move of the annual dinner from the Savoy to the Guildhall was a leap of faith as we increased the number of guests from 350 to 620. This brave move has paid off

handsomely. This year's dinner sold out within a week. Whilst the format will be very similar to last year we have made some changes in the light of the feedback provided by members after last year's event. We have booked the art gallery as an additional space before dinner which I hope everyone will enjoy. We have also decided to not have a band after dinner as from feedback many wanted to use that time for networking. I am very pleased that Catriona has been able to secure Baroness Kennedy as our guest speaker. I know that Helena Kennedy has been an inspiration to many members of ARDL and look forward to hearing her speak.

ARDL's other great strength is its seminar program. As matters stand we have a further 10 seminars in the planning stage in addition to those earlier in the year. These will continue to touch upon matters that are of importance to members.

Sadly, with the AGM we have also had to say goodbye to other members of the Committee. As well as Catriona, Nicole Curtis has been a long standing member of the committee and has made a massive contribution over the years. Thankfully Nicole has agreed to stay on as an ex officio member of the Committee as Co-Editor of the Bulletin. Can I also take this opportunity to thank Rachel Cooper who has also stood down for her brilliant support to ARDL over the last few years.

We recently had our first Committee meeting after the AGM and we welcomed four hugely impressive new members to the Committee. I am delighted that Clare Chapman, Sara Mason, Kate Steele and Joanna Shaw were elected unopposed at the AGM and also that John Lucarotti was re-elected.

At our first committee meeting we had a discussion on ARDL's priorities over the next 2 years. ARDL will continue to organise the dinner and run an extensive seminar program. In addition we are looking at new ways to engage members in the work of ARDL. This will be by both developing sector specific Sub-Committees and also extending the number of Sub-Committees that organise ARDL events outside London. As part of this, Catriona has kindly agreed to take on an ex officio role in encouraging ARDL's work in Scotland.

We are also looking at ways in which we can assist those who want to practice in regulatory and disciplinary law. We already have the Marion Simmons QC prize where we make awards totalling £3500 each year to entrants to the essay competition. I will make an announcement on future plans at the Annual Dinner.

No review of the work of ARDL would be complete without touching on this Bulletin. We aim to bring together useful and informative articles from practitioners across the full spectrum of regulatory and disciplinary law and this edition is no exception. The topics range from CQC regulation through to the latest developments in the meaning of lack of integrity and include contributions from leading practitioners in their fields. I hope you find these informative and thank you to Kenneth Hamer and Nicole Curtis for their hard work in putting it together. I look forward to seeing many of you at the dinner on 29<sup>th</sup> June.

Iain Miller, Kingsley Napley LLP

## The relationship between dishonesty and lack of integrity: the Court of Appeal's decision in SRA v Wingate Evans and Malins

In *Malins v Solicitors Regulation Authority* [2017] 4 W.L.R. 85 Mostyn J sent shockwaves through the regulatory field in a judgment in which he stated that dishonesty and lack of integrity meant the same thing. On Mostyn J's analysis, a charge of lack of integrity amounts to a charge of dishonesty and therefore cannot be found proven unless the test for dishonesty is considered and satisfied. Mostyn J's analysis has been recently considered and overturned by the Court of Appeal in a landmark decision in two linked appeals, *SRA v Wingate Evans and Malins* [2018] EWCA Civ 366.

In both cases solicitors had been found to lack integrity on particular charges but had been acquitted of dishonesty in respect of those charges: Mr Wingate was found by Holman J to lack integrity by signing a sham contract and Mr Malins was found by the Solicitors Disciplinary Tribunal (SDT) to lack integrity on two charges of creating documents after the event in respect of which he had not been charged with dishonesty.<sup>1</sup> The Court of Appeal upheld Holman J's finding of lack of integrity in the case of Mr Wingate, and reinstated the SDT's findings of lack of integrity in the case of Mr Malins. In so doing they disapproved Mostyn J's reasoning in *Malins*.

As regards the relationship between dishonesty and lack of integrity, the Court of Appeal reached the following conclusions:

- (1) Honesty is a basic moral quality which is expected of all members of society. It involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct. The legal concept of dishonesty is grounded upon the shared values of our multi-cultural society. Since dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest [93].

<sup>1</sup> Mr Malins was charged with, and found guilty of, dishonesty in respect if a further charge, namely deploying the documents in correspondence with the other side.

- (2) None of the SRA Principles specifically require a solicitor to act honestly. Dishonesty by a solicitor is an aggravating feature of other misconduct [74].
- (3) The test for dishonesty in disciplinary and criminal proceedings has recently changed. In the past the SDT applied the two-stage Twinsectra test. Since *Ivey v Genting* [2017] 3 WLR 1212 the test for dishonesty is whether, in light of the defendant's knowledge and beliefs as to the facts, his conduct was dishonest applying the objective standards of ordinary decent people. There is no second subjective limb requiring proof that the defendant knew that what he was doing was, by those standards, dishonest [90-92 and 94]. As Lord Hughes said in *Ivey* at [48] and [53], dishonesty is characterised more by recognition than by definition, being "a jury question of fact and standards".
- (4) Integrity is a broader concept than honesty. In professional codes of conduct, the term integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards [95-96].
- (5) It is not possible to formulate an all-purpose, comprehensive definition of integrity. However, it is possible to set out the broad contours. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. The duty to act with integrity applies not only to what professional persons say, but also what they do. Examples of what constitutes acting without integrity in the case of solicitors include:
- i) A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (*Emeana v SRA*);
  - ii) Recklessly, but not dishonestly, allowing a court to be misled (*Brett v SRA*);
  - iii) Subordinating the interests of the clients to the solicitors' own financial interests (*Chan v SRA*);
  - iv) Making improper payments out of the client account (*Scott v SRA*);
  - v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks mortgage fraud (*Newell-Austin v SRA*);
  - vi) Making false representations on behalf of the client (*Williams v SRA*). [98-101]
- (6) Neither courts nor professional tribunals must set unrealistically high standards. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public. A jury in a criminal trial is drawn from the wider community and is well able to identify what constitutes dishonesty. A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly such a body is well placed to identify want of integrity. The decisions of such a body must be respected, unless it has erred in law [102 to 103].

Richard Coleman QC and Chloe Carpenter  
Fountain Court Chambers

*(Richard Coleman QC acted for the SRA in both the Wingate Evans and the Malins appeals. Chloe Carpenter acted for the SRA as junior counsel in the Malins appeal.)*

## Stay of proceedings, professional misconduct and recent advances in the test for relief

The past decade has seen 'a major increase in the number of regulatory and disciplinary cases coming before the courts'.<sup>2</sup> An ever-growing proportion of these now consist in appeals or judicial reviews by registrants,<sup>3</sup>

<sup>2</sup> K. Hamer, *Professional Conduct Casebook* (2<sup>nd</sup> edn, OUP 2015) 'Foreword' by Lloyd Jones L.J., v and (1<sup>st</sup> edn, OUP 2013) 'Preface' vii.

<sup>3</sup> G. Treverton-Jones, A. Foster and S. Hanif, *Disciplinary and Regulatory Proceedings* (9<sup>th</sup> edn, LexisNexis 2017) 'Preface' v, see also S. Hanif and R. Dunlop 'Appeals and Reviews'

in G. Treverton-Jones et al 273 ff and R. Clayton, 'Regulation and the Human Rights Act' [2015] A.R.D.L. Bull. 2015/16 Aut/Win 1 at 3.

often challenging the policies, practices or procedures applied by their regulators, tribunals or employers.<sup>4</sup> For many registrants such proceedings are often only one among a number to which they may eventually be party – there being a very real prospect for those alleged of misconduct that further civil or criminal action will follow. However, as practitioner reports increasingly document the severe reputational, economic and personal harms regulatory and disciplinary proceedings often inflict upon those registrants affected,<sup>5</sup> interest in the law surrounding the stay of concurrent or parallel proceedings has witnessed something of a renaissance. Recent case law and commentary has spanned a wide range of specialisms; from arbitration and education, to data protection and employment.<sup>6</sup> In this piece, I summarily consider two recent decisions concerning the stay of proceedings in professional cases: *R (on the application of MP) v Chair of Police Misconduct Panel*<sup>7</sup> and *Hayes v Financial Conduct Authority (FCA)*.<sup>8</sup> I briefly examine the basis upon which relief was denied in the former case but granted in the latter before, then, continuing to explore how both decisions appear to advance the criteria upon which future applications for stay may be judged.

To stay, or not to stay: that is the question!

While it may seem unthinkable that until recently there existed ‘no binding legal authority’ on whether it was unfair for a professional registered with more than one body to have to face duplicative proceedings in respect of the same offence,<sup>9</sup> precedent on the stay of professional and civil proceedings has been markedly more settled. In civil matters at least,<sup>10</sup> the courts have long had at their disposal the power to order a stay in favour of any applicant who is able to demonstrate the continuation of one or more proceedings, or the application of certain policies or procedures, would be

‘manifestly unfair’<sup>11</sup> or present a ‘real risk of serious prejudice’<sup>12</sup> were a stay denied. The extent of the courts’ jurisdiction in such matters is that it may opt to ‘stay any proceedings before it’, before or after judgment is handed down, temporarily, conditionally or absolutely.<sup>13</sup> Similarly, its jurisdiction ‘includes a power to stay proceedings before the disciplinary tribunal of a public authority’.<sup>14</sup> However, the reality remains that such powers are seldom exercised – there having long existed a ‘strong presumption against the [granting of] stay[s]... [as] it is [widely regarded to be] a power which has to be exercised with great care...’.<sup>15</sup> Notwithstanding, there are some instances in which a stay may be preferred, such as on public interest grounds and to preserve the ‘finality of proceedings’, for example.<sup>16</sup> Yet, a recent surge in the number of cases in which registrant-applicants have either sought or later been granted a stay of proceedings has precipitated a shift in judicial thinking. One example of this is the decisions of *Hayes* and *MP*.

a. *Hayes v Financial Conduct Authority* [2017] UKUT 0423 (TCC)

Tom Alexander William Hayes, a banker, was arrested in December 2012 on suspicion of conspiracy to defraud, after evidence emerged that he, along with several others, was involved in manipulating the Japanese Yen London Interbank Offer Rate (‘Yen Libor’) – the interest rate by which banks in London determine what to charge one another on commercial loans.<sup>17</sup> After months of investigation, Hayes was charged in June 2013 with eight counts of conspiracy to defraud. In August 2015, he was found guilty and sentenced to 14 years imprisonment.<sup>18</sup> In December 2015, Hayes launched an appeal against his conviction. Dismissing his appeal, the Court of Appeal held that his conviction would remain but, in ‘taking account of all the circumstances’ which, inter alia,

<sup>4</sup> For discussion on the expanding jurisdiction of employment tribunals in regulatory and disciplinary matters following the decision in *General Medical Council v Michalak* [2016] EWHC Civ 172, see S. Thomas, ‘Regulatory appeals – an alternative forum’ [2016] A.R.D.L. Bull., Sum, 10-12.

<sup>5</sup> See eg S. Heley, ‘Disciplinary proceedings inflict unnecessary damage’ [2016] S.J. 160 (32) 27; S. Heley ‘The SRA’s process of intervention is not infallible’ [2015] S.J. 159 (47) 23 and A. Felix and T. Orpin-Massey, ‘Coming soon? Adverse inferences.’ N.L.J. [2017] 167 (7754) 15-16

<sup>6</sup> See eg Arbitration Law Monthly, Commentary ‘Stay of proceedings: validity of arbitration clauses’ [2018] Arb. L. M., Feb, 2-4 and ‘Stay of proceedings: scope of arbitration clause’ [2018] Arb. L. M., Feb, 4-5; R. Mussa and S. Mawji, ‘Preserving one’s position’ [2017] S.J. 161 (36) 40 and J. Agate, ‘Data protection and prior restraint: Stunt v Associated Newspaper Ltd’ [2017] Ent. L. R. 28 (6) 218.

<sup>7</sup> [2018] EWHC 386 (Admin) (Supperstone LJ) (‘MP’ hereafter)

<sup>8</sup> [2017] UKUT 0423 (TCC) (Herrington J) (‘Hayes’ hereafter)

<sup>9</sup> J. Norris and S. Jones, ‘When duplicative proceedings are abusive and unfair’ [2016] A.R.D.L. Bull. 2016/17, Win, 5 on the decision in *R (Mandic-Bozic) v BACP* [2016] EWHC 3134.

<sup>10</sup> For the stay of proceedings in criminal matters, see J. Richardson, *Archbold Criminal Pleading, Evidence and Practice* (66<sup>th</sup> edn, Sweet and Maxwell 2017; 2<sup>nd</sup> supp, March 2018) at para. 4-101 et seq; Sir Geoffrey Vos C and others (eds), *Civil Procedure 2018:*

*Volume 2* (The White Book Service, Sweet and Maxwell 2018 via Westlaw) at 9A-184 for discussion.

<sup>11</sup> G. Treverton-Jones and A. Hearnden, ‘Pre-Trial Issues’ in G. Treverton-Jones et al (n 3) 164 at 7.51 ff; *Jahson v Gore Wood & Co* [2000] UKHL 65 [2002] AC 1 (Lord Bingham of Cornhill); Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-176 ff and s 49 (3) Senior Courts Act 1981.

<sup>12</sup> *R v The Panel on Take-overs and Mergers ex p. Al-Fayed* [1992] BCC 524 per Neill LJ. at 531, see also *Wakefield v Channel Four Television Corporation* [2005] EWHC 2410 per Eady J at [11].

<sup>13</sup> s 49 (3) Senior Courts Act 1981; Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-176 and 9A-180 et seq for discussion. Note, however, ‘[a]n adjournment of a hearing is not the same as a stay of proceedings’, at 9A-182, while a disposal of a case at hearing is to be viewed differently to a stay. Where a stay does endure, then, further proceedings cannot be entertained, save for the purpose of lifting or setting aside the stay in question, at 9A-180.

<sup>14</sup> Treverton-Jones and Hearnden in G. Treverton-Jones et al (n 3) 164.

<sup>15</sup> *Hayes* (n 8) at [53]

<sup>16</sup> *Johnson* (n 11) [2002] A.C. 1 per Lord Bingham at 31 and Lord Millet at 59, see Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-176 for discussion.

<sup>17</sup> *R v Tom Alexander William Hayes* [2015] EWCA (Crim) 1944 (Lord Thomas CJ, Sir Brian Leveson, Gloster LJ) at [3]

<sup>18</sup> *ibid* at [1]

included Hayes's age, non-managerial position within the bank, and the nature of his mild Asperger's Syndrome when committing his offences, his original sentence was deemed longer than was necessary and it was therefore deemed appropriate to reduce this to 11 years.<sup>19</sup> In sole reliance upon this finding, the FCA decided to initiate proceedings, and issued Hayes with a 'Decision Notice', pursuant to s 56 Financial Services and Markets Act 2000.<sup>20</sup> In its notice, the FCA stated it intended to prohibit Hayes from performing such a role in order to protect the public, arguing his conviction demonstrated he was not a 'fit and proper [person] to perform [such] functions'.<sup>21</sup> Hayes subsequently decided to submit an application to Criminal Cases Review Commission (CCRC),<sup>22</sup> and to refer the FCA's notice to the UKUT.<sup>23</sup> In the latter referral, Hayes sought a stay of the Authority's proceedings pending a decision by the CCRC on 'whether to refer his conviction to the Court of Appeal as unsafe'.<sup>24</sup> He claimed the continuation of the FCA's proceedings, and any publicity that it would generate, would adversely impact upon 'continuing attempts to overturn his conviction',<sup>25</sup> and his imprisonment meant he posed no real threat to the public as opposed to what FCA had claimed.<sup>26</sup>

Significantly, in granting a stay in Hayes's favour, Herrington J held that while as a matter of strict law the CCRC's proceedings did not constitute a part of the appeals process until a decision is made to refer the case to the Court of Appeal,<sup>27</sup> he was bound to have regard to the Tribunal's overriding objective and,<sup>28</sup> on this basis, the FCA's proceedings ought to be stayed.<sup>29</sup> He noted, in accordance with its Rules, the Tribunal was under prima facie obligation to ensure each case was dealt with 'fairly and justly', and its powers ought to therefore to be exercised to this effect.<sup>30</sup> In giving reasons for his decision, Herrington J noted he concurred with the arguments advanced by counsel for the FCA, and that he could see no reason for staying proceedings 'on the basis that there is any potential serious risk of injustice to any retrial'.<sup>31</sup> Notably, he argued this may have been

different had Hayes been likely to face professional proceedings shortly before a criminal case.<sup>32</sup> He observed it was relatively common for parallel regulatory and criminal proceedings to occur, and that any prospective risk of injustice can be cured through the use of case management powers in civil cases, or jury direction in criminal matters.<sup>33</sup>

Viewed differently, of course, such an analysis may be perceived as contradictory. On the one hand, Herrington J helpfully expands on the limited number of instances in which professional cases may now be stayed on the grounds of preserving fairness and justice. Indeed, his novel equating of CCRC proceedings with that of any pending application for permission for leave to appeal, or ongoing proceedings, ought to be commended for affording the applicant the protection sought.<sup>34</sup> However, on the other hand, to afford such proceedings this degree of reverence is, in my own view, similarly to suggest they are 'in substance' as important, and ought to be treated as, any other kind of civil or regulatory and disciplinary proceeding – something Herrington J partly seems to acknowledge himself.<sup>35</sup> Accordingly, it follows, in my own view, that any risk in relation such proceedings is one that ought to be regarded as sufficiently 'serious [a] risk [so as to be regarded as prospective threat] of injustice' as to be classified as such,<sup>36</sup> without the need for recourse to Tribunal powers.<sup>37</sup> Nevertheless, Herrington J provides two leading authorities upon which his reasoning was based.<sup>38</sup> Moreover, it is trite law that where a judge opts to exercise a stay other than by way of the court's powers, then one must to do so with 'great care and only where there is [perceived to be] a real risk of serious prejudice that may lead to injustice'.<sup>39</sup>

b. *R (on the application of MP) v Chair of Police Misconduct* [2018] EWHC 386 (Admin)

Conversely, the decision in MP concerned an application made by a serving police sergeant, who has been

<sup>19</sup> *ibid* at [107] to [108]

<sup>20</sup> *Hayes* (n 8) at [1] to [2], [7]

<sup>21</sup> *ibid*

<sup>22</sup> For a brilliant introduction and critique of the CCRC, see M. Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009).

<sup>23</sup> On the function of the TCC in respect of FCA notices, see Art 13 (1) b, First-tier and Tribunal and Upper Tribunal (Chambers) Order 2010. This replaces role performed by The Financial Services and Markets Tribunal, which was abolished in April 2010.

<sup>24</sup> *Hayes* (n 8) at [5].

<sup>25</sup> *Hayes* (n 8) at [9], [27], [48], [49] and [71]. Note, Hayes made a separate privacy application, in attempt to restrict the FCA's notice from being published, which was upheld in part; see the judgment at [82] et seq.

<sup>26</sup> *ibid*

<sup>27</sup> *ibid* at [69]

<sup>28</sup> Rule 2 (1) and (2), Tribunal Procedure (Upper Tribunal) Rules 2008.

<sup>29</sup> *ibid* at [66] ff with reasons for his decision.

<sup>30</sup> *ibid* Rule 5 (3) j, see also *Hayes* at [21] to [26].

<sup>31</sup> *Hayes* (n 8) at [52]-[53], [57] relying on *Millet J in D.P.R. Futures Ltd* [1989] 1 WLR 778 at 790 D-E on the issue of 'significant' time gaps between civil and criminal proceedings, see also fn 55 below.

<sup>32</sup> *ibid*

<sup>33</sup> *Hayes* (n 8) at [53]

<sup>34</sup> *ibid* at [69]

<sup>35</sup> *ibid*

<sup>36</sup> *ibid* at [52] to [58]; [80] to [81] cf fn 12, 31 above and 55 below.

<sup>37</sup> See fn 28 to 30 above, see also *Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703, [2000] 1 W.L.R. 173 at 183-186 (Lord Bingham of Cornhill CJ) (on the authority of the judge and court to make advances on existing precedent in 'rare and compelling' circumstances).

<sup>38</sup> *Hayes* (n 8) at [52] to [58], see *Montgomery v Her Majesty's Advocate* [2003] 1 AC 641 (Lord Hope of Craighead) at 674B and *R v Abu Hamza* [2007] QB 659 [Lord Phillips CJ] at 683B, see also *R v Dunlop* [2006] EWCA Crim 1354.

<sup>39</sup> *R v The Panel on Take-overs and Mergers* (n 12), see Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-184 for discussion.

employed by the Durham Constabulary since 1997.<sup>40</sup> In June 2017, MP was served with a notice pursuant reg 15 of the Police (Conduct) Regulations 2012, detailing allegations made by two female officers which suggested his conduct may have breached the ‘Standards of Professional Behaviour’, and would form the basis upon which he would be placed under investigation.<sup>41</sup> Under the same regulation, another notice was issued tabling further allegations – on this occasion alleging inappropriate comments and sexual conduct towards another female officer.<sup>42</sup> Together, the allegations were assessed by the Constabulary as amounting to misconduct, and in November 2017 MP was issued a notice pursuant to reg 20 of the Regulations, informing him that he had ‘a case to answer in respect of gross misconduct and the matter would be referred to a misconduct hearing’.<sup>43</sup> Separately, in November 2017, MP was arrested on suspicion of a number of rapes, child assault and neglect. He was subsequently charged with 19 offences, including rape, assault by way of ABH and a number of sexual offences.<sup>44</sup> MP later appeared before the Magistrates Court in December 2017 and was remanded in custody to appear before the Crown Court in January 2018.<sup>45</sup>

Correspondence between MP and the Chair of Police Misconduct Panel and Constabulary continued after his arrest and remand, whereupon it was submitted on his behalf that the misconduct hearing should be adjourned, at least until criminal proceedings were concluded.<sup>46</sup> The appropriate authority disagreed,<sup>47</sup> and argued the hearing should continue notwithstanding any criminal proceedings that may follow, and later determined it would do so subject to a number of ‘reasonable adjustments’ which the Constabulary was willing to make.<sup>48</sup> In December 2017, MP made an application to the High Court challenging the appropriate authority’s decision not to adjourn. Knowles J ordered that misconduct proceedings against MP be stayed until the outcome for his ‘application for judicial review or any further order’ is considered, stating he was ‘concerned about the impact the claimant’s arrest and remand in

custody... would have on fairness... [and] his preparation for the misconduct hearing’.<sup>49</sup> At a hearing held in February 2018, counsel for MP advanced four grounds of challenge against the Panel’s decision, including the suggestion that the proceedings would be ‘oppressive... inimical to the proper, fair and impartial conduct of the disciplinary hearing... [and that any decision would result] in substantial prejudice’ and adverse publicity.<sup>50</sup>

At the High Court, Supperstone J held, lifting the stay and finding in favour of the Panel, that the concerns first envisaged by Knowles J had ‘dissipated with time’ and, given adjustments and preparation for the hearing had been agreed, he did ‘... not consider there [to be] any unfairness [, oppression or prejudice] in [allowing] the misconduct hearing’ to proceed as scheduled.<sup>51</sup> In reviewing representations made by the parties, Supperstone J stated that he accepted the arguments advanced by counsel for the Panel, in which it was stated ‘the criminal charges have no connection whatsoever with the misconduct allegations... [there being] a lack of commonality of either facts or witnesses as between the two sets of charges’.<sup>52</sup> The extent to which this is true is unclear, given both the criminal and misconduct charges all relate to inappropriate or sexual conduct, albeit to different people. However, this decision stands in contrast to the position approach taken in Hayes. Herrington J held, relying upon Millet J in *D.P.R. Futures Ltd*, that his decision to stay proceedings may have been different were ‘the regulatory proceedings [in question] to take place shortly before the criminal proceedings’.<sup>53</sup> Indeed Millet J in *D.P.R. Futures Ltd* observed ‘... it has been accepted there will be a real risk of prejudice to the right to a fair trial where civil proceedings are heard shortly before the criminal proceedings... on the basis any publicity... will be fresh in the minds of the jury or any witnesses’ at the time of proceedings.<sup>54</sup> Of course, the FCA’s action in Hayes was in direct response to a criminal conviction, and so the evidence may be viewed as interrelated given the circumstances, which will explain Herrington J’s use of Millet J’s finding. In MP the police misconduct proceedings were distinct from the criminal

<sup>40</sup> *MP* (n 7) at [3]

<sup>41</sup> *ibid* at [4]; reg 15, Police (Conduct) Regulations 2012 (the Regulations); Section 3 in College of Policing, Code of Ethics: a Code of Ethics and Standards of Professional Behaviour for Policing in England and Wales (CoP, July 2014) accessed on 2 March 2018 via << [http://www.college.police.uk/What-we-do/Ethics/Documents/Code\\_of\\_Ethics.pdf](http://www.college.police.uk/What-we-do/Ethics/Documents/Code_of_Ethics.pdf) >>

<sup>42</sup> *ibid* at [5]; reg 20 of the Regulations.

<sup>43</sup> *ibid*, see Part 4 of the Regulations.

<sup>44</sup> *ibid* at [6] to [7]

<sup>45</sup> *ibid*

<sup>46</sup> *ibid* at [8]

<sup>47</sup> Under reg 3 of the Regulations ‘appropriate authority’ means the chief officer or acting chief officer of the force.

<sup>48</sup> *MP* (n 7) at [8] to [11]. Note reg 9 and 33 of the Regulations, as discussed in the judgment. Note also, the decision by the appropriate authority was made in October 2017, sometime before MP then being charged could have been anticipated.

<sup>49</sup> *ibid* at [1] and [13], see here counsel’s reliance on reg 33 (3) of the Regulations. See also, s 49 (3) Senior Courts Act 1981 and Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-176 for discussion.

<sup>50</sup> *ibid* at [13] and [16]. However, counsel for MP acknowledged this was not the only source of publicity, see [16].

<sup>51</sup> *ibid* at [18] and [21]

<sup>52</sup> *ibid* at [15]

<sup>53</sup> See fn 31 above and Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-184 for discussion, see also *R (Montgomery) v Police Appeals Tribunal* [2012] EWHC 936 (Admin) (on the matter of the caveat noting speed cannot override fairness, and the conduct of police proceedings).

<sup>54</sup> *Hayes* (n 8) at [57].

action being taken against MP. Of course, alternatively, it may be said the key issue in both (or indeed all) cases of this kind is temporality. That is to say, how long a period of time must first pass between one set of proceedings and another or else it may be unfair or prejudicial not grant a stay in favour an applicant claiming a lack of reasonable time to prepare or make representations?<sup>55</sup>

## Conclusion

This short commentary on the UKUT and EWHC decisions in Hayes and MP demonstrates that there is a renewed willingness on the part of the courts to engage in difficult questions concerning applications for stays in professional misconduct proceedings. These contrasting but timely decisions offer two different approaches to existing law, illustrating minor but important developments in the assessment and criteria for relief. The decision by Herrington J in Hayes illustrates a readiness on part of the courts to use its inherent and statutory powers to provide applicants with relief where they might otherwise find themselves disadvantaged by the absence of precedent justifying the imposition of a stay. By contrast, Supperstone J's ruling in MP highlights that the courts are not prepared to rule unreservedly in favour of stays merely because applicants face the prospect of civil action prior to impending criminal proceedings. This may be seen as departure from the otherwise sympathetic approach of courts in such cases, as reaffirmed in Hayes.<sup>56</sup>

Kieran Lee Marshall<sup>57</sup>, of King's College London  
& Durham Law School, University of Durham

## Does greater regulation of care homes create better outcomes?

At a time when the health and social care sector, and particularly care home sector, is in crisis, are greater regulatory powers on the part of the CQC going to result in better outcomes for service users?

After being accused of failing to act on warnings of inhumane and cruel treatment of patients at

Winterbourne View six years ago, the CQC has been striving to demonstrate that it is an effective regulator ever since. This has inevitably resulted in additional burdens being placed on care providers.

The role of the CQC as regulator of the health and social care sector has been expanding. Prior to 1 April 2015, the CQC's ability to bring prosecutions was limited and infrequently used, with other enforcement options being preferred. However, since 1 April 2015, following the recommendations made by Sir Robert Francis QC in the Mid Staffordshire Inquiry, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 came into force and set out the new prosecution powers that the CQC now has to try and ensure that better fundamental standards are adhered to.

Section 12 of the 2014 Regulations states that care and treatment must be provided in a safe way for service users. This is clearly a wide-ranging requirement and a non-exhaustive list is provided by the legislation. The list includes the requirement that risks to health and safety to service users must be assessed and all reasonably practicable measures taken to mitigate such risks. A breach of this regulation by a care provider amounts to a criminal offence if such a breach results in avoidable harm (physical or psychological) to the service user, or if it results in the service user being exposed to a significant risk of such harm.

By way of defence, the provider must prove that they took all reasonable steps and all due diligence to prevent the breach that has occurred.

This requirement is broadly similar to the offence under section 3 of the Health and Safety at Work Act 1974 whereby employers have a duty to ensure, as far as reasonably practicable, that persons who are not employees are not exposed to risks to their health and safety.

Prosecutions for health and safety offences such as these traditionally fell to the Health and Safety Executive or the Local Authority. However, in keeping with the new powers gifted to the CQC, from April 2015 enforcement responsibility for health and safety incidents relating to

<sup>55</sup> Herrington J observes this is not an issue where there is a 'significant gap' (ibid), but what counts as significant is not determined. In this respect, see *Dyer v Watson* [2002] UKPC D 1, [2002] 3 WLR 1488 (Lord Bingham of Cornhill) at [52] and G. Treverton-Jones and A. Hearnden, 'Pre-Trial Issues' in G. Treverton-Jones et al (n 3) 165 at 7.61 (in particular, on the first of three areas of inquiry noted by Lord Bingham, on complex cases requiring time and preparation for a fair hearing). Of course, supplement to guidance published by regulators and tribunals, CPRs leave it open to cases before the EWHC or EWCA to stay proceedings where an applicant has been unable to make representations, see eg (2) (f) or r 3 (3) (5) of the Civil Procedure Rules 1998 / 3132

while r 3 (1) of the Rules and s 49 (3) Senior Courts Act 1981 permit the courts and tribunals inherent jurisdiction on such matters, see here Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-178 and 9A-176 for discussion.

<sup>56</sup> *Hayes* (n 8) at [53], see also Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-178.

<sup>57</sup> Teaching Fellow in Law, The Dickson Poon School of Law, King's College London and Visiting Lecturer and Researcher in Law, Durham Law School, University of Durham, email: marshall.kieranlee[at]gmail[dot]com.

service users in the health and social care sector transferred from the Health and Safety Executive and Local Authorities to the CQC under a Memorandum of Understanding.

However, despite the considerably larger remit that this gave the CQC (and the corresponding drain upon its resources), in 2016 the Care Quality Commission (Fees) (Reviews and Performance Assessments) Regulations 2016 cut the regulator's budget, forcing it to make up the shortfall by transferring costs to care homes. These Regulations gave the CQC the power to charge fees associated with its review and performance assessment functions as well as all its activities associated with rating services. This caused significant concern in the House of Lords when it was debated, in recognition of the perilous state of the sector and the dangers of forcing care homes to shoulder another financial burden, and the impact that this may have on the front line care that is being provided. Nevertheless, the 2016 Regulations went through.

Despite the limiting of its resources, there has been a considerable rise in the number of prosecutions being brought by the CQC. In the two years following the 2014 Regulations coming into force on 1 April 2015, there was a 200% increase in the number of prosecutions brought by the CQC, up from the two years preceding the Regulations. Indeed, the CQC appears to exert its powers in relation to care homes to a greater degree than the HSE used to. In England, the HSE only undertook two prosecutions in relation to care home residents under section 3 of the Health and Safety at Work Act 1974 between 2013- 1 April 2015. By contrast, between 1 April 2015- 1 October 2017, the CQC undertook 8 prosecutions in relation to care home residents.

While this increase in enforcement action might appear to suggest an act of strength on the part of the CQC, and indicate that it is getting a handle on its new enforcement powers, it could also represent a sector that is in crisis, with the CQC failing to engage with providers quickly enough to stop problems before they escalate, therefore ultimately requiring more serious enforcement action (i.e. prosecution) later needing to be taken.

Currently, service users or relatives cannot directly contact CQC inspectors. Urgent matters that a relative or service user may want to speak to an inspector about are currently routed to a national call centre where the staff have no direct involvement with the care home. This inevitably causes delay in dealing with the issue.

Clearly, not dealing with problems as soon as possible can allow them to get worse, leading to serious situations escalating. Further, the CQC has no separate division for enforcement, as is the case with other sector regulators (such as Ofsted and the FCA). Therefore, serious problems, such as a culture of abuse, may go overlooked for years before the next scheduled inspection takes place.

The question remains whether 'meeting the fundamental standards' as set by the CQC is really translating into better front line care.

Ultimately it must be remembered that the CQC set the standards by which they judge success. The CQC is likely to be aware that too rigorous an approach could crush the sector completely, with the number of providers closing down recently hitting record highs – particularly as the providers themselves now shoulder the burden for the costs of inspection. Reportedly, 421 homes closed due to insolvency between 2010-May 2017.

Targeting large providers carries a special risk. If large providers disappear, so too will far too many beds at a time when demand is already beginning to outstrip supply. In these circumstances, the CQC may feel it has little choice but to take a more lenient approach towards large providers.

If the standards being set by the CQC are superficial, so too will be the improvements that they generate. Although there has been a rise in the number of care homes that improved their rating after being initially rated as inadequate, the inspection regime may be less effective than it appears. In 2017, 23% of adult social care services rated 'good' saw their ratings drop on re-inspection, raising questions about whether compliance with CQC standards are sustainable and whether services' responses to inspections are superficial. In 2017, 38% of adult social care services rated 'requires improvement' remained at this rating upon re-inspection.

Clearly a proper and efficient regulator is critical to ensuring the safety of service users within the care sector. However, Winterbourne View illustrated that the worst cases of abuse were about a care home's culture, not record keeping. It may be to the detriment of service users that CQC inspections appear to be increasingly focused on this area.

Andrew Katzen and Claire Wallace,

of Hickman and Rose Solicitors

## LEGAL UPDATE

### **Professional Standards Authority v. Health and Care Professions Council and Doree [2017] EWCA Civ 319**

Lindblom LJ (with whom Sharp LJ agreed) said at [38] that he did not accept that, in principle, a professional disciplinary committee may only reasonably find that a registrant has shown insight or remorse after he has given oral evidence to demonstrate it, and has made himself available for cross-examination or other questioning on that evidence – even if it has rejected his evidence on some or all of the allegations he faced. Whether a registrant has shown insight into his misconduct, and how much insight he has shown, are classically matters of fact and judgment for the professional disciplinary committee in the light of the evidence before it. Some of the evidence may be matters of facts, some of it merely subjective. In assessing a registrant’s insight, a professional disciplinary committee will need to weigh all the relevant evidence, both oral and written, which provides a picture of it. This may include evidence given by other witnesses about the registrant’s conduct as an employee or as a professional colleague, and, where this is also relevant, the quality of his work with patients, as well as any objective evidence, such as specific works he has done in an effort to address his failings. Of course, there will be cases in which the registrant’s own evidence, given orally and tested by cross-examination, will be the best evidence that could be given, and perhaps the only convincing evidence. Any such evidence may well be more convincing if given before the findings of fact are made. But this is not to say that in the absence of such evidence a professional disciplinary committee will necessarily be disabled from making the findings it needs to make on insight, or bound to find that the registrant lacks it.

### **Hussain v. General Pharmaceutical Council [2018] EWCA Civ 22**

This case arose from a BBC documentary into a number of pharmacies in London selling prescription-only medicines without a valid doctor’s certificate, and the

appellant Mrs Hussain was the responsible pharmacist on duty when an undercover reporter was able to buy Amoxicillin, a prescription-only medicine, over the counter in the absence of a valid prescription. In directing the removal of her name from the register of pharmacists, the committee said in its determination that Mrs Hussain maintained that she had strengthened the standard operating procedures in the pharmacy, but the committee were not satisfied that she really understood the reasons behind the Human Medicines Regulations 2012, and the vital role entrusted to the profession as gatekeepers for the safe and lawful use of medicines. The committee was not satisfied that she had any real understanding of the risk to patient safety or the public interest, and they were unable to assess the risk of recurrence in her favour, given that she had no insight. The committee said that having seen and heard the registrant give evidence, they considered that there was little or no prospect of her developing true insight. The Court of Appeal (Peter Jackson, Newey and Singh LJ) dismissed Mrs Hussain’s appeal from the decision of Elisabeth Laing J: [2016] EWHC 656 (Admin), who had dismissed her appeal from the committee. Newey LJ said that the committee was plainly entitled to take the view that Mrs Hussain’s conduct involved a “flagrant” and “extremely serious” breach of the law that went to the heart of the profession’s standards of conduct, ethics and performance and the court would not be justified in rejecting the committee’s conclusion on insight. Moreover, the conduct related to professional performance. Singh LJ agreed that the court could not say that the committee was wrong. Peter Jackson LJ said that the extent of Mrs Hussain’s insight was bound to be “a key factor”, as appeared from paragraph 5.17 of the Council’s “Good decision making: fitness to practise hearings and sanctions guidance”. The learned Lord Justice continued:

81. I am in the end persuaded that the Committee’s assessment of insight is one it was entitled to make and that the sanction it imposed was properly within its powers. The case is different to Khan [Khan v. General Pharmaceutical Council [2017] 1 WLR 169 SC]. There, the misconduct (though not professional) was far more serious, that the registrant had made reparation and shown insight from the start of the disciplinary

proceedings. Here, Mrs Hussain had shown no insight and had thoroughly compounded the matter by the way in which she approached the disciplinary proceedings. While it cannot be decisive, it is not in my view irrelevant to note that she continued to fight the misconduct finding (a) for over two years from early 2013, when she was first confronted, to September 2015, when the disciplinary proceedings ended, and (b) for another six months until March 2016, when her first appeal was refused. Even 18 months later at the hearing before us, there was no sign of acknowledgement of her misconduct or of insight. Had Mrs Hussain acted differently at a very early stage, the Committee would no doubt have taken a different view. Had she done so in the immediate aftermath of the disciplinary hearing, I might have been persuaded that the Committee's approach had been shown to have been wrong. But that is not the case, and I therefore agree that the appeal must be dismissed.

#### **Professional Standards Authority v. Nursing and Midwifery Council and M [2017] CSH 29**

SM was a senior charge nurse in a busy NHS hospital. She faced several charges that her fitness to practise was impaired by reason of misconduct. The committee made a finding of misconduct; in particular that SM had acted dishonestly after she became aware of a clinical error on her part. However, it concluded that her fitness to practise was not impaired. The PSA appealed. The NMC supported the PSA's appeal and submitted that a caution should have been administered. The charges against SM were that she administered the wrong drug to an end of life patient (phenobarbitone rather than morphine), thus depriving the patient of 24-hours of pain relief (the wrong drug itself caused no direct harm). In a dishonest attempt to cover up what had happened, SM destroyed two vials of morphine; made incorrect entries in the controlled drugs book, including a false signature of a colleague; and failed to report the drugs error to her manager. The committee concluded that in amending records and destroying two vials of morphine SM's actions amounted to dishonest misconduct which breached fundamental tenets of the profession and brought it into disrepute. The committee considered whether SM's fitness to practise was currently impaired.

It noted that SM made immediate admissions and checked the patient's welfare. She panicked and said that she did not act logically in circumstances which amounted to 'the last straw'. The context for this comment was a previous incident in which she had been let down by her manager, something which had a traumatic and significant impact upon SM. In addition management had paid no attention to her concerns as to the difficult circumstances on the ward, including staff shortages, and the adverse consequences for staff and patient care. The committee noted that her trust in management was undermined, adding to her confusion as to how to deal with the error made by her and her colleague. The committee considered that these were exceptional circumstances. The committee also took into account that at the time she was suffering a depressive illness which impacted on her concentration and functioning significantly and there was no continuing concerns as to her present fitness. There was no risk of repetition. Her employers were supportive, and the testimonials and the evidence of the nurse manager attested to SM being a good and competent nurse. The committee considered that this was a single incident in an otherwise long and unblemished career. SM had full insight and had undertaken appropriate remediation with regard to the clinical issues. The committee was convinced that the risk of repetition of the clinical error was very low. In rejecting the submissions of the PSA and the NMC, the Court of Session said that not every case of misconduct will result in a finding of impairment. An example might be an isolated error of judgment which is unlikely to recur, and the misconduct is not so serious as to render a finding of impairment plainly necessary. In the instant case the committee had in mind and weighed up all the material factors, including the various public interest aspects. It committed no material error of law or procedure.

#### **Miller and another v. Health Service Commissioner for England [2018] EWCA Civ 144**

The appellants, registered medical practitioners and GPs working in a practice in Chichester, applied for judicial review of a decision of the Health Service Commissioner for England (the ombudsman) upholding a complaint made by Mrs P about the medical treatment provided to

her late husband, P, and that his subsequent death would have been avoided had he received appropriate care in June 2012. The second appellant attended P's home and diagnosed a urinary tract infection and prescribed antibiotics, and the first appellant later advised Mrs P to continue with the course of antibiotics. P's condition continued to deteriorate and on 17 June 2012 he died as a result of a burst colonic abscess secondary to undiagnosed diverticular disease. Lewis J dismissed the claim for judicial review: [2015] EWHC 2981 (Admin), and the appeal to the Court of Appeal concerned the procedural fairness of the decisions of the ombudsman in her investigation and determination of Mrs P's complaints against the doctors. Section 11(1A) of the Health Service Commissioners Act 1993 provides that where the commissioner proposes to conduct an investigation pursuant to a complaint, he shall afford to the family health service provider an opportunity to comment on any allegations contained in the complaint. The GMC, after conducting its own investigation, concluded that no action should be taken. Mrs P did not pursue negligence proceedings against either doctor. Allowing the doctors' appeal and quashing the ombudsman's decision, Sir Ernest Ryder P (with whom Gloster V-P and David Richards LJ agreed) said that Mrs P's complaint to the ombudsman was not disclosed until after the issue of the judicial review claim and, that prior to the ombudsman's draft report being delivered the appellants were not provided with a copy of the reports of the ombudsman's specialist GP (the GP Adviser) or the clinical advice from a consultant colorectal surgeon (the Surgical Adviser). The draft report contained the ombudsman's "provisional conclusions and the recommendations that the Ombudsman is minded to make". The draft report set out in clear and emphatic terms a series of conclusions and recommendations which included that the complaint be upheld. The appellants submitted detailed comments on the draft report and expert reports from a consultant general practitioner and a professor of general practice who firmly disagreed with the advice obtained from the ombudsman's GP and Surgical Advisers. Some very limited revisions to the draft report were made and the ombudsman's final report was issued in October 2014 in the same terms as the second draft and substantially the same terms of the first draft. The ombudsman's

conclusions and recommendations remained the same. Sir Ernest Ryder said that the section 11 duty was breached. The plain language of section 11 (1A) required the ombudsman to obtain the relevant person's comments about the allegations in the complaint before a decision to investigate is made. That is a protection which relates at least in part to the precedence given to legal and tribunal proceedings. The protection contained in section 11 is not a mere technicality: [44]- [45]. There is no requirement that the appellants be provided with all the evidence that the ombudsman has considered. The procedure is an inquisitorial process, not an adversarial one, and the ombudsman's purpose and the process should not be confused with that of the civil court. Although there is no procedural requirement that there be disclosure of the entirety of the evidence which the ombudsman obtains, the appellants must be able to respond to the allegations and in this case that necessitated disclosure of the medical evidence upon which the ombudsman relied coincidental with delivery of the draft report: [48] - [49]. Applying the test of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the investigation was biased by pre-determination, Sir Ernest Ryder, disagreeing with Lewis J, said that the contents of the ombudsman's file gave every appearance of pre-determination and almost none of a fair handed approach. From the outset the actions of the doctors were assessed and reported upon as if they were "guilty as charged". The language used by the ombudsman's officers was firm, concluded and adverse and gave no hint that there may be a possibility of doubt. The final report of the ombudsman contained not one trace of the extensive expert opinions provided on behalf of the doctors nor of the important challenges to the advices of the ombudsman's clinical advisers in respect of good practice, the timings of symptoms and causation. It was as if the ombudsman had never received those opinions. They were rejected without explanation: [57] - [61]. Moreover the ombudsman had not considered, as required by section 4 (1) of the 1993 Act, whether in the particular circumstances it was not reasonable to expect Mrs P to have resorted to an alternative remedy. The decision to investigate was accordingly unlawful: [83] - [92].

Kenneth Hamer, of  
Henderson Chambers

-----



## Request for Comments and Contributions

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

**Nicole Curtis, Penningtons Manches LLP**

**[nicole.curtis@penningtons.co.uk](mailto:nicole.curtis@penningtons.co.uk)**

**Kenneth Hamer, Henderson Chambers**

**[khamer@hendersonchambers.co.uk](mailto:khamer@hendersonchambers.co.uk)**