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## ABS'S - HOW ARE THEY DOING SO FAR?

One of the main provisions of the Legal Services Act 2007 is the introduction of a statutory scheme for licensing law firms not entirely owned and controlled by qualified lawyers. The organisations are generally referred to as Alternative Business Structures (ABSs) although, absent one heading, the Act refers to them as 'licensed bodies'. Subject to some limited exceptions the introduction of ABSs has no precedent in other jurisdictions. The market for legal services in England and Wales therefore is currently acting as a petri dish to allow the rest of the world to see what happens when such organisations are released into the market. The SRA began licensing ABSs on 3 January 2012. There are now over 100 ABSs including the Law Society President's own firm, Scott-Moncrieff & Associates<sup>1</sup>. It therefore seems an appropriate time to assess what the nature of those businesses tells us about the legal

<sup>1</sup> *Legal Futures*: <http://www.legalfutures.co.uk/latest-news/law-society-president-embraces-abs-status/> (15 March 2013, downloaded 17 March 2013)

marketplace and what they may mean for future regulation of legal services.

Certainly even a brief review of the SRA's register of ABSs suggests that as a business vehicle, the ABS has already found purchase with a broad range of suppliers of legal services. At one end there are large corporate brands such as Co-op Legal Services Limited who are different to other established providers in the market at the other there are a perhaps surprising number of smaller established law firms such as Nicola Phillips Solicitors, Residential Property Lawyers of Horsham, who see ABSs as a way to widen ownership rather than to change the way they work.

A number of themes are already apparent from such a review which herald potential regulatory challenges for the licensing authorities (currently the SRA and the Council for Licensed Conveyancers):

### 1) *It's about the brand*

Other than Co-op Legal Service Limited, a number of other eye-catching brands have already gained ABS Licenses or are in the process of doing so, including BT Law, the AA and SAGA.

One of the features of these new larger entrants is that they are used to working in a highly regulated environment and will have established compliance procedures do deal the requirements of their regulators. Having built their brands and market share by delivering what customers require in terms of price and quality, it seems likely that their internal systems for managing staff and clients, dealing with complaints, controlling costs and administering files may be considerably more developed than some established law firms.

This effect was noted in New South Wales which was the first significant jurisdiction to allow external ownership. Steve Mark, Legal Services Commissioner for New South Wales cited improved management as the biggest ramification of the introduction of the equivalent to ABSs in that jurisdiction, leading to a greater focus on professional ethics and an associated drop in complaints to the regulator<sup>2</sup>. These findings

<sup>2</sup> Interview with Steve Mark in the Law Society of Upper Canada Gazette: <http://www.lawsocietygazette.ca/alternative-business-structures-australia> (27 December 2012, downloaded 17 March 2013)

emphasise that there is nothing inherently unethical about ABSs.

However, the new entrants do present different risks to established firms. One risk is that there are real practical difficulties in separating out the parts of the business regulated by the SRA and other non-regulated activities. The types of legal activity that are actually reserved to qualified persons are surprisingly small. For example, legal advice or indeed representation outside courts is not regulated. The SRA's established way of dealing with this has been to provide in broad terms that if you are regulated by it then all legal services provided by an entity are regulated. Such an approach works well for law firms but is more difficult in relation to an organisation that provides a wide range of services.

A second difficulty is one of ownership. When a firm is owned by lawyers they are by definition easily identifiable and have been through an approval process when they enter the profession. In contrast, an ABS application could involve ownership by an entity offshore and whose ultimate ownership is less clear. Whilst the authorisation process is directed at addressing the risks associated with a complex ownership structure, the issues are less clear cut than in a traditional law firm. There is certainly a higher risk that others can exercise some degree of influence outside the regulatory framework.

Non-lawyer ownership also presents risks associated with multiple ownership, in the sense of holding an interest in more than one entity. What would happen if an organisation held a significant shareholding in a law firm and also a similar holding in an organisation being sued by the law firm? The risks these issues present are far less understood at this early stage of ABS authorisations.

## **2) *It's about the clients***

The register also shows signs that ABSs are being created around client needs, which may be much wider than simply legal services. For instance, Red Square London provides a comprehensive service to clients mainly from CIS or Eastern European countries looking to integrate into UK life, extending to finding properties, organising bank accounts and parking permits as much as to advising on immigration law or company formations. Abbey Legal Services is the logical extension of a legal expenses insurer's interest in managing risk amongst its clients. Of course that a traditional law firm might provide a range of (legal) services to a sole client or set of clients is not a new development (for instance, the trade union solicitors Thompsons, itself now an ABS).

However criticism has occasionally been levelled at the big accountants for the degree to which their perhaps understandable desire to cross-sell consultancy services to their audit clients has compromised their objectivity<sup>3</sup>. The Sarbanes-Oxley Act came about in part because of the concern that Arthur Andersen, auditors of Enron, had given their client an easy ride as a result of the amount of lucrative consultancy business it provided. The Act now restricts auditors in the USA from providing most non-audit services to firms they audit.

From the regulatory viewpoint, one may be interested to see how ABSs cope with maintaining ethical standards in an environment where there is likely to be a greater degree of inter dependence between the provision of legal advice and other business activities.

## **3) *It's about the money***

Bringing the possibility of private equity to allow expansion has been the driver for certain firms in converting to ABSs, perhaps most strikingly in the case of Knights Solicitors LLP, bought by 'Dragon's Den' entrepreneur James Caan<sup>4</sup>. It seems logical to expect similar investments in the successful parts of the industry, particularly in an environment where bank lending remains tight. In other instances (e.g. BT Law), the ABS offers another potentially lucrative business channel in an already sizeable and well-resourced business.

Taking a broader view, the impact on licensing authorities of these developments may be one of scale. Co-op Legal Services is part of a group of companies with a turnover in the region of £11.9 billion (as compared to e.g. Clifford Chance's last reported turnover of £1.303 billion. In areas such as conveyancing and personal injury, the future suggests significant consolidation so that legal services provided to consumers may for the first time concentrated mainly in the hands of a few volume suppliers, some of which will be ABSs. The problem for the regulator is likely to be the costs required to deal with businesses that may have huge number of affected clients should a catastrophic failure occur.

## **4) *It's about the market***

It has been clear from the outset (not least because the regulatory principles in the Legal Services Act 2007 make the point explicit) that ABSs are a mechanism for economic liberalisation of what has been seen as an ossified legal services market. However, and particularly at the commoditised end of legal services, will the market place any value at all on the traditional

<sup>3</sup> See e.g. 'A conflict of interest?' The Economist October 14 2010 (accessed online).

<sup>4</sup> The Lawyer, 19 December 2012.

professional values underpinned by regulation, or simply concern itself (like the supermarkets) whether the price is right?

In their 2005 paper for the Department of Constitutional Affairs, ‘The Benefits of Multiple Ownership Models in Law Services’<sup>5</sup>, the authors Dow and Lapuerta powerfully argued that the government should only restrict specific ownership structures that could be reasonably anticipated to persist in the market profitably while simultaneously degrading the quality of legal services below acceptable levels. They pointed out that there was in fact the capacity for such errors in the then existing legal services market and that more diffuse structures of ownership might in fact reduce the temptation placed in the way of sole practitioners or partnerships to maximise profit at the expense of standards or professional ethics: “...The separation between ownership and management reduces the incentives of the manager to maximise profits. Temptation abates when our own investments are not at stake. Also, large corporations can have especially strong incentives to prevent or discipline the misconduct of individuals, because one scandal can harm an entire corporation’s reputation and business.”

What a price-sensitive market may tolerate in the way of standards is a subject that ARDL members may come to reflect on as the first of the summer’s burgers sizzle on the barbeque...

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## CAN PROFESSIONAL REGULATORS JUDICIALLY REVIEW THEMSELVES?

At some point, all those who act for professional regulators will wonder whether it is possible to challenge a decision of a tribunal or panel. A decision of the panel may be riddled with legal errors but also favour the professional, and so is unlikely to be appealed. Some regulators rightly feel aggrieved about this, but do not have the benefit of a statutory right of appeal. The only remaining option appears to be judicial review.

This short piece asks whether judicial review is the only option and how such a judicial review might operate in practice. Whilst it appears possible for a regulator to effectively judicially review itself, there are practical issues that would need to be taken into account.

<sup>5</sup> July 2005, accessed online at:  
[http://www.brattle.com/\\_documents/UploadLibrary/Upload364.pdf](http://www.brattle.com/_documents/UploadLibrary/Upload364.pdf).

### *Is judicial review the only option for the regulator?*

When a decision-maker has discharged its legal functions, it is described as being *functus officio*<sup>6</sup>. Whether a decision-maker is *functus* is usually an issue that arises when considering whether it has power to reconsider a decision. Unless there is specific provision stating otherwise, the decision-maker will not be able to set aside the decision. The result is that to overturn a decision, it would be necessary to seek a quashing order by way of judicial review.

The *functus* principle is engaged when a disciplinary tribunal has come to a final decision on culpability and sanction. In particular, this means when the tribunal has made its order, even if reasons are to follow, as happened in *Baxendale-Walker v Law Society [2006] EWHC 643 (Admin); [2006] 5 Costs L.R. 696*. In his judgment Moses LJ held that “by reference to the statutory jurisdiction of the tribunal and, as a matter of principle” the SDT had discharged its functions and so could not reconsider its decision (paragraph 23).

‘Slip rules’ cannot be used to avoid the *functus* principle. This was considered in *R (B) v Nursing and Midwifery Council [2012] EWHC 1264 (Admin)* where the Investigating Committee of the NMC sought to set aside one of its decisions. This was done in reliance on *R (Jenkinson) v Nursing and Midwifery Council [2009] EWHC 1111 (Admin)*. Although not expressed in terms of the *functus* principle, it is clear from Lang J’s judgment that the IC had discharged its functions and that without statutory authority it could not set aside its decision.

This basis of this decision is the Court of Appeal’s judgment in *Akewushola v Secretary of State for the Home Department [2000] 1 WLR 2295*. This provided that tribunals only have a limited power “to correct accidental errors which do not substantially affect the rights of the parties or the decision arrived at”, which is akin to CPR r40.12. Importantly, both *Akewushola* and the *B* case highlight that it is not possible to manoeuvre around the *functus* principle by relying on supposed ‘slips’ or ‘accidental errors’.

Drawing these threads together, it is clear that once the tribunal has made a decision it has discharged its functions and the *functus officio* principle bites. As a statutory appeal is not available to the regulatory body, the only option is to pursue judicial review.

### *Practical considerations of regulators judicially reviewing themselves*

The best example of a professional regulator judicially reviewing itself is *R v Statutory Committee of the Pharmaceutical Society of Great Britain, ex parte*

<sup>6</sup> The literal translation from Latin is ‘discharged office’.

*Pharmaceutical Society of Great Britain [1981] 1 WLR 886* (the ‘PSGB case’). In this case, the regulator was granted quashing and mandatory orders against its disciplinary committee.

Given that judicial review was the only available route to the regulator, it is understandable that no issue was taken in the PSGB case on whether regulator could judicially review its disciplinary committee. There is unlikely to be a principled objection to a regulator taking a similar course. The more pressing issues are likely to be practical.

*First*, the normal practice in judicial review cases is to engage with the pre-action protocol by sending a letter before claim. One of the purposes of the protocol is to encourage settlement and to narrow the issues – however, in cases where the *functus officio* principle bites settlement is not possible. The best that can be hoped for is a consent order.

Accordingly, it may be sensible for the regulator to send a letter before action that is aimed both at the Defendant and Registrant (as an interested party). This may help narrow the issues and begin communication about whether a consent order is possible. This is the policy of the Treasury Solicitor in *functus* cases and there is evidence that it is a useful process<sup>7</sup>. It also provides extra cover if the court ask whether there should be any cost consequences for failing to engage with the protocol<sup>8</sup>.

*Secondly*, the regulator will need to decide about the details of the Defendant. Referring to the ‘Fitness to Practice Panel of the General XYZ Council’ is likely to be sufficient. However, there is a deeper problem here: to handle the case properly, the individuals who receive the judicial review ought to be sufficiently independent of the regulator.

This will not be an issue for some regulators where efforts have been made to separate the disciplinary functions from the other regulatory functions. For instance, the GMC would be able to serve its judicial review on the Medical Practitioners Tribunal Service (MPTS), and the MPTS should be able to engage and fund legal advice independently of the GMC.

However, this architecture is not available to many smaller regulators. A decision would therefore need to be taken about how to achieve this on an ad hoc basis – three suggestions would be: *first*, ensuring Chinese walls are in place to protect the privilege of any legal advice; *secondly*, ensuring that sufficient funds are available to fund the litigation properly; and *thirdly*,

drafting a witness statement by the disciplinary committee that reassures the court of these arrangements. It may be that the disciplinary committee takes the decision to adopt a neutral position in the litigation. However, it is important that such a decision is arrived at the basis of proper legal advice and not due to an organisational link to the regulator.

This set up may seem convoluted, but it is an essential part of demonstrating the independence of the regulator’s disciplinary system. The court will be deeply unimpressed if it appears that the parties are in cahoots, and failure to do so will only increase the perception by some registrants that the disciplinary process is not truly independent.

*Thirdly*, it is important to list the registrant concerned as an interested party on the N461 form. He or she will obviously be directly affected by the claim and so will need to be listed (see CPR r54.1(1)(f)). This will mean that registrant is also served with the claim (CPR r54.7(b)) and will be informed of the requirements to serve a response if they wish to participate (CPR r54.14).

*Fourthly*, the final practical matter to consider is costs. In the PSGB case, although the regulator was successful there was no order as to costs. This was a sensible result in that case, as the costs of both parties would have been paid from the same overall pot. Depending on the conduct of the parties, no order as to costs is likely to be a pragmatic starting point. However, it should be noted that if the registrant interested party attempts to derail the litigation through excessive evidence and hopeless arguments, there would be an obvious case to move away from this position.

### **Conclusion**

The *functus officio* principle means that regulators are likely to confront the issue of how to judicially review their own disciplinary panels. However, the mechanics of doing so requires consideration. The most problematic matter for some regulators will be ensuring that their disciplinary panels have the appropriate separation and resources to defend a judicial review challenge. Other matters simply require an appropriate modification of elements such as the pre-action protocol. By moving through the steps described, the regulator will have brought together the most important elements to begin this unconventional form of judicial review.

### **Post-script**

It has been questioned whether this need to bring judicial review proceedings is satisfactory, particularly in cases where the tribunal has fallen into an obvious legal error. This was the subject of a question in the

<sup>7</sup> See Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (2009), p29

<sup>8</sup> See *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895

Law Commission's consultation paper where the cost and delay of an application to the High Court was noted<sup>9</sup>. A small majority of responses, including ARDL, agreed that a power for the regulators to quash decisions would be useful where both the regulator and registrant have agreed on the error<sup>10</sup>.

It should be noted that the Department of Health, the Scottish Government and the GMC raised concerns about such a power, which may see the idea shelved. Therefore, the need to bring judicial proceedings in this context could well remain<sup>11</sup>.

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## BOOK REVIEW

### PROFESSIONAL CONDUCT CASEBOOK BY KENNETH HAMER

Every now and again a book comes along which causes busy practitioners to offer up a silent prayer of thanks. Kenneth Hamer's *Professional Conduct Casebook* (OUP, price £95) falls into precisely that category. There are precious few books which deal with professional conduct across the various disciplines. There are excellent books dealing with doctors, lawyers and financiers as discrete professionals. But, until Hamer's book, there has been very little other than Harris, that has tried to cover all of the ground.

And what a lot of ground there is. Hamer has assembled around a thousand cases under sixty nine chapter headings which run alphabetically from *Absence of the Practitioner* to *Vulnerable Witnesses*. Each chapter contains a brief summary of the relevant legal framework, followed by a summary of the leading cases on the topic. It is all very user-friendly, with copious cross-references to ensure that the reader is always pointed in the right direction. And so if a practitioner has a case in which the professional Respondent in the disciplinary proceedings has accused the tribunal of bias, walked out in protest, and now wishes to appeal, he or she will look at chapter 6, *Bias*, chapter 1 *Absence of the Practitioner*, and chapter 4

<sup>9</sup> Law Commission, Regulation of Healthcare Professionals: Consultation Paper (2012), p188.

<sup>10</sup> Law Commission, Regulation of Healthcare Professionals: Consultation Analysis (2013), p231 – 234.

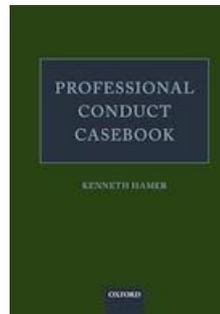
<sup>11</sup> It should be noted that the GMC is seeking its own right of appeal against decisions of the MPTS. This is currently being considered by the Government:

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhealth/566/56607.htm>

*Appeals*, and will find summaries of all of the leading cases in those chapters.

One of the drawbacks of the internet age is that often there is too much information available, rather than too little. Internet searches can produce pages of results on a bewildering and ultimately counter-productive scale. The joy of Hamer's book is that one can focus upon precisely what one needs to find out. It is right up to date, and in my own specialist field (regulatory issues concerning solicitors), he has identified and summarised all of the leading cases. I have no doubt that the book will rapidly become indispensable to those who practice in this field.

*Professional Conduct Casebook* is published by Oxford University Press in March 2013 and valued at £95 (ISBN: 978-0-19-965613-4).



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## LEGAL UPDATE

- *General Dental Council v Savery and others [2011] EWHC 3011 (Admin)*

In this case, the GDC applied for a declaration that it may use and disclose the dental records of fourteen patients and former patients of the fifteenth interested party, Dr Al-Naher, who is a registered dentist. The GDC wishes to be able to use the patient records for the purposes of professional disciplinary proceedings which have been commenced against Dr Al-Naher. The GDC wishes to establish that the registrar of the GDC (and those working in his office) who already have copies of the relevant patient records in their possession, may pass those records to the Investigating Committee of the GDC to enable that committee to conduct an investigation into the allegations of professional misconduct and impairment of fitness to practise against Dr Al-Naher. Efforts had been made by the GDC to contact all of the patients to obtain their consent to the use of their records for this purpose. Of the fourteen patients, ten had expressly refused to give their consent and four had not replied to the GDC's enquiries. The net effect, therefore, is that in relation to all fourteen of the patients there is an absence of

consent to the use of their records by the GDC for the purposes of the professional misconduct proceedings against Dr Al-Naher. The fourteen patients each took out dental health insurance with an insurance company, and in doing so, the patients authorised the release of their medical records to the insurance company to inform the GDC about its concerns in regard to claims for reimbursement of monies paid to Dr Al-Naher for treatment. Sales J said that section 33B(2) of the Dentists Act 1984 gave power to the GDC to require the insurance company to provide information and patient records as it did. The obligation on the registrar under section 27(5)(a) to refer an allegation to the Investigating Committee includes an obligation to refer all evidential material relevant to the allegation to the Investigating Committee as well. This includes the patient records in this case. There is no requirement under this regime for the registrar first to obtain an order of the court before passing such records on to the Investigating Committee. The members of the Investigating Committee who receive the patient records will also take them subject to common law duties of confidentiality owed to the patients and dentist in question. The Investigating Committee will, if it determines that the allegation ought to be considered by a Practice Committee, be under an obligation to refer the allegation to such committee under section 27A(4)(a) of the Act. Again, it is clear that by implication the referral includes an obligation to refer all evidential material relevant to the allegation to the Practice Committee, and there is no requirement to obtain an order from the court. The members of the Practice Committee will receive the patient records subject to common law obligations of confidentiality in relation to them. Sales J held that the provisions in the 1984 Act fall to be read as qualified by Article 8 rights. The learned judge said that the leading Strasbourg authority regarding one public authority transmitting confidential patient records to another public authority to enable the second authority to carry out functions in the public interest was **MS v Sweden (1999) 28 EHRR 313**. The learned judge concluded that the proposed disclosure in the instant case fell within Article 8(2), as being in the interests of public safety, for the protection of health and morals, and for the protection of the rights and freedoms of others. The proposed disclosure was also in accordance with the law, since it was made pursuant to the clear statutory regime in the 1984 Dentists Act. The proposed disclosure of the patient records also satisfied the requirements of being necessary in a democratic society. Accordingly, the court confirmed that the GDC was permitted to use and disclose patient dental records for the purpose of fitness to practise proceedings even though the patient had not consented to their use and disclosure.

- ***Afolabi v Solicitors Regulation Authority [2011] EWHC 2122***

A qualified and was admitted as a solicitor in 2007, and the Law Society was informed that she had immediately become a partner in a firm. One of the allegations against A was that she gave evidence to an employment tribunal that the employment tribunal considered not to be honest. The Solicitors Disciplinary Tribunal found the allegation proved. It arose from a claim by an employee against the firm in relation to unlawful deduction from wages. On an application by the firm to set aside a default judgment Mrs A gave evidence on oath on behalf of the firm. The chairman of the employment tribunal in written reasons stated that her evidence was no honest before the tribunal. In quashing the decision of the Solicitors Disciplinary Tribunal, which had ordered A's name to be removed from the roll of solicitors, Holman J observed that rule 15(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 provided that the findings of fact upon which a judgment was based were admissible as proof, but not conclusive proof of those facts. The standard of proof adopted by the chairman of the employment tribunal was the civil standard of proof. The finding of the chairman was little more than the trigger for the allegation, and under rule 15(4) it was admissible as proof, but not conclusive proof, and as the required standard before the disciplinary tribunal was the criminal standard, it was vital that the disciplinary tribunal reached a final conclusion of their own to that standard upon the critical question. An order for a rehearing by a differently constituted tribunal would be made.

- ***Iqbal v Solicitors Regulation Authority [2012] All ER (D) 217 (July)***

The appellant, I, a solicitor, appealed against the decision of the SDT, which, whilst making no finding of dishonesty, nevertheless ordered that the appellant be struck off the roll of solicitors. The appellant appealed against that sanction. In dismissing B's appeal, the Divisional Court (Sir John Thomas P and Silber J) said that the appellant did not give evidence before the SDT despite the seriousness of the allegations. Of course, he was perfectly entitled to decline to give evidence, but it has been a principle in civil courts from time immemorial to take into account a person's failure to give evidence when reaching a conclusion in respect of him. Similarly, in the criminal courts, since the change in the law at the end of the last century, the court, when considering the evidence, is entitled to take into account the position that the defendant has taken as regards the giving of evidence. The practice of the SDT is not to take into account the failure to give evidence by a solicitor. However, the ordinary public would expect a professional man to

give account of his actions and it would be appropriate for the SDT to review this practice. It can only be in the public interest that this practice, which might have been justified by analogy to the law as it used to be in the last century, might be brought up to date for the present century.

- ***Pottage v Financial Services Authority, Ref no. FS/2010/33, 20 April 2012***

P, the CEO of UBS AG and UBS Wealth Management (UK) Ltd, referred a decision of the Financial Services Authority (FSA) to impose a penalty for misconduct on him of £100,000 to the Upper Tribunal (Tax and Chancery Chamber). The penalty was imposed by the FSA pursuant to section 66 of the Financial Services and Markets Act 2000. The case against P was that he had failed to take reasonable steps to ensure that the business of the firm complied with the requirements of standards of the regulatory system. In allowing P's appeal, Sir Stephen Oliver QC, giving the judgment of the Upper Tribunal, said that, on the evidence as a whole, the FSA had not established its case that P had committed misconduct. The Tribunal was aware that the explanations that P had given in the course of interviews with the FSA were less focussed and indicated a level of awareness on his part of the firm's actual exposure to risk that did not emerge from the measured account in his statement. The fact remained, however, that every specific control failure identified had been fully investigated and had been remedied, or was being dealt with in accordance with a defined plan. Steps had been taken to strengthen the compliance monitoring team; these had been under way since early 2007, and a suitable candidate had been found and started in office in September 2007. It is also a fact that no one, including the FSA, had considered it to be necessary or appropriate to carry out a wider review of systems and controls that had in fact been put in place. P himself took a number of steps throughout the relevant period September 2006 to July 2007. The FSA had not satisfied the Tribunal, from the evidence as a whole, that P's standard of conduct was 'below that which would be reasonable in all the circumstances': see the Statements of Principle and Code of Practice for Approved Persons (APER) in the FSA Handbook, APER 3.1.4G.

- ***Spencer v General Osteopathic Council [2012] EWHC 3146 (Admin)***

S, a registered osteopath, pleaded guilty to three allegations of failing, in relation to two consultations, to adequately record the patient's case history; and in relation to one of the consultations, to adequately record the result of the examination of the patient's hip joints. Following complaint by the patient concerned to the General Osteopathic Council, the matter was

investigated and a number of allegations brought forward for consideration. However, the opinion of a senior osteopath expert sought by the Council exonerated the appellant of many of the criticisms. Other allegations of failing adequately to investigate specific signs and symptoms were not established before the Professional Conduct Committee. The only matters which were established were acknowledged by S from the outset, and these related to record-keeping. The committee found S guilty of 'unacceptable professional conduct', within the meaning of section 20 of the Osteopaths Act 1993, and concluded that the appropriate sanction was an admonishment. Section 20 provides that 'unacceptable professional conduct' means conduct which falls short of the standard required of a registered osteopath. Irwin J said he accepted that note-taking and retention of notes is very important for osteopaths. Moreover, the present case was dealing not with one single act of poor performance but two: two examples on two dates, on which proper notes had not been taken. There had, however, been a proper assessment of the patient, a proper plan for treatment, and proper treatment was given. Irwin J reviewed *Meadow v General Medical Council [2007] 2 QB 462*; *Preiss v General Dental Council [2001] 1 WLR 1926*; *Silver v General Medical Council [2003] Lloyds Rep Med 333*; and *Calhaem v General Medical Council [2008] LS Law Med 96*. In quashing the finding of 'unacceptable professional conduct', Irwin J said:

23. In my judgment, the starting point for interpreting the Osteopaths Act 1993 must be the language of the Act itself. Although one notes that 'unacceptable professional conduct' has the definition in section 20(2): "conduct which falls short of the standard required of a registered osteopath", there is an unhelpful circularity to the definition. Indeed one might not unfairly comment that the statutory definition adds little clarity. The critical term is 'conduct'. Whichever dictionary definition is consulted, the leading sense of the term 'conduct' is behaviour, or the manner of conducting one's self. It seems to me that at first blush this simply does imply, at least to some degree, moral blameworthiness. Whether the finding is 'misconduct' or 'unacceptable professional conduct', there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen. That is an observation not merely about the natural meaning of the language, but about the likely effect of the finding in such a case as this, given the obligatory reporting of the finding under the Act.

25. ...if Parliament had intended to give formal powers of warning or admonition to the Council, in circumstances where the Registrant had breached the

Code of Practice but not been guilty of unacceptable professional conduct, it would have been very simple to do so. Equally it seems to me, there is nothing to prevent the PCC from giving advice to a practitioner where allegations have been made out which constitute a breach of the Code of Practice (or indeed the Standard of Proficiency) but where neither professional incompetence nor 'unacceptable professional conduct' is made out. As it is, the Act stipulates that if unacceptable professional conduct is made out, there has to be at least a formal admonition and publicity which is bound to affect the Registrant's professional reputation. Those are considerable sanctions. In my view, they support the natural meaning of the language contained in the statute and point to a threshold for a finding of 'unacceptable professional conduct' which there is no reason to distinguish from 'misconduct' in the medical and dental legislation.

The learned judge added that it seemed to him that the present case was not incompetence or negligence of a high degree or at least not self-evidently so. It was hard to construe the failings of S as worthy of the moral opprobrium and the publicity which flow from a finding of unacceptable professional conduct.

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## **FORTHCOMING EVENTS**

On Monday 24 June 2013, ARDL will be hosting a seminar entitled '**Ongoing monitoring and revalidation for regulators**' in Manchester.

ARDL will also be hosting a seminar on Wednesday 25th September 2013 in Edinburgh.

Please check the ARDL website for further details.

## **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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