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ARDL SEMINAR REPORT

A very successful seminar was held at Gray's Inn last month.

Professor Sir Ian Kennedy, Chairman of the Independent Parliamentary Standards Authority, gave a thought-provoking and amusing talk on the subject of what constitutes effective regulation.

The event was very well attended by ARDL members who benefitted from Sir Ian's insights gained from his long career in regulation. An enthusiastic audience took the opportunity to ask a number of questions which generated interesting debate.

Many topics were covered, including the bottom-up approach to standard setting, maintaining independence from stakeholders, what it means to serve the public

interest and whether one should regulate to a minimum, good or best practice standard.

Sir Ian is a lawyer who, for the past few decades, has lectured and written on the law and the ethics of healthcare. He is also Emeritus Professor of Health Law, Ethics and Policy at the School of Public Policy, University College of London and Visiting Professor at the London School of Economics. He has been involved in public life for 25 years, earning a reputation for safeguarding the interests of members of the public in healthcare. He led the public enquiry into the deaths in children's heart surgery at the Bristol Royal Infirmary, whose report contributed to the establishment of the Healthcare Commission which he chaired from its creation in 2004 until its abolishment in 2009. During his time at the Commission, Sir Ian worked to improve standards across the NHS through access to information and knowledge for patients, clinicians and managers. He also chaired the Nuffield Council on Bioethics and is currently Chair of the UK Research Integrity Office, whose remit covers the proper conduct of research in universities and other research organisations.

Details of ARDL's programme of seminars for 2013 will be posted on the website in due course.

Nicole Ziman
ACCA

EX PARTE NAWAZ AND THE PRIVILEGE AGAINST SELF-INCRIMINATION IN REGULATORY PROCEEDINGS

The rules of professional bodies/regulators generally impose a duty on their members to provide information, assistance or cooperation in pursuit of the regulator's investigatory and disciplinary functions. In the course of their investigations, regulators may find that members (whether witnesses or individuals under investigation) are reluctant to provide such assistance, on the basis that to do so may expose them either to further disciplinary proceedings or to criminal proceedings. The issue was considered by the High Court and Court of Appeal in *R v Institute of Chartered Accountants in England and Wales, ex*

*parte Nawaz*¹. The effect of *Nawaz* is that, provided that the regulator exercises functions of sufficient public interest, the member will not be able to claim the privilege against self-incrimination.

Mr *Nawaz* was a member of the Institute of Chartered Accountants in England and Wales ('ICAEW'). As part of its investigatory process and under the relevant byelaw, ICAEW requested that Mr *Nawaz* provide ICAEW with information and documents. These could subsequently be used against him in disciplinary proceedings. Having taken legal advice, Mr *Nawaz* refused, describing the request as an effort to 'dig the dirt'. The Investigating Committee laid a formal complaint against Mr *Nawaz* of, inter alia, failing to respond adequately to the request for information. The charge was found proved against Mr *Nawaz* and he was disciplined. He subsequently appealed to the High Court on the basis that the duty to provide information violated the common law privilege against self-incrimination.

Privilege and waiver

The court held that the privilege against self-incrimination was capable of applying in relation to all exercises of public power, rather than being confined to judicial or quasi-judicial proceedings. Notwithstanding this, by becoming a member of the ICAEW, *Nawaz* was taken to have contracted with the ICAEW on the terms of its charter, byelaws and regulations and, therefore, to have prima facie waived privilege.

Potential limits on waiver

The main question to be decided was whether the requirement to provide information is so wide that it should be read down to conform with the requirements of public law. If so, this would limit the prima facie waiver of privilege and thus exclude ICAEW's power to call on Mr *Nawaz* to provide material which may incriminate him. Sedley J considered the decisions of the *House of Lords in AT and T Istel Limited v Tully*², and *R v Director of the Serious Fraud Office ex parte Smith*³, which both consider in detail the nature of the privilege in criminal and civil proceedings.

In *Smith*, Lord Mustill distinguished six 'rights to silence'⁴, the relevant one in *Nawaz* being 'a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.' His Lordship then proceeded to discuss four distinct

motives which had seen these immunities become embedded in English law⁵:

- 1) The common view that one person should, so far as possible, be entitled to tell another person to mind his own business;
- 2) The long history of reaction against abuses of judicial interrogation, with specific reference to the secretive proceedings of the Star Chamber;
- 3) The notion that it is 'contrary to fair play' to put an accused in a position where he is exposed to punishment whatever he does;
- 4) The desire to minimise the risk that an accused will be convicted on the strength of an untrue extra-judicial confession.

Sedley J held that none of these motives applied to Mr *Nawaz*, noting that:

- The Royal Charters constituting ICAEW and the legislation under which it operates make it ICAEW's business to investigate possible cases of misconduct;
- The requirement to provide information cannot be equated with torture and is a reasonable function of the public responsibility which an individual undertakes by becoming a chartered accountant;
- The same is true of the argument that an accused is put in a position where he is exposed to punishment whatever he does. The instinct for fair play which ordinarily makes such a dilemma unacceptable has to accommodate the public interest in detecting malpractice in a profession which is central to the financial wellbeing of millions of individuals and of the country as a whole;
- The final consideration, the risk of untrue admissions, had no bearing in *Nawaz*'s case.

On appeal, Sedley J's decision, namely that "intelligible and powerful grounds of public policy"⁶ exist for endorsing the waiver was endorsed by the Court of Appeal, Leggatt LJ remarking as follows:

"When a person enters a profession he accepts its duties and liabilities as well as its rights and powers. Similarly, he may acquire or surrender privilege and immunities... In my judgment, acceptance of a duty to provide information demanded of an accountant constitutes a waiver by the member concerned of any privilege from disclosure. It is plainly in the public

¹ [1997] EWCA Civ 1530 (Court of Appeal, Leggatt J); [1997] P.N.L.R. 433 (High Court, Sedley J)

² [1993] A.C. 45

³ [1993] A.C. 1

⁴ *Smith* pp.30-31

⁵ *Smith* p.31

⁶ *Nawaz* p.452

interest, as well as the interests of the profession, that the Institute should be enabled to obtain all such information in the profession of its members as is relevant to complaints of their professional misconduct.”

Other regulators and the importance of the public interest

The same reasoning has subsequently been applied to solicitors’ disciplinary proceedings⁷ and has seen the courts giving significant regard to the nature of a regulator’s responsibilities and the public interest inherent in their work. Provided that the public interest is sufficiently great, any regulator exercising supervisory functions of its members is likely to be able to require information or assistance from them, notwithstanding that this may expose the member in question to further regulatory proceedings.

Criminal proceedings and the duty to administer cautions

The misconduct identified in Nawaz related to unregistered auditing, itself a criminal offence⁸. In addition, at common law there is no absolute bar on evidence in regulatory proceedings being adduced in subsequent criminal proceedings⁹. Further, there is no principle in law which debars a claimant in a civil action from pursuing an action merely because to do so would or might result in the defendant, in taking some necessary procedural step in defending the civil proceedings, having to disclose his likely defence in parallel criminal proceedings¹⁰. The weight of authority therefore suggests that an individual subject to professional disciplinary proceedings cannot refuse to engage simply on the basis that to do so may expose them to criminal charges.

In addition, provided that they are not persons ‘charged with the duty of investigating offences or charging offenders’¹¹, investigators questioning persons suspected of conduct which may amount to a criminal offence are under no duty to administer a formal caution to the effect that the answers given may be used in criminal proceedings; this exemption will apply in

⁷ *Macpherson v Law Society* [2005] 2837 (Admin) at paragraph 10; *Holder v Law Society* [2005] EWHC 2023 (Admin) at paragraphs 34-42.

⁸ Sedley J remarking at p.451 ‘that such auditing can also be a criminal offence emphasises, if anything, that it is not merely the accountant’s private business’

⁹ See, for example, *Colpus* [1917] 1 K.B. 574 where evidence given before a military Court of inquiry was admissible in criminal proceedings.

¹⁰ *Jefferson v Bhetcha* [1979] 1 W.L.R. 898, though the court may exercise its discretion to stay the civil proceedings pending the outcome of the criminal proceedings in the interests of justice.

¹¹ Police and Criminal Evidence Act 1984 s.67(9)

the context of the majority of regulatory proceedings (though, *Colpus* notwithstanding, a failure to caution could potentially have an impact on the admissibility of any admissions in subsequent criminal proceedings).

Legal Professional Privilege

While a regulatory body may have the power to demand information from its members, communications which are subject to legal professional privilege generally fall outside such a power. Legal professional privilege can only be overridden by primary legislation containing express words or necessary implication¹². A notable exception relates to solicitors’ accounts. In *Parry-Jones v The Law Society*¹³ the Law Society’s power to require solicitors to disclose their books was held to be ‘a valid rule which overrides any privilege or confidence which otherwise might subsist between solicitor and client. It enables the Law Society for the public good to hold an investigation, even if it involves getting information as to client affairs’¹⁴.

In *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*¹⁵ the House of Lords held that the true justification for this decision was that ‘this limited disclosure did not breach the clients’ LPP... It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege’. The disclosure of the documents in question must be truly necessary to enable the investigating officer to ascertain whether or not the individual in question has complied with the Solicitors’ Accounts Rules, and the material must only be used for the purpose of the investigation and any consequent proceedings.

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IMMUNITY FROM SUIT FOR DEFAMATION IN REGULATORY PROCEEDINGS: PUBLICATION OF DECISIONS

The basic ingredients of a libel are satisfied when (1) A establishes (2) that B has published (3) to one or more third persons (4) words which refer to A and (5) are defamatory of A. Words are considered ‘defamatory’ if they tend to lower A in the opinion of others, or if they

¹² See, for example, *B & Others v Auckland District Law Society and Another* [2004] 4 All E.R. 269

¹³ [1969] 1 Ch. 1

¹⁴ *Parry-Jones*, judgment of Lord Denning at p.8.

¹⁵ [2003] 1 A.C. 563, opinion of Lord Hoffman at p.612.

have or tend to have a substantial adverse effect on the attitude of other people towards the claimant. 'Publication' means communication to one or more people other than A. A does not need to prove malice on the part of B. In addition, B is responsible for republication of the words if republication is a foreseeable, natural and probable consequence of the initial publication. The burden of establishing a defence lies on B. This article considers defences which may be available to independent tribunals tasked with making decisions in relation to fitness to practise and to the regulators in question.

Under s.14 of the Defamation Act 1996, fair and accurate reports of *court* proceedings which are published contemporaneously are absolutely privileged; this privilege does not extend to the fitness to practise tribunals of regulators, who therefore have to look elsewhere for defences for publishing defamatory decisions. While justification may provide an absolute defence, a case will need to be litigated to prove justification; since litigation carries attendant risks and potentially significant costs (which, even in the event of success, may not be recouped), it is worth looking elsewhere.

Tribunals

Article 6 ECHR requires tribunals determining an individual's right to practise their chosen profession to be independent. The majority of tribunals have a duty to either report their findings or give directions to the regulator. Examples include:

- *General Medical Council*: under s.35B(4) Medical Act 1983 the GMC has a duty to publish, in such manner as it sees fit, decisions of its Fitness to Practise Panel;
- *Nursing and Midwifery Council*: paragraph 22(9) of the Nursing and Midwifery Order 2001 mandates that the NMC publish particulars of any orders and decisions made by a Practice Committee, while paragraph 29(5) of the Order mandates that the NMC's Conduct and Competence Committee ('CCC') make directions to the Registrar in relation to its findings. Though the Order does not direct the CCC to give specific reasons for its decision, reasons are required in such cases by Article 6 ECHR;
- *Accountancy and Actuarial Discipline Board*: under para 7(10) of its scheme, the Disciplinary Tribunal has a duty to make a report setting out its written decision and reasons and must send that decision to, amongst others, the Board itself. Under paragraph 7(12) of the scheme,

the Board must publish the report in such manner as it sees fit.

In all cases, the decision-makers have a duty to communicate their decision to the regulator in circumstances where republication of the decision is a foreseeable, natural and probable consequence of the initial publication.

Such tribunals will generally be able to claim common law privilege in relation to their decision. The test is that set out in *Adam v Ward*¹⁶:

'A privileged occasion is, in relation to qualified privilege, an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.'

In each of the examples cited above, the respective tribunals are under a legal duty to communicate to the regulator, which constitutes a person with a corresponding interest or duty to receive it. Even where there is no express statutory or contractual duty, there is significant scope to argue that the tribunal will be under a social or moral duty to report its findings. It could also be argued that the guarantee of a fair and public hearing under Article 6 ECHR requires publication of a decision, constituting a legal duty for the tribunal for the purpose of this privilege.

It is important to note that qualified privilege is vitiated by proof of malice. In *Egger v Chelmsford*¹⁷ a letter published by the Regulations Committee of the Kennel Club (which stated that it was unable to approve the appointment of the plaintiff to judge Alsatians at a show) was held to be defamatory. A number of members of the committee were found by the court to be actuated by malice in coming to their decision. The court held that those defendants actuated by malice did not enjoy the protection of qualified privilege, while those not actuated by malice were protected by privilege.

Regulators

In relation to members of a professional body subject to disciplinary proceedings, the regulator may be able to plead that the contractual nature of the relationship between the regulator and the member is one whereby the member consents to the rules of the regulator, including publication of disciplinary findings. Some bodies (such as the FA) make this an explicit condition

¹⁶ [1917] A.C. 309 at p.334.

¹⁷ [1965] 1 Q.B 248.

of their rules but the nature of a regulator's supervisory functions means that it is arguable that such consent could be implied. Consent an absolute defence, but will not apply to third parties defamed by a decision, since the third party will not have given their consent to prima facie defamatory statements being made about them.

The common law privilege discussed above can be held to apply to regulators themselves in the onward publication of the findings of the tribunal; that said, care needs to be taken. While common law privilege may apply to publication of a decision to a complainant or to an employer, publication to a wider audience (such as on the regulator's website) may fall foul of the reciprocity required for common law privilege. While it could be argued by a regulator that statute, the public interest and/or the requirements of Article 6 ECHR place it under a legal, social or moral duty to publish findings of its disciplinary decisions to the general public, this approach carries an inherent degree of risk and the point has not been tested.

Statutory reporting privilege – s.15 Defamation Act 1996

An alternative option for a regulator would be to seek to rely on the reporting privilege contained in s.15 of the Defamation Act 1996:

s.15 – Reports etc protected by qualified privilege

- 1) *The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice, subject as follows.*
- 2) *In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant –*
 - a) *was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and*
 - b) *refused or neglected to do so.*

Schedule 1, Part II, sub-paragraph 14(b) contains the relevant provision:

A fair and accurate report of any finding or decision of [an] association... any committee or governing body of... an association formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with that

trade, business, industry or profession, or the actions or conduct of those persons.

There are two potential obstacles to claiming this privilege: (1) whether a regulator can be said to report its own conclusions; and (2) whether the decision of an independent tribunal is a decision of 'an association... or of any committee or governing body of an association'.

Can a regulator 'report' its own conclusions?

Gatley on Libel and Slander (11th Edition) notes at 16.3 that the law prior to the Defamation Act 1996 confined this statutory reporting privilege to newspapers or broadcasters. *Gatley* goes on to state that '*the policy of the statute would seem to be aimed at protecting the reporter and the originator cannot fairly be said to be "reporting his own words"*'.

In a footnote to this comment, however, *Gatley* mentions the unreported case of *Lloyd-Allen v Adams* in which it was held that the statutory privilege in question applied to a councillor in respect of a newspaper report of her speech which she had caused or authorised. Further, the notion that a regulator 'cannot fairly be said to be "reporting his own words"' stems from a time when tribunals were not independent from the regulator. Though the point has not yet been decided, there are good reasons to think that a court would accept that the distance between a tribunal and the regulator as a result of the requirement for independence would see the statutory reporting privilege held to encompass regulators publishing decision of their independent disciplinary tribunals.

In *McCartan Turkington Breen v Times Newspapers*¹⁸ Lord Bingham stated (referring to the fact that press conferences were 'unknown' when the operative statute in *McCartan* was enacted) that statutes '*must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today*'¹⁹.

¹⁸ [2001] A.C. 277, a case regarding qualified privilege as it relates to published reports of a public press conference.

¹⁹ Ibid p.292. See also Lord Steyn at p.296: '*There is another preliminary matter to be considered. Counsel for the solicitors emphasised that the wording of paragraph 9 can be traced back to the Law of Libel Amendment Act 1888. He observed that at that time the phenomenon of press conferences was unknown. This was an invitation to the House to say that press conferences could not have been within the original intent of the legislature. There is a clear answer to this appeal to Victorian history. Unless they reveal a contrary intention all statutes are to be interpreted as "always speaking statutes".*'

Does an independent tribunal constitute an ‘association’, ‘committee’ or ‘governing body’ of an association?

On a strict interpretation of the statute, an *independent* tribunal may not be considered to be an association, or a committee, or the governing body of an association in that its independence distances itself from the association in question. Notwithstanding this, there are good reasons to suggest that a court would take a purposive approach to the construction of the statute. Moreover, in *McCartan* Lord Bingham emphasises that:

“Public”, a familiar term, must be given its ordinary meaning. A meeting is public if those who organise it or arrange it open it to the public or, by issuing a general invitation to the press, manifest an intention or desire that the proceedings of the meeting should be communicated to a wider public. Press representatives may be regarded either as members of the public (as made clear by the language of paragraph 10 of the Schedule) or as the eyes and ears of the public to whom they report.’²⁰

It would be a perverse distinction to deny a regulator the defence of the statutory reporting privilege but to afford the same privilege to the press, especially considering the fact that, as cited above in relation to the GMC and the NMC, a number of regulators have a statutory duty to publish the findings of disciplinary committees. In addition, one must consider the attendant public interest in relation to the work of such bodies.

The right of reply

s.15(2) gives a claimant the right to request publication of a reasonable letter or statement by way of explanation or contradiction. Though the onus is on a claimant to make the request, there will be circumstances in which it will be prudent for a regulator to give notification of publication. ‘Reasonable’ is unsatisfactorily opaque and may have attendant complications of its own.

With thanks to Mark Warby QC of 5 Raymond Buildings for his advice and clarifications.

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BOOK REVIEW

THE REGULATION OF HEALTHCARE PROFESSIONALS: LAW, PRINCIPLE AND PROCESS

As the authors rightly say in their introduction, healthcare regulatory law is now an established discipline. Whilst there are similarities and points of crossover with other areas of regulatory and disciplinary law, healthcare regulation has nevertheless developed its own principles, policy imperatives and an ever-expanding volume of specialist jurisprudence. Joanna Glynn QC is a leading silk in this area and has appeared regularly before the Fitness to Practise Committees and Panels of the healthcare regulators and on appeal, conducting cases involving a wide-range of alleged professional malpractice. David Gomez is a regulatory law specialist with extensive experience of healthcare regulation in practice, including experience gained from his previous roles as general counsel to the Human Fertilisation and Embryology Authority and legal advisor to the Royal Pharmaceutical Society of Great Britain. *The Regulation of Healthcare Professionals: Law, Principle and Process* is a substantial and impressive work. The book is divided into six parts: Part 1 The Regulators and the Regulatory Landscape; Part 2 The Regulation of Persons Studying or Training for Entry into the Healthcare Professions and the Registration of Healthcare Professionals; Part 3 Continuing Professional Development and Revalidation; Part 4 Fitness to Practise and Restoration; Part 5 Complaints and Discipline in the NHS in England; and Part 6 The Regulation of Primary Care in the NHS in England. Each Part contains extensive detail and in-depth information of the relevant jurisprudence and processes. The book is designed with practicality in mind by the experienced authors. It is a comprehensive work which embraces the whole regulatory cycle based on the legislation, case law and information placed in the public domain by the various regulators, the Council for Healthcare Regulatory Excellence and the Department of Health. In her foreword the Honourable Mrs Justice Nicola Davies commends Joanna Glynn QC and David Gomez upon the quality and detail of their text, and says that the book is of real assistance, not only to those who practise and provide legal advice within the regulatory field – it is a source of insightful information for all those who sit upon regulatory tribunals. The book indeed is that, and it provides the reader with expert, detailed and speedy access to all key provisions.

The Regulation of Healthcare Professionals: Law, Principle and Process is published by Thomson Reuters

²⁰ Ibid p.292.

Sweet & Maxwell and valued at £170 (ISBN: 978 0 414 04640 5). It can be purchased by visiting www.sweetandmaxwell.co.uk, calling Customer Services on 0845 600 9355, or emailing: TRLUKI.orders@thomsonreuters.com.

Kenneth Hamer
 Henderson Chambers

LEGAL UPDATE

- ***Gurpinar v Solicitors Regulation Authority [2012] EWHC 192 (Admin)***

The primary ground of appeal by G is that the tribunal wrongly proceeded to hear the allegations in his absence, despite the fact that it had been told that he was unable to be present owing to a combination of ill health and the disruption to air travel caused by the Icelandic volcano in April 2010. Moore-Bick LJ, in dismissing G's appeal, said that he was not persuaded that certain letters or emails purportedly sent by G ever reached their intended recipients and that the only explanation for that is that they were not sent. At the hearing on 22 April 2010, the tribunal was faced with a difficult and frustrating situation. One co-defendant in partnership with G, N, was present, but G was not, nor was anyone there to represent him. He had failed to serve his defence bundle. The tribunal thought that G was 'playing fast and loose', and Moore-Bick LJ said it had good reason to think so. In the circumstances, the tribunal could not be criticized for proceeding in G's absence.

- ***Baines v Nursing and Midwifery Council; Adesina v Nursing and Midwifery Council [2012] EWHC 2615 (Admin)***

The first appellant, Janet Baines, was the subject of a hearing before the NMC's Conduct and Competence Committee on 14 February 2012, when, on the basis of various findings of the Committee, she was ordered to be struck off the register.

It was not in dispute that the decision letter dated 17 February 2012 was posted by the Council by first-class post on that day, Friday 17 February, and was received by the appellant in the course of the post on Monday 20 February 2012. The appellant wished to appeal and lodged an appellant's notice with the High Court on Monday 19 March 2012. The NMC submitted that, the decision notice having been posted on Friday 17 February, it was, by virtue of rule 34(4) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004, deemed served the following day, Saturday 18 February. The time for lodging an appeal expired

twenty-eight days later—that is, Saturday 17 March. Because the appeal was lodged on Monday 19 March, it was out of time. Rule 34(4) provides: 'Where any notice is sent under these rules, it shall be treated as having been served on the day after it was sent by delivery service...' The appellant contended that the reference in rule 34(4) to 'the day after it was sent by delivery service' was a reference to the next working day or business day, so that the notice was deemed served on Monday 20 February and the time for appealing expired on 19 March 2012. The appeal was lodged that day and hence was in time. In dismissing the appellant's arguments, Hickinbottom J said that the notice of decision was deemed served on B the day after it was posted—that is, it was deemed served on Saturday 18 February 2012. The Court was not concerned with CPR Part 52, rules 17.3–17.4A, which appear to give time limits for an appeal based upon different criteria. The wording of rule 34(4) is very different—namely, that when a notice is sent it shall be treated as having been served on the day after it was sent by delivery service. On the usual meaning of the words used, that is the next calendar day. If something else had been intended (such as the next working or business day), then that could have been made clear to rebut the usual and ordinary meaning of the words used—as it is in CPR 6.26, in which all of the periods of time listed for serving documents under the CPR, other than claim forms, refer to 'business days' as defined in rule 6.2(b). The scheme for service under CPR 6.26 is very different from service under rule 34(4) of the NMC 2004 Rules. Under the CPR, service can be effected only on a business day and service can be dispensed with. Under the NMC Rules, there is no such restriction, nor any provision for dispensation. The CPR do not apply in this case. Accordingly, the time for lodging an appeal expired on Saturday 17 March, and the appellant's notice lodged on Monday 19 March was, consequently, out of time.

The appeal by the second appellant, Victoria Adesina, does not turn upon a question of law, but a question of fact. There was a dispute as to when the relevant notice was put into the post. The appellant contended that the original decision notice was not posted until 9 February 2012, which she received on 10 February 2012, and accordingly her notice of appeal lodged on 9 March 2012 was in time. However, the Council's evidence was that, following the decision of the relevant committee on 27 January 2012, notice was sent by first-class post, although not by recorded delivery, on 30 January 2012. The affidavit evidence of the Council, made on oath, was accepted by the Court and on that basis the notice of appeal was out of time.

- ***R (Cela) v General Pharmaceutical Council [2012] EWHC 2785 (Admin)***

The respondent, the General Pharmaceutical Council, applied to strike out C's notice of appeal on the grounds that it was lodged out of time and there were no justifiable grounds to extend time. Article 58(3) of the Pharmacy Order 2010 provides that any notice of appeal must be filed at the High Court and served on the Council 'within 28 days beginning with the day on which the written notice for the reasons for the decision was sent or within such longer period as the High Court may in accordance with the rules of court they allow'. On 12 December 2011, C was informed in writing of the decision of the Council that he be suspended from practice for twelve months and he was informed that the expiry of his period for appeal would be 9 January 2012. C's notice of appeal was issued on 24 January 2012 and not served on the Council until 2 March 2012. No explanation was ever furnished to the Court and no evidence was ever served on the Court as to why the notice of appeal was issued late. His Honour Judge Seys Llewellyn QC, sitting as a High Court judge, said that he turned first to consider whether C's appeal was one that may have merit, because ultimately it is the interests of justice that are likely to determine whether time should be expended: see ***Gilthorpe v General Medical Council [2012] EWHC 672 (Admin)***. In the instant case, C was a pharmacist who was convicted in the magistrates' court on 11 January 2010 of theft by an employee, to which he was sentenced to a community order. The offence was carried out in breach of trust and when employed in the practice of a pharmacist, and involved taking money from the hands of customers and not putting it into the till or registering the relevant order or prescription that he had received the relevant monies. Before the fitness-to-practise committee, C admitted the allegations. The decision of the committee as to impairment was unappealable and its decision on sanction, to impose a period of suspension of twelve months, was in some respects a humane approach, in that many cases of dishonesty may lead to erasure and this was a breach of trust to a high degree because it was committed during C's practice as a pharmacist. Under the Civil Procedure Rules, rule 3.9, the Court is directed to consider all matters, including the merits. Since in the instant case there was a sanction, if the appeal were not brought in time and it were not extended, this would be analogous to the situation in which a litigant needs to apply for relief from sanction under the Civil Procedure Rules. As to CPR rule 3.9(a), the interests of the administration of justice, in the instant case the interests of justice did not require an extension of time to be granted to the appellant because the appeal was without merit. As to (b), whether the application for

relief has been made promptly, it does not follow even where an application is made promptly, that the Court must always grant an extension of time. There may be other relevant considerations. Here, in any event, application had not been made, let alone promptly. As to (c), whether the failure to comply was intentional, it was right to say that C had never furnished positive evidence or explanation that failure to comply was caused by mistake or inadvertence. As to (d), whether there is a good explanation for the failure, the answer in this case was emphatically not. As to compliance with other court orders, rule 3.9(e), it was to some extent striking that C was required to serve with his appellant's notice a skeleton argument and grounds of appeal, and that he had never done so, nor had there ever been an attempt to remedy that. For these reasons, to extend time would be of prejudice to the respondent Council, the committee of which had made a decision that appeared to the Court to be impeccable and which would have been denuded of effect by an extension of time to present an appeal. For these reasons, the Court refused to extend time beyond that set out in article 58(3) of the Pharmacy Order 2010.

- ***Uddin v General Medical Council [2012] EWHC 2669 (Admin)***

U, a GP, together with her husband, owned a care home. The manager of the care home referred U to the GMC after U referred the manager to the Department of Health under the Protection of Vulnerable Adults (POVA) scheme, under which H was placed on a list barring her from working with vulnerable adults. The decision was later reversed. In its determination, the GMC's fitness-to-practise panel, applying the test in ***R v Ghosh***, made five findings of dishonesty against U. The panel concluded that U's conduct in referring H under the POVA scheme was misleading and irresponsible, and that witness statements submitted by U had been falsified and that the material sent to POVA to substantiate the referral was inaccurate. The panel included that erasure from the medical register was the only appropriate sanction. In allowing U's appeal against the panel's findings of dishonesty, Singh J held that the findings were flawed and could not stand. The Court directed that the case should be remitted to a fresh panel for reconsideration. In future, in considering issues of dishonesty, the GMC should take care in applying the *Ghosh* test, which was devised in the criminal law context. The standard of proof in proceedings before the GMC was the civil, and not the criminal, standard. Even in the criminal context, it was not the general practice to give a *Ghosh* direction in all cases and the advice given by the Judicial College to Crown court judges was that no direction was generally required on the meaning of dishonesty. A *Ghosh*

direction was given where an issue was raised as to whether a relevant charge was dishonest by the standards of ordinary people. The real issue in the instant case was whether the conduct took place and whether it was known that it was false, or that it was innocent or negligent. Singh J said:

30. In the appeal before me, the advice of the legal assessor, and the panel's clear acceptance of it, were not in themselves the subject of any challenge. Nevertheless, it was submitted that it might be helpful for this court to make any observations which may be helpful for future consideration by the respondent in its approach to cases that may raise issues of dishonesty. I would tentatively accept that invitation, although it is not necessary for a final decision in this particular case and I have not heard full argument on the points. Nevertheless, in the hope that it may be helpful, I would wish to make two brief observations which I would hope will be considered by the General Medical Council in the future. The first is that care needs to be taken about applying a test which was devised in the context of criminal law. As is clear from the standard of proof which is relevant in the present context, the standard of proof is the ordinary civil standard of a balance of probabilities and not the criminal standard. The question of dishonesty can arise in civil contexts as well as criminal ones. There can be, for example, torts or other civil disputes which raise the question of whether a person did or said what they did or said dishonestly, for example fraudulently as distinct from negligently.

31. The second observation to bear in mind is that even in the criminal context it is not general practice to give the so-called *Ghosh* two-part direction. In many cases, the advice which is given now by the Judicial College to judges who sit in the Crown Court is that no direction is required on the meaning of dishonesty. One context in which the twofold *Ghosh* direction may be required is where, on behalf of a defendant in criminal proceedings, an issue is raised whether he or she realised that the conduct charged was dishonest by the standards of reasonable and honest people. In many cases, there will be no such issue of fact raised. It will be perfectly apparent that if the conduct alleged did take place then it clearly was dishonest. The real issue in many cases may be whether the conduct took place and with what state of mind. For example, was a false representation made? But even if it was,

was it done knowing that it was false or may have been, for example, innocent or even a negligent mistake?

- ***Bryant v Solicitors Regulation Authority [2012] EWHC 1475 (Admin)***

In October 2007, B, a solicitor, appealed against a finding of dishonesty made by the SDT, which ordered him to be struck off the roll of solicitors. The finding of dishonesty was quashed by the Divisional Court in December 2007 and a two-year suspension from 17 October 2006 was substituted for the striking-off order: ***Bryant and Bench v Law Society [2007] EWHC 3043 (Admin), [2009] 1 WLR 163***. The Court had concluded that B was guilty of conduct unbecoming a solicitor, but to a much lesser extent than that found by the Tribunal. Once the two-year suspension period ended, in October 2008, B was granted a series of practising certificates subject to conditions. The conditions were directed towards protecting and reassuring the public. An appeal committee of the SRA dismissed B's appeal against the conditions on 30 March 2011. It was against that decision that B appealed to the Administrative Court. In dismissing B's appeal, Eady J said that there was no dispute as to the appropriate test to be applied on such an appeal. In ***Lebow v Law Society [2008] EWCA Civ 411***, Sir Anthony Clarke MR explained that such an appeal was by way of rehearing, although it was important to have in mind that the imposition of conditions on a practising certificate is a regulatory decision, based on the need to protect the public and the reputation of the profession. Conditions, however, if they are to be imposed, must be both necessary and proportionate; see also ***Razeen v Law Society [2008] EWCA Civ 1220***. The Court recognized that previously the imposition of conditions on a practising certificate was compatible with continuing professional life and that, subject to a period of suspension, the solicitor would be able to resume practice thereafter. According to the evidence before the Court, the position has fundamentally changed: the imposition of conditions is now, in practical terms, recognized to be 'the kiss of death'. To all intents and purposes, they render the prospect of further practice impossible. In a sense, therefore, it may be said that what were originally intended to be temporary and precautionary measures have, in reality, become permanent and punitive. However, it is unthinkable that B would apply to any prospective employer without revealing his disciplinary record and that what would trouble an employer is not so much the mere fact of the conditions, but rather the disciplinary hinterland that they represent. In these circumstances, even if B were to succeed fully in his appeal, in the sense of having the conditions removed from his certificate, he would still face the practical

difficulties in obtaining employment purely by reason of his disciplinary record. Considering the five conditions in the instant case, it was quite impossible to conclude that the imposition of the conditions was irrational, illogical, unnecessary, or disproportionate. They were sensible and were directed towards proper objectives. Furthermore, there was no reason for bypassing the well-established statutory regime and seeking to address the legitimate concerns of the SRA by way of undertakings. Either they would make no difference or they would be less effective in serving the SRA purposes of protecting the public and maintaining confidence in the profession.

• ***Mould v General Dental Council [2012] EWHC 3114 (Admin)***

M, a registered dentist, faced two allegations in May 2011 of prescribing, dispensing, and administering diclofenac sodium (Voltarol), including on one occasion at his National Health Service (NHS) place of work during NHS working hours, to two patients for the purposes of alleviating pain, but in circumstances in which he knew, or ought to have known, that he was not permitted or qualified to prescribe medication for non-dental purposes. The PCC found the allegations proved and imposed nine conditions upon M's registration for a period of one year. The conditions included that M must identify and appoint within one month a mentor, that he must meet his mentor on a regular basis and at least on a monthly basis, and that, at those meetings, he should develop a personal development plan addressing the prescribing, dispensing and administering of medication for dental purposes. M was forty-nine days late in complying with appointing a mentor. At the time of the review hearing in June 2012, M had met his mentor only three times and, despite prompts, no personal development plan had been produced. Accordingly, the Committee determined that M's name be suspended from the register for twelve months. On appeal, M contended that the Committee's decision-making process was flawed and that its findings were unjust. The General Dental Council (GDC) submitted that the Committee was correct to suspend M's registration in circumstances in which it could not be satisfied that M would comply with a further period of conditions and in which he showed a continuing lack of insight into his failures. In dismissing M's appeal, His Honour Judge Allan Gore QC, sitting as a judge of the High Court, said at [40] that the Committee considered that M had not given any adequate assurance that conditions would be complied with in the future. This was a conclusion that it was entitled to come to in view of the serial and continuing failure to abide by conditions in the past. The Committee was entitled to consider the public

interest, the protection of patients, the maintenance of public confidence in the profession, and the declaring and upholding of proper standards of conduct and behaviour.

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REQUEST FOR COMMENTS AND CONTRIBUTORS

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