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TWO AND A HALF CHEERS FOR STRACHAN!

On 2nd February, 2005 the Financial Services Authority (the **FSA**) announced a comprehensive review of its enforcement process. The review was largely triggered by the criticism it had received following publication of the decision of the Financial Services and Markets Tribunal in the case of *Legal and General Assurance Society Limited -v- FSA*.

On 19th July, 2005 the review team, led by David Strachan, the FSA Director of retail firms and sector insurance, published its findings (the **Strachan Review**). Many of these findings are now being consulted upon, whilst others have already been implemented.

There is no doubt that many of the changes are to be welcomed. The Strachan Review has clearly listened to those who have had experience of the regulatory enforcement process post N2. The changes attempt to strengthen the independence of the Regulatory Decisions Committee, (the **RDC**), make the enforcement process more transparent and improve the quality of decision making within the FSA Enforcement Division.

It is the changes involving the RDC which will affect

most legal practitioners in this area. Concerns had been expressed that the RDC was not independent enough. While the Financial Services and Markets Act 2000 prohibits a wholly independent RDC, many of the reforms have sought to strengthen its independence within the confines of the statutory limitation. In future, all communications between the RDC and the FSA will be disclosed to the firm or the individual under investigation. Following an RDC hearing, the Enforcement Project Team (the **EPT**) will no longer be allowed to make oral representations in the absence of the firm or individual. The creation of a legal secretariat within the RDC will further reduce the reliance of the RDC on the EPT for legal advice and factual guidance.

However, perhaps the greatest change is the removal of the RDC (once the Warning Notice is issued) from any involvement in settlement. Not only does this reform free up the scarce resources of the RDC to concentrate on contested cases, it speeds up negotiation and prevents, as was sadly often the case, the EPT hiding behind the RDC in an attempt to seek a more advantageous settlement. Going forward, all settlement decisions will be taken by two the Settlement Decision Makers (who will be drawn from a pool of FSA Directors).

Whilst the Strachan Review stopped short of recommending that the decision to issue Warning Notices should be devolved to FSA management, it was also sensitive that representations to the RDC should be a meaningful exercise. Under the old system many felt that the RDC stage was rather pointless, since firms or individuals were, in effect, trying to persuade the very body that had decided to issue a Warning Notice that it had "got it wrong". To alleviate this concern, the review recommends that in most cases the decision to issue the Warning Notice should be taken by the Chairman or his Deputy alone or with one other. Once the matter becomes contested, two further members should then be co-opted to hear representations.

It is at the representation phase that perhaps the greatest opportunity has been lost. The Strachan Review points out rightly that the RDC is not a Court or Tribunal but

part of the FSA. As such, its administrative procedures should be relatively informal and flexible. Consequently, in an attempt to prevent the RDC phase becoming a trial run for the Tribunal, the enforcement process before the RDC does not give either party the right to call and test evidence. Thus, enforcement decisions are taken solely on the basis of the documentary evidence and interview transcripts collected during the course of the investigation. Whether that evidence would stand up to scrutiny and cross-examination is not a matter the RDC is able to assess. However, in such cases, it would seem better for both the FSA and the firm or individual under investigation to discover that the evidence is unsafe at the RDC stage, rather than in the public forum of the Tribunal. Rather like the old style section 6(1) Magistrates Courts Act committal in criminal proceedings, in appropriate cases a firm or individual should be allowed to require the EPT to call evidence to satisfy the RDC that there is a case to answer. While this would potentially lengthen hearings before the RDC, it would reduce the risk of evidentially weak cases being proceeded with and might even move some cases, where the evidence comes out well, towards settlement.

Other steps have also been taken to improve transparency and decision making. During the EPT's investigation there will now be a formal system to escalate cases to senior management where the case is high impact, precedent setting or requires significant commitment of FSA resources. Further, before submission of a case to the RDC for possible enforcement action it will now be fully reviewed by an FSA lawyer who is completely independent of the investigation. When cases come to settle it is proposed that the hitherto rather arbitrary system of discount for early settlement will be formalised with a fixed scale of percentage discounts determined in accordance with the stage at which settlement is reached.

The Strachan Review removes most of the perceived injustices of the previous enforcement process. For that Mr Strachan and his team should take a significant amount of credit. The review has listened to a lot of what the financial services industry and legal practitioners were saying. However, while the improved transparency, refinements and greater checks and balances are to be broadly welcomed, an opportunity to introduce a truly robust RDC phase where the evidence is considered fully has been missed. Post-Strachan, although it is less likely, the fact remains Legal and General could still happen again.

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EXPERTS

WHAT MAKES AN EXPERT?

Lord Salisbury wrote these salutary words to Lord Lytton in 1877:

"No lesson seems to be so deeply inculcated by the experience of life as that you never should trust experts. If you believe the doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe. They all require to have their strong wine diluted by a very large admixture of insipid common sense."

The definition of an "expert" is a person whose special knowledge or skill causes him to be an authority. It has been said of an expert that he is one who knows more and more about less and less (from the commencement address of Nicholas Barry Butler when he was appointed as Principal of Columbia University (1901)) and that he is someone who knows some of the worst mistakes that can be made in his subject and who manages to avoid them (Werner Heisenberg, a German mathematical physicist (1969)). But an expert of distinction who loses humility needs to be treated with caution. An expert has considerable influence. With influence comes responsibility. An expert should appreciate the responsibility which he has to the accused, to the public and to the administration of justice.

FULL AND FRANK DISCLOSURE

An expert must disclose all of the information available to him, whether or not he relies on that information. It is not for the expert to decide whether or not it is relevant or whether another expert would ignore it as he has done. Nor can he keep to himself information under the guise of confidentiality. The Court of Appeal has very recently stated that:

"As a matter of principle no witness, expert or otherwise, is entitled to keep secret relevant information on the basis that it is confidential to him or his business. If it is relevant to the issues and, in the case of any expert, forms the basis or part of the basis for his opinion in our judgment it must be disclosed." (See *R v Allsopp* [2005] EWCA Crim 703 per Gage LJ at para 63)

NO WIN NO FEE

The expert can no longer be a hired gun, as he owes an overriding duty to the Court. This is underlined by the guidance in the "Code of Guidance on Expert Evidence"

which makes it clear that an expert should not be instructed on a "no win no fee basis". In *Davis v Stena Lines* ([2005] EWHC 420 (QB) per Forbes J at para 16) Forbes J stated that the guidance should be followed save, perhaps, in exceptional circumstances. In that case, the solicitor was ignorant of this guidance and had instructed the expert on a conditional fee basis. After providing an initial report, the expert questioned the fee arrangement and alerted the solicitor to the problem. The solicitor then cancelled the contingency fee arrangement and entered into a deferred fee arrangement with the expert. However, the objection to the expert on the ground that he was initially instructed on a contingency basis was taken at the trial. The judge exercised his discretion to admit the expert's evidence after hearing searching cross-examination of the expert on the aspect of his fee arrangement and its effect on his judgment. The judge rejected the suggestion that the expert's evidence lacked objectivity or was biased in any way as a result of the proposed agreed basis for remuneration.

EXPERT HYPOTHESIS V COMMON SENSE

The Court has no expertise of its own, other than legal expertise, and therefore invariably needs and depends upon the help it receives from experts. The expert must fully consider any opposing expert evidence and decide why, in his expert opinion, it is wrong or doubtful. If he does not agree with the opposing expert evidence, he must explain why, so that the judge can evaluate the evidence before him. Specialist judges acquire from their professional experience as lawyers and judges, a body of knowledge which although, strictly speaking, cannot be substituted for the evidence received, can be deployed to spot any weakness in the expert evidence. The judge will look at the reasons given by expert witnesses for the conclusions that they draw. Judges do not suspend judicial belief simply because the evidence is given by an expert. This is particularly so where the expert is seeking to construct what happened from evidence of other facts. In *Roadrunner Properties Ltd v John Dean* (see [2003] EWCA Civ 1816 per Chadwick LJ at paras 25-30) the Court of Appeal criticised the first instance judge for accepting hypothetical and theoretical reasoning and said that a Court should be slow to discard common sense in favour of expert hypothesis.

An expert should consider whether his evidence is supported by the common sense conclusion and, if it is not, he should consider why he has rejected common sense. If he does not have an explanation for departing

from common sense, then the judge ought to be circumspect before accepting that expert's evidence.

EXPERT OPINION V EVIDENCE OF FACT

The opinion of an expert may be to explain how an event occurred. However, there may also be witnesses of fact as to the event. An expert should be careful if his evidence is inconsistent with those witnesses of fact. In *Joe Armstrong v First York* ([2005] EWCA Civ 277 at para 27) the Court of Appeal upheld a first instance judge who rejected the expert's evidence when that evidence contradicted two palpably honest witnesses of fact.

Longmore LJ said:

"If a judge is convinced, on proper evidence, that the claimants are in fact telling the truth and are not fraudulent, that conviction may well be a reason for declining to accept expert evidence to the contrary effect."

THE ROLE OF THE EXPERT V THE ROLE OF THE JUDGE

The final decision is that of the judge or jury and not of the expert. The expert must be careful not to usurp the judge or jury's function of deciding the case (see *Roadrunner Properties Ltd v John Dean* [2003] EWCA Civ 1816 per Sedley LJ at paras 36-40). The expert should not attack the credibility of the other party's witnesses, whether factual or expert. That is a matter for the judge or jury to assess. In *Friend v Civil Aviation Authority* ([2005] EWHC 201 (QB)) there had been a personal spat between the expert on one side and another party. The expert had, in his evidence questioned the motives of the other party and accused them of having a "clear intention to mislead". Whilst Eady J had no doubt about the expert's personal qualities and his qualifications to be an expert witness, he considered it unfortunate that, in this capacity the expert should have chosen to attack the credibility of the defendants and their experts. Eady J said that it was an unusual stance for an expert to take and that most experts recognise that it is for the Court to form its own view of the credibility of witnesses.

Where the judge is not comfortable with the evidence of an expert, he will be sceptical of the evidence and will be more inclined to reject it as being unreliable. Although the judge cannot substitute his own views for the views of the expert, where the judge finds one of the experts unsatisfactory he will be looking to other evidence to support his own views. It is therefore important that the expert gains the confidence of the judge.

THE PERFECT EXPERT

In *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* ([2005] EWHC 181 (TCC) per Judge David Wilcox) the judge said of the expert witness that he:

"was properly subjected to rigorous cross-examination by [counsel] as to his duties to the Court and the possibility of his independence as an expert witness being compromised. I am satisfied that he was a witness of intellectual vigour and independence who did his best to assist the Court in an objective and dispassionate way. His research and analyses were impressive and comprehensive. They were based upon the contemporary primary documentation which include computer records and timed site photographs depicting the actual progress of the demolition preparation and construction on site and the inter-relation of these activities. This data was objectively evaluated and reflected in his expressed opinion."

PREPARING AN EXPERT

The Civil Procedure Rules clearly provide that the expert's duty to the Court overrides his duty to the client. It is important that those instructing the expert are satisfied that the expert fully understands and is complying with this duty. It is of no benefit to the client that his expert joins the group of experts who are criticised by the Courts.

It is important that when preparing to give oral evidence, the expert should anticipate the likely cross-examination. He should be ready to be attacked and should not be taken by surprise.

An expert should be aware of any criticisms made against him by the Courts in cases where he has been instructed as an expert. He should also know when his evidence has been accepted by a Court and particularly why the Court has accepted his evidence.

WASTED COSTS ORDERS

In *Phillips v Symes* ([2004] EWHC 2330) a successful application was made by a party to join the opposing party's expert witness to the proceedings for the purpose of making a wasted costs order against that expert. Peter Smith J considered that an expert is open both to a wasted costs order being made against him where his evidence is given recklessly in flagrant disregard of his duties and to a negligence claim being brought against him (see *Karling v Purdue* (The Times,

15th October 2004). The Court of Session (Outer House) (Mr Gordon Reid QC) which upheld the immunity of an expert witness). However neither of these remedies against an expert has yet been imposed.

EXPERT WITNESS SHOPPING

The Court deprecates expert shopping. Where a party needs the permission of the Court to rely on expert witness "A", in place of expert witness "B", the Court has power to give permission on condition that A's report is disclosed to the other party or parties, and the Court has stated that it will usually impose such a condition when granting permission to substitute expert witnesses. In imposing such a condition, the Court has stated that it is not abrogating or emasculating legal professional privilege. It is merely saying that if a party seeks the Court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so.

In *Vasiliou v Hajigiorgiou* (see CA (Civil Div) [2005] EWCA Civ 236 per Dyson LJ; citing *Beck* (CA) and on *Marley Davenport Ltd* [2004] EWCA 1225) the Court of Appeal held that the condition not merely relates to the report signed by the first expert as his report for disclosure, but also covers any of his reports containing the substance of his or her opinion. The Court of Appeal ordered the disclosure of a document marked "draft interim report" on the basis that it was this document which had caused the party to enter into the undesirable practice of expert shopping.

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LEGAL UPDATE

Bradley v. Jockey Club The Times, July 12th 2005

In this case, the Court of Appeal held that the decision of the Jockey Club (imposed as a professional disciplinary body) to disqualify the claimant for 5 years for breaches of the rules of racing committed while he was a licensed jockey was not disproportionate, despite it depriving him of the right to continue to earn his living. The disqualification had effectively put an end to the claimant's new business as a bloodstock agent. The appellant contended that the disqualification order was an excessive interference with his right to work and in consequence was disproportionate. Lord Phillips of Worth Maltravers MR, in dismissing the appeal, said that professional and trade regulatory and disciplinary bodies were usually far better placed than the Court to evaluate the significance of

breaches of the rules and standards of behaviour governing the profession or trade to which they related; and that when an individual took up a professional occupation that depended critically upon the observance of certain rules, and then deliberately broke those rules, he could not be heard to contend that he had a vested right to continue to earn his living in that profession or occupation. The Court concluded that the Jockey Club was entitled to decide that a five year disqualification was proportionate on the facts of the instant case.

D v East Berkshire Community Health NHS Trust [2005] 2 WLR 993

The House of Lords has confirmed that healthcare professionals and social workers mistakenly diagnosing and investigating child abuse by parents, owe no duty of care to the parents, for any resulting psychiatric injury, only to the child. In dismissing appeals by three parents, the House of Lords held that the parent, not the child, was the healthcare professional and social worker's patient, (in whose best interest he was obliged to act), and that although the interests of the parent and the child were normally coincident, they were not so where the possibility of abuse arose; and that given the seriousness of child abuse as a social problem, healthcare and other child care professionals should not be subject to conflicting duties when deciding whether a child might have been abused and what further steps should be taken. The House of Lords held that in the absence of bad faith or sufficient proximity, it was, accordingly, not fair, just and reasonable that a common law duty of care claimed by the parents should be imposed.

Law Society v. Sephton & Co. [2005] 3 WLR 212.

This interesting case on limitation concerned whether the Law Society's cause of action against reporting accountants accrued at the time of misappropriation of funds by the solicitor, at the delivery of the annual report by the accountants, or at the time of the Society's resolution to intervene in the solicitor's practise. Between 1990 and 1996, P, a solicitor, misappropriated a total of over £750,000 of client monies, and was plainly in breach of the Solicitors' Accounts Rules. The defendant accountants delivered to the Society, an annual report recording that they had examined all relevant documents and were satisfied that P had substantially complied with the Solicitors' Accounts Rules, and that the monies in his client accounts were consistent with what was in the relevant ledger accounts. None of the matters certified in the reports were true, the defendants had not examined P's

documents, and there was a very large, and increasing client account shortfall throughout the period 1990-1996, owing to P's persistent misappropriation of his clients' funds. In May 1996, the Society intervened in P's practice, and on 18th May 2002, issued proceedings in negligence against the Defendants, claiming that it had relied upon their reports when deciding not to exercise any of its powers to investigate, or to intervene in P's practice before May 1996.

The deputy judge held that the Society's cause of action in negligence, in relation to each report had accrued as soon as P had misappropriated monies, thereby exposing the Society to the risk of a claim against the compensation fund, which accordingly was statute-barred. The Court of Appeal disagreed, and by a majority, Carnwath and Maurice Kay LJ (Neuberger LJ dissenting) held that, although the Society suffered a risk of loss on receiving each report from the defendant accountants, the Society did not, at that stage suffer actionable loss, which only accrued on the date when it resolved in May 1996, for the first time to pay compensation to a client whose monies had been misappropriated; and that, accordingly, the claim in negligence was not statute-barred.

On 24th February 2005, the Appeal Committee of the House of Lords allowed a petition by the defendant accountants for leave to appeal.

R (Roberts) v Parole Board [2005] 3 WLR 152

The Parole Board, in reviewing the claimant prisoner's case, decided not to disclose evidence to him or his legal representatives, in order to protect the source and identity of an informant. The Board decided that if the material were disclosed to the claimant or his legal representatives the informant would be put at risk, and accordingly, it resolved that the evidence should only be disclosed to a specially appointed advocate acting on the claimant's behalf. The claimant sought judicial review of the Board's direction. Dismissing his claim the House of Lords held that the Board in determining the safety of a prisoner's release was required to make a practical judgment, balancing a triangulation of interests involving the prisoner, the public and the informant who was at risk if his identity became known, but giving preponderant weight to the protection of the public from significant risk of serious injury; and that accordingly the Board had acted within its powers, and in principle fairly in giving its direction, and had not violated Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

R (in the application of Heath) v. Home Office Policy and Advisory Board for Forensic Pathology [2005] EWHC 1793 (Admin), The Times, October 18th, 2005

In this case, the claimant Dr Michael Heath, a senior forensic pathologist accredited by the Home Office, sought judicial review to quash the decision of the Home Office Policy and Advisory Board for Forensic Pathology to refer a complaint to a disciplinary tribunal. The secretary of the board had received two complaints about the claimant's work, in respect of his conduct as a forensic pathologist and expert witness on behalf of the Crown, in two murder trials. Dr Heath sought to quash both the scheme and the Board's terms of reference as unlawful, as well as to quash the decision to refer complaints against him to a disciplinary tribunal. Newman J. held that the Home Secretary had the power to act to set up the Board and the scheme, and observed that the application for permission to apply for judicial review had reached the Court before any substantive disciplinary hearing had commenced. In the usual course, the roles and duties of a screening committee were not appropriately made the subject of applications for judicial review, and the way to avoid prejudice would be to allow the disciplinary proceedings to proceed to a hearing, promptly before a tribunal. Insofar as it was alleged that there were gaps or defects within the scheme, the learned judge said that the governing principle of law in connection with such procedures is that they should be fair; that it was not a requirement of law that the procedures of such disciplinary tribunals be elaborate enough to cover every matter which might arise in connection with the process; and that where there were gaps they can be filled in by the relevant body having the responsibility to decide the issues, always having in mind that the process must be one which is capable of achieving justice and fairness between the parties in respect of the matters at issue.

The learned judge went on to endorse the remarks of the chairman of the tribunal convened in the claimant's case, Mr Andrew Pugh QC, that, by being a tribunal, it had intrinsic powers, and the obligation to observe the rules of natural justice and to conduct its proceedings fairly, and to decide procedural matters which were not expressly dealt with in the rules. It may well be that a tribunal acting fairly can fill in any procedural gaps.

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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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