QUARTERLY BULLETIN
DECEMBER 2008

ARDL
Association of Regulatory & Disciplinary Lawyers

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REGULATORY PENALTIES: TWO LESSONS FROM THE EU CONTEXT

Regulatory penalties, particularly financial penalties, are in the news, and the stakes are rising. Prominent domestic cases in 2008 have included the Office of Rail Regulation ("ORR") imposing a fine of £14m on Network Rail after the engineering overruns at Christmas; and Ofgem imposing a fine of £41.6m on National Grid for restricting the development of competition in the domestic gas meter market.

But as the stakes grow higher, so do the risks. Higher penalties mean that supervisory tribunals and courts will insist on higher standards of procedural fairness and proof. Against that background, regulatory lawyers need increasingly to think not merely of a particular sectoral regime (e.g. the hoops through which the FSA must jump before declaring a person not "fit and proper"), but also of more general, overarching legal principles which can, where applicable, affect the penalties which can be imposed by any regulator.

At least three of those principles will be familiar to any regulatory practitioner:

- the right to a fair hearing, guaranteed both at common law and under Article 6 ECHR is a key protection, and can be asserted even against regulators whose decisions are not subject to judicial review: ***Bradley v Jockey Club*** [2004] EWHC 2164 (QB), para 37 per Richards J.
- the principle of legitimate expectation, again recognised in both domestic and European jurisprudence, provides protection where a regulator proposes to impose a penalty which would involve it resiling from a previous representation, whether as to substance or as to procedure. For an example from the medical context, see ***R v General Medical Council ex p Toth*** [2000] All ER (D) 865.
- the principle of proportionality, rooted most conspicuously in the law of the ECHR and the EU, but also potentially applicable at common law in penalties cases (***De Smith***, London 2008, §11-076), is a merits-intrusive form of scrutiny which requires not only that the punishment should fit the crime, but also that it should go no further than is necessary for it to do so. This can lead to developed bodies of case law on the proportionality of fines in a particular area: see e.g. ***Napp v DG Fair Trading*** [2002] CAT 1; Argos v OFT [2005] CAT 13; ***Sepia v OFT*** [2007] CAT 13.

Furthermore, the field of EU law has in recent years highlighted two perhaps slightly less obvious general penalties "controls".

The first is the principle of double jeopardy, or, as euro-lawyers would have it, the principle of "non bis in idem". In essence this principle requires that the same person should not be sanctioned more than once for the same conduct in order to protect the same legal interest. The principle is a fundamental principle of EU law (Joined Cases C-238 etc ***Limburgse Vinyl v Commission*** [2002] ECR I-8375 §59) and must therefore be complied with whenever penalties are imposed under a scheme of national measures adopted pursuant to Community rights (Case C-260/89 ***Elliniki v Dimotiki*** [1991] ECR I-2925 §43). The most topical application of the principle in the UK regulatory context has been seen in the context of competition law, in the case of ***Devenish Nutrition Ltd v Sanofi-Aventis SA*** [2008] E.C.C. 4. In that case, it was held that under English law, exemplary damages are not recoverable from a cartellist who has already been investigated and fined by the Commission (or, by the same logic, the OFT), because such exemplary damages would fulfil the same deterrent purpose as a fine.

The second general control on regulatory penalties which has been highlighted by cases in the field of EU law is that of workability; a regulator must not impose a penalty which is unworkable and/or incapable of effective supervision, especially if its sanctions regime is enforced by proceedings for contempt of court. The leading case in this area is ***English, Welsh and Scottish Railway Ltd v E.ON UK Plc*** [2008] E.C.C. 7, QB. The ORR, in exercise of its powers concurrent with the OFT, had investigated a coal carriage agreement and had concluded that, in various respects, the agreement was contrary to Article 82 EC and the Chapter II prohibition. The ORR then ordered the parties, by way of penalty, to remove or modify various provisions of the coal carriage agreement. However, on proceedings brought by the Claimant, the Commercial Court held that, as a matter of contract law, there could be no severance of the relevant terms and therefore the whole contract was void and unenforceable. In other words, the relief imposed by the ORR was unworkable and therefore could not be sustained as a matter of law.

Although these two further penalties "controls" arose in the context of EU law cases, they are plainly of wider application. The principle of double jeopardy is a long-established common law principle (see e.g. ***Archer v Brown*** [1985] Q.B. 401), and the requirement that a form of relief should be workable is one familiar to any practitioner of the Commercial Court. Thus the field of EU law is likely to give impetus to other fields of regulatory law. The same process has applied in reverse to some extent in, for instance, the ***Norris*** litigation.

The increasing reach of regulators, and the increasing sums at stake, are thus leading regulatory lawyers to set aside their conventional taxonomy in penalties cases. It is no longer sufficient to think only in terms of a particular regulatory scheme (e.g. that of the GMC or the FSA); other areas of law such as public, criminal and EU law, which might not at first glance seem relevant, can have an important impact on the penalties which can be imposed.

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DEFINING FITNESS TO PRACTISE

A striking feature of the reforms to the regulation of the healthcare professions in the early part of this century was the attempt to unify procedures for assessing different causes of disciplinary action. The General Medical Council (GMC) provides a useful example. Before 2004, the GMC ran a number of different disciplinary committees with distinct competencies, powers and procedures: the Professional Conduct Committee, the Health Committee and the Committee on Professional Performance. This produced difficulties of demarcation. For example, where would a case go if it involved health concerns which had an adverse impact on performance? These problems were exacerbated by the limited opportunities for transfer between the Committees.

After the amendments to the Medical Act 1983 (the 1983 Act) entered into force on 1 November 2004, all disciplinary cases involving registered medical practitioners were subject to the unified jurisdiction of the Fitness to Practise Panel (FPP). Under the new section 35C(2) of the 1983 Act, the question (which determines the availability of sanctions) for the FPP has become whether the practitioner's fitness to practise is impaired. Impairment to fitness to practise can be made out in one of five ways: misconduct; deficient professional performance; a conviction or caution for a criminal offence; adverse physical or mental health; or a determination by another regulatory body in the UK or elsewhere that fitness to practise is impaired.

The reform gives rise to two questions: what constitutes an impairment to fitness to practise given that the concept is not defined in the 1983 Act or the GMC (Fitness to Practise) Rules Order of Council 2004; and when that assessment should be made. Two recent decisions in the Administrative Court concerning allegations of misconduct have gone some way to providing the answers.

In ***Zygmunt v General Medical Council*** [2008] EWHC 2643 (Admin), Mitting J described the assistance provided in the GMC's Indicative Sanctions Guidance on the definition of fitness to practise as "unhelpful" (paragraph 28). The learned judge preferred the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, paragraph 25.50), that is, where the doctor (a) presents a risk to patients; (b) has brought the profession into disrepute; (c) has breached one the fundamental tenets of the profession; or (d) has acted in such a way that his integrity can no longer be relied upon. Mitting J also adopted that part of

the judgment of Silber J in ***Cohen v General Medical Council*** [2008] EWHC 581 in which it was stated that the FPP should take into account the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour (Cohen, paragraph 62).

Both cases emphasise that the FPP's decision must be based on their assessment of the practitioner's fitness to practise at the date of hearing. As such and unlike under the old procedure (in line with ***R (Campbell) v General Medical Council*** [2005] 1 WLR 3488), a finding of misconduct does not automatically lead to the consideration of sanction: the FPP must acknowledge that there are situations where the misconduct was an isolated error which is unlikely to be repeated in the future or has been remedied by the time of the hearing. In ***Meadow v General Medical Council*** [2007] QB 462, Sir Anthony Clarke MR (paragraph 32) emphasized that the role of the FPP was not to punish the practitioner for past wrong-doing, but to protect the public: to look forward, not back. Sir Anthony Clarke acknowledged, however, that the FPP's view of a practitioner's fitness to practise today would inevitably be influenced by how they had acted or failed to act in the past. In this connection, both judges in the Administrative Court held that the FPP's practise of not hearing evidence from testimonials about current performance until the stage of sanction was wrong (***Cohen***, paragraph 69 and ***Zygmunt***, paragraph 33). Such evidence may be highly relevant to the question of current impairment and should be considered before the FPP reaches its conclusion on impairment.

The importance of ***Cohen*** and ***Zygmunt*** should not be overstated. In the many cases, the findings of misconduct (for example, where they relate to matters of great seriousness or are repeated) are likely to make a finding of impairment almost inevitable. However, in those cases which fall outside this category, these decisions fill an important gap in the guidance available to FPPs and to courts hearing appeals from their decisions.

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was counsel for the GMC in Zygmunt.

LEGAL UPDATE

Re: B (Children) (Care Proceedings: Standard of Proof) [2008] 3 WLR 1 and Re: D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499

The House of Lords has delivered judgment in these two cases concerned with the civil standard of proof. The speeches in the two cases largely reflect the approach set out in ***Re H (Minors)*** [1996] AC 563 and in ***R (N) v. Mental Health Review Tribunal*** [2006] QB 468. In particular they emphasise that there are only two standards of proof recognised by the common law, proof beyond reasonable doubt and the balance of probabilities; and that the balance of probabilities simply meant that the court or tribunal was satisfied an event had occurred if it considered that, on the evidence, the occurrence of the event was more likely than not.

The decisions endorse the conventional approach that in general the more serious the allegation the more cogent will be the evidence for which the tribunal will be looking. Thus, in some contexts a court or tribunal might have to look at the facts more critically or anxiously than in others before it can be satisfied to the requisite civil standard of a balance of probabilities, but the standard itself was finite and unvarying.

The speeches in these two House of Lords decisions do not endorse the principle that the more serious the consequences for a practitioner the more cogent is the evidence required. However, situations might make heightened examination of the facts necessary, such as the inherent unlikeliness of the event taking place, the seriousness of the allegations to be proved, or the seriousness of the consequences which could follow from acceptance of proof of the relevant fact. Those situations require the application of good sense and appropriately careful consideration on the part of decision-makers, but they did not require a different standard of proof or a specially cogent standard of evidence before being satisfied of the matter which had to be established.

Helow v. Secretary of State for the Home Department [2008] 1 WLR 2416

In this important case on apparent bias by reason of the judge's membership of a body or association, the House of Lords dismissed the appeal by Fatima Helow from the decision of the Inner House of the Court of Session dismissing her application alleging that the Lord Ordinary, Lady Cosgrove, should have recused herself on the hearing of an immigration appeal tribunal matter on the grounds that she belonged to an association of Jewish lawyers.

The House of Lords applying the test in ***Porter v. Magill*** [2002] 2 AC 357 held that membership of the association did not necessarily connote approval or endorsement of all material that was published in its publications, which in any event the member might not have read, and although circumstances might arise where an association's publications were so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not wish to be thought to approve of them, the Lord Ordinary had been a member of an association whose published aims and objectives were unobjectionable and whose membership could not be assumed to share the views expressed in the material complained of.

Further, the House of Lords went on to state that it could be assumed that a judge was able to discount material which she had read and reach an impartial decision according to the law; and that, accordingly, in the absence of evidence that the Lord Ordinary had read the material complained of, or endorsed the views expressed therein, a fair-minded and informed observer would not have concluded that there was a real possibility of bias.

Law Society v. Salsbury [2008] 2 EWCA Civ 1285

The Court of Appeal has reversed the decision of the Administrative Court which had set aside the order of the Solicitors Disciplinary Tribunal that the respondent be struck off the Roll of Solicitors in a case of dishonesty (see ARDL Quarterly Bulletin July 2008).

Jackson LJ sitting with Sir Mark Potter and Arden LJ said that the statements of principle set out by Sir Thomas Bingham MR in ***Bolton v. Law Society*** [1994] 1 WLR 512 remained good law subject to one qualification. In applying the ***Bolton*** principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the European Convention for the Protection of Human Rights. It is now an overstatement to say that "a very strong case" is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the Tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the Court will interfere. It should also be noted that an appeal from the Solicitors Disciplinary Tribunal to the High Court normally proceeds by way of review under CPR rule 52.11(1).

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FORTHCOMING EVENTS

Seminar: Friday 16 January 2009
Legal Developments in Professional Regulation

Speaker:
The Right Hon The Lord Rodger of Earlsferry, Lord of Appeal

Venue: Anderson Strathern LLP,
1 Rutland Court, Edinburgh, EH3 8EY

This is the first ARDL Seminar to be held in Scotland and will be chaired by
Robert Carr, Chairman, Anderson Strathern

REQUEST FOR COMMENTS AND CONTRIBUTORS

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