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ARDL – OUR HORIZONS

It is a privilege to take over as Chairman of ARDL, and to do so in the footsteps of Roger Henderson QC and the team who have so ably led ARDL over the past seven years.

ARDL is one of a relatively few lawyer organisations in that it draws its membership from the ranks of solicitors and barristers and from all walks of life in the regulatory and disciplinary fields of practice. We also have a large number of members, over 600 of us at the July count and likely to rise when all the subs are in!

We are living through a period of increased regulation, and regulatory activity. Under the current Government, the rate of regulatory reform and regulatory promulgation has been massive. A decade ago we did not have the Financial Services Market Act (2000) nor did we have the Financial Services Authority. The Legal Services Act 2007 was not on the drawing board and has come into being since Sir David Clementi began his review of the legal professions as recently as 2004. This has led to the much heralded advent of Alternative Business Structures or “ABSs” intended to be under way in 2011. On the medical front we have seen reforms at the GMC and in their processes following the Shipman inquiry. Each one of these developments has been significant in its own right.

And all of this happened before the credit crunch, and the financial melt down following the collapse of Lehman Brothers in September 2008. The financial crisis heralds yet further reform in City and financial regulation as Lord Turner’s report indicates. The FSA has been recruiting more staff for enforcement purposes, and it looks likely that the clamour for reform of financial regulation will lead at the very least to more regulatory enforcement activity, extending into new areas, such as salary and bonuses, and possibly to the Bank of England becoming the regulator again if the Conservatives take power. All professions have been conscious of there being more to do from a regulatory point of view.

It is against this background that we have been asking ourselves how ARDL should work for its membership over the coming years, a topic which we discussed at the July ARDL committee meeting. ARDL has over the past seven years concentrated its work on our highly respected seminars, on this publication, and on our very successful dinners and social gatherings.

My view is that we should use the strengths of the Association more. Experience in one sector of regulation can be of enormous benefit in another. An organisation which has amongst its members experts from different fields of regulation and discipline ought to provide the benefit of that expertise to those who might be considering regulatory reform, or change. We have not been an organisation which provides responses to consultations: but this is I believe something we should now consider. At the July Committee we agreed that we would consult the

membership about the future direction of ARDL. You will shortly be provided with an easy to answer electronic questionnaire. We shall, in the best of traditions, set the direction of ARDL after careful consideration of the evidence provided by the membership. Please do take a few moments to answer the paper when it hits your screen. Using the results of this survey, the Committee will be able to set the future direction for ARDL with confidence.

There is as ever much to look forward to. We have agreed to sponsor an essay competition open to University undergraduates in honour of the late Marion Simmons QC. Marion firmly believed that regulatory law is a subject which should be taught as a standard module in Universities for law degrees. I am glad that we are sponsoring this competition – not simply because Marion was a friend to many of us – but because the competition will be a fitting tribute to an indomitable regulatory lawyer, and will help promote awareness amongst young lawyers of this ever burgeoning field of law practice. We have also agreed to run a joint seminar with the Professional Negligence Lawyers Association in the autumn.

All of us who are involved in financial and legal regulation will be in for a particularly interesting time over the next couple of years. We can learn lessons from those involved in the reforms of medical regulation (take for example their reform of the standard of proof). Even if we do not learn lessons from the substance of their reforms, we will at least know where we can find a good recommendation for a doctor!

Tim Dutton QC
Fountain Court Chambers

THE RIGHT TO LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS – *KULKARNI v MILTON KEYNES HOSPITAL NHS FOUNDATION TRUST*

Introduction

Recent judicial attention has focused on whether employees have a legal right to legal representation at internal disciplinary hearings. The Court of Appeal in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* establishes that doctors and dentists employed in the NHS have a contractual right to legal representation at disciplinary hearings involving allegations of misconduct and incapability. More significantly, in obiter remarks the Court of Appeal suggests that Article 6 of the European Convention on Human Rights is engaged which implies a right to legal representation

where the doctor faces charges of such gravity which, if proven, would amount to a bar from practising in the profession again. This decision follows hot on the heels of the recent High Court decision in *R (on the application of G) v Governors of X School* which held that a teacher was entitled to legal representation under Article 6 before a disciplinary committee considering serious misconduct charges.

The background

Dr Kulkarni faces allegations of serious sexual misconduct. His medical defence organisation (MPS) requested legal representation at any disciplinary hearing, which was refused by the Trust who relied upon an express term in the disciplinary procedure which excluded the right to legal representation. The Trust’s own disciplinary procedure had to be construed consistently with a new disciplinary procedure introduced by the Secretary of State called *Maintaining High Professional Standards in the Modern NHS* (MHPS). Clause 22 of MHPS provides that a doctor may be accompanied by a companion who “*may be legally qualified but he or she will not be acting in a legal capacity.*”

Dr Kulkarni applied to the High Court for an injunction to compel his employer to permit legal representation arguing that there was a breach of the implied term of trust and confidence and Article 6. The High Court refused the injunction.

Breach of contract

The Court of Appeal (Smith LJ giving the leading judgment, with which Sir Mark Potter and Wilson LJ agreed) found that clause 22 of the MPHS did in fact set out the right to legal representation at both capability and misconduct hearings, rather than just the latter which had been previously understood. Further, properly construed it permitted a practitioner to be legally represented by a legally qualified person, employed or retained by a defence organisation and the expression “*not representing the practitioner formally in a legal capacity*” was devoid of any meaning. As a result, Dr Kulkarni was contractually entitled to be represented at the disciplinary hearing by a lawyer instructed by his medical defence union (the MPS).

Article 6

Smith LJ went on to make further observations by way of obiter remarks in relation to non-medical defence members and Article 6. She held that Article 6 was engaged where an NHS doctor faces charges of such gravity which, if proven, would effectively bar them from employment in the NHS. Further in the context of

civil proceedings, Article 6 implies a right to legal representation in circumstances where the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings since the issues are virtually the same and the consequences can be very serious. In doing so, Smith LJ rejected the submission that the subsequent GMC Fitness to Practise Panel and Employment Tribunal proceedings would be Article 6 compliant and provide sufficient protection for Dr Kalkarni.

The implications

Since the disciplinary policy of every NHS Trust must comply with MHPS, the decision directly applies to all NHS employed doctors and nurses. The decision means that any NHS Trust doctor or dentist has a contractual right to legal representation at a disciplinary or capability hearing by a lawyer instructed by his or her medical defence organisation. For these professionals, the decision in *Kulkarni* arguably supports the contractual right to legal representation in cases not just limited to serious professional misconduct or incompetence. Whatever the scope of the decision, one can expect such proceedings to be a rather more drawn out affair with for example, increased cross-examination and more disclosure requests. Indeed, in finding that the term “*not representing the practitioner formally in a legal capacity*” was devoid of meaning, Smith LJ firmly rejected attempts to limit the scope of what the lawyer might be permitted to do. She held, “...*once the lawyer is admitted as a representative, he or she is entitled to use all his or her professional skills in the practitioner’s service.*”

How is all this going to fit within the existing employment case law which, in the case of a misconduct dismissal, provides a fairly limited scope of inquiry ie the test is not whether the employee was guilty of the misconduct but whether, having conducted a reasonable investigation, the employer had reasonable grounds for believing that the employee was guilty of misconduct – see *British Home Stores v Burchell* [1978] ICR 303? We can expect some lively arguments about the proper scope of the internal proceedings.

There are even more interesting points regarding the potential wider implications of Smith LJ’s obiter comments in relation to Article 6. It would clearly apply to proceedings which might deprive an employee of the right to practise his or her profession. But as was recognised by Smith LJ, cases in which Article 6 is engaged and cases in which it is not “*may be a difficult line to draw.*” Therefore, an employer who received such a request will be well advised to give it proper consideration in circumstances where the denial of

legal representation might amount to a breach of Article 6.

The right to legal representation would arguably apply to practitioners who faced serious charges but were not supported by a medical defence organisation. It could also apply to other public sector employees facing serious charges who work for monopoly employers.

In *R (on the application of G) v Governors of X School* the Article 6 point was successfully made in the context of a school teacher facing sexual misconduct charges in relation to a student. A key consideration in that case was that the school reported the claimant’s dismissal to the Secretary of State, who can direct that a person should be prohibited from working with children in educational establishments on grounds that they are unsuitable, which could result in a lifetime’s disadvantage to the claimant. The deputy High Court judge held that the disciplinary proceedings and the referral to the Secretary of State formed one and the same proceedings for the purposes of Article 6 and given the seriousness of the allegations and the consequences, fairness required that there should be a right to legal representation.

Further, if Article 6 applies does it extend to other elements of the right to a fair trial, for example, the right to an independent panel to hear the case?

Given the potentially wide ranging implications of the decision in *Kulkarni*, the Secretary of State has been given leave to appeal to the Supreme Court.

Cases referred to:

Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789.

R (on the application of G) v Governors of X School [2009] EWHC 504 (Admin) or (2009) IRLR 434.

British Home Stores v Burchell [1978] ICR 303.

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SPORTS REGULATION: RUGBY FOOTBALL UNION

NEW RULES BRING NEW CHALLENGES

The introduction of the Rugby Football Union's (RFU) new anti-doping provisions early this year means that now more than ever it is crucial for rugby players, clubs and support staff to understand how to comply. But perhaps as importantly, players and clubs need to be aware of the complexities they will now face if brought before an RFU disciplinary tribunal.

The RFU is at the forefront of anti-doping, having set itself the goal of becoming a world leader in the field and most recently working alongside UK Sport and the International Rugby Board (iRB) to approve revisions to the WADA Code made in Madrid in November 2007.

To this end, at national level it has revised its own anti-doping provisions to reflect key changes to regulation 21 of the iRB doping regulations and the WADA Code, which are effective from 1 January 2009¹.

The RFU's rule changes, brought about by direct incorporation of regulation 21, are wide ranging and include new rules on sanctions, "Whereabouts" requirements, Therapeutic Use Exemptions (TUE), as well as rules on retirement and return to competition.

The complexity of the "Whereabouts" requirements and their immediate impact on athletes in all sports is now widely recognised. Yet now, gradually emerging from view, are the intricacies of the new sanction regime, which is set to significantly impact on players, albeit in fewer numbers, by increasing the level of difficulty of cases brought before RFU disciplinary tribunals.

The philosophy behind the new sanction regime – which applies to all WADA compliant sports – is based on the widely held view that anti-doping rules should focus more on those who intentionally dope to enhance their performance. The approach, endorsed by the RFU, is now clearly reflected in the sanction options open to its disciplinary tribunals. The available sanctions now include:

- four-year suspension instead of two where there are "aggravating circumstances" such as a player being part of a sophisticated doping ring²;
- potential for reduced suspension for certain "specified substances", but only where the player

can prove how the substance entered their body and that it was not taken for performance enhancing reasons³;

- reduced suspension by up to 75% for those athletes who provide "substantial assistance" to doping authorities or enable others using performance-enhancing drugs to be caught⁴.

Flexible sanctions for specified substances only?

As the majority of substances on the prohibited list under the existing rules are now classified as "specified substances", it is anticipated that in the majority of cases more flexible sanctions will be imposed, which is welcome news to many. However, drugs primarily aimed at enhancing performance, including hormones and anabolic steroids remain prohibited list substances and their presence still warrants an immediate two-year mandatory ban in the absence of any exceptional circumstances. Flexible sanctions (outside the exceptional circumstances provisions) will simply not apply.

However, perhaps confusingly and contrary to the underpinning philosophy of the regime, is the fact that many listed stimulants, including recreational drugs such as cocaine and amphetamines are not on the specified substances list and are still classed as prohibited substances. As in the in the recent high profile case of Matt Stevens, presence of cocaine or amphetamines continues to carry a strict two year sanction for a first offence where there are no exceptional or aggravating circumstances. This strict provision has been kept despite the view in some quarters that recreational drugs included in the testing regime, which are not performance enhancing, should not therefore remain in the prohibited substances category. However, their inclusion ultimately reflects the belief prevailing within the rugby authorities that all rugby players must understand their individual responsibility for the maintenance of the reputation of their sport and for their own actions, including lifestyle choices.

Added complications to the flexible sanctions regime emerge when looking at how it works in practice. Eligibility for a flexible sanction in fact requires a player to prove how the substance entered their body and to show it was not taken to enhance performance. In practice, this is a considerable hurdle and players will need to rely on medical evidence, witnesses or other circumstantial or corroborative evidence to prove how and why the substance was in their system.

¹ Regulation 5.1 of the RFU Anti-Doping Provisions, 1 January 2009

² iRB Regulation 21.22.9

³ iRB Regulation 21.22.3

⁴ iRB Regulation 21.22.6

Following the Keyter case (International Rugby Board v Keyter⁵), a “speculative guess” as to how it happened, even where the player is of good character, is unlikely to be enough. But it doesn’t stop there; even if a player can prove how and why the substance was present, the extent of any reduction in the ban will still depend on his level of fault — so factors like player negligence will still remain important.

Aggravating features

Equally careful thought is needed in cases where aggravating features may be present. As a first step, it will be important to consider what kinds of factors are aggravating. A wide range of circumstances may fall within this class, most obviously membership of a large doping scheme, use of multiple prohibited substances or a prohibited substance on multiple occasions, or engaging in deceptive or obstructive conduct to avoid the detection or adjudication of an anti-doping rule violation. For players, key decisions will need to be made at an early stage. The most important such decision is likely to be whether to admit the offence early in order to take advantage of a possible reduction to the mandatory four year ban. This will depend to a large degree on the extent of the evidence in the hands of the RFU (and advance disclosure of it), and whether the player can rely on any of his own witnesses to mount an effective challenge to the allegation. With the possibility of a reduction to the four year ban, the stakes are high and there will no doubt be many more cases going to the Court of Arbitration for Sport.

Substantial assistance

Again where “substantial assistance” is offered to judicial or doping authorities, consideration will need to be given to the terms of that assistance – as the part-lifting of any ban will depend on the seriousness of the doping violation and most likely, on the extent of the help given to the authorities. This is especially so, given that under regulation 21 the disciplinary panel will have to provide written justification for its decision⁶.

Conclusion

It is noteworthy that in recognition of the complexity and extensive nature of the new regulations, the International Rugby Player’s Association (IRPA) has called for even greater focus on player education and

has even called for the provision of funding to players who face doping proceedings. The IRPA has argued that given the intricacies of the new rules, it is in the interests of both players and the sport as a whole that some element of contribution is made towards a player’s defence costs should a matter proceed to a hearing. Whether this is forthcoming or not, doping hearings are set to become far tougher for those players who find themselves there.

Sophie Kemp
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FINANCIAL SERVICES AUTHORITY v FOX HAYES: A “STRONG MESSAGE OF DETERRENCE”

In February of this year, the Court of Appeal handed down judgment in the FSA’s enforcement action against Fox Hayes: *Financial Services Authority v Fox Hayes* [2009] EWCA Civ 76. In allowing the FSA’s appeal from the Financial Services and Markets Tribunal (the tribunal), the respondent, an FSA-authorised firm of solicitors in Leeds, was ordered to pay a penalty of £954,770 for its breach of the Conduct of Business Rules in approving financial promotions that permitted so-called “boiler room” operations to target UK investors. Lawrence Collins LJ, in agreeing with the order proposed by Longmore and Wilson LJ, said that the case illustrated the dangers for professional persons (and also for financial institutions) whose names are used, not only for specific statutory purposes, but also to add respectability or credence to financial documents.

The factual background to the case can be shortly stated. By section 21 of the Financial Services and Markets Act 2000, a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless he is an authorised person or unless the content of the communication is approved by an authorised person or an exemption applies. During 2003 and 2004 Fox Hayes approved a number of financial promotions for five unauthorised and unregulated overseas companies. Using these promotions, the overseas companies contacted UK investors offering a free research report about a listed UK company in which the investor already held shares. If an investor responded and agreed to be contacted by the overseas company, the company would then telephone the investor and seek to persuade him or her to purchase OTC (Over the Counter) Bulletin Board shares, which are regarded as high risk investments.

⁵ International Rugby Board v De Keyter CAS 2006/A/1067 (Court of Arbitration for Sport 2006)

⁶ iRB Regulation 21.22.6

As a result of the promotions approved by Fox Hayes, 670 UK purchasers invested in excess of \$20 million in shares recommended by the overseas companies. Most of that money was lost. The tribunal made an important finding that Fox Hayes knew that the whole purpose of the offer of free research reports was to obtain the consent of investors to be contacted by the overseas companies who would then try to sell the OTC Bulletin Board shares to the investors.

The Court of Appeal found that Fox Hayes had not taken reasonable steps to ensure that the promotions were clear, fair and not misleading, and that the firm had reason to doubt that the overseas companies would deal with customers in the UK in an honest and reliable way. An unusual feature of the case was that the senior partner of Fox Hayes, who was the partner responsible for this part of the firm's business, had personally received substantial commissions from the overseas companies which had not been disclosed initially to the firm or at any time to the investors who purchased shares recommended by those companies.

In giving the leading judgment in the Court of Appeal, Longmore LJ said that the FSA's argument was and is very simple. The whole purpose of the promotion was that investors should be contacted by overseas companies who would try and sell OTC Bulletin Board shares to investors. These shares were high risk shares. That purpose was not set out clearly (or indeed at all) in the promotional literature. It followed that the promotion was neither clear nor fair nor "not misleading". It did mislead in the sense that investors did not expect to be subject to pressure to buy shares that might well be unsuitable for them. Since Fox Hayes knew that the purpose of the promotion was as found by the tribunal, it followed that Fox Hayes could not show that they took reasonable steps to ensure that the promotion was clear, fair and not misleading. The case made by the FSA was correct in law and, in the light of the express findings of the tribunal, unanswerable.

Longmore LJ described the purpose of the promotion as being disguised "*in the sense that it was not mentioned and was hidden behind the procurement of a report on a UK listed company in which the investors already had shares*". The fact that the Conduct of Business Rules did not prohibit overseas companies from accessing UK investors was "*nothing to the point if the promotion is, in fact, not fair or, in fact, disguises its true purpose.*" Since Fox Hayes knew the purpose of the promotion - but that purpose was disguised so that the promotion was not "clear, fair and not misleading" - the Court of Appeal had no difficulty in concluding that Fox Hayes had reason to doubt that the

overseas companies would deal with their customers in an honest and reliable way.

The court did not agree with the tribunal that there was no reason to doubt the honesty or reliability of the overseas companies until mid-November 2003 (by which time press comment had become insistent and there had been nine customer complaints). Rather, the court found that Fox Hayes had reason to doubt the honesty and/or reliability of these companies at the time when the promotions first began. Longmore LJ observed that if the senior partner of Fox Hayes "*was not prepared to deal honestly with his partners as a result of receiving the commission...he must have had every reason to doubt whether the companies...would themselves be dealing reliably and honestly with their UK customers.*"

In determining penalty, the Court of Appeal took as its starting point that pursuant to section 206 of the 2000 Act the FSA has power to impose a penalty of such amount as it considers appropriate. The court noted the FSA's statement of policy with respect to the imposition of penalties, and relevant factors included (1) the seriousness of the misconduct or contravention (2) the extent to which the contravention or misconduct was deliberate or reckless (3) whether the person on whom the penalty is to be imposed is an individual and the size, financial resources and other circumstances of the firm or individual (4) the amount of profits accrued or loss avoided (5) conduct following the contravention (6) other disciplinary record and compliance history (7) previous action taken by the FSA and (8) action taken by other regulatory authorities.

The Court of Appeal said that the penalty should reflect both the seriousness and, at least, the recklessness of the misconduct. In a case like the present one where ordinary investors had lost many millions, it would be inappropriate, other things being equal, to fix a penalty less than £750,000. However, this figure was reduced to £500,000 because it appeared from evidence before the tribunal that some uncertainty existed at the FSA as to the correct interpretation of the Conduct of Business Rules. The court took into account that the Fox Hayes case had been brought to some extent as a test case or at least "*for the benefit of the FSA to be able to seek an authoritative interpretation of their Rules*". However, the amount of the senior partner's commissions was added to the penalty in full, producing a total of £954,770 (subject to the matter being remitted to the tribunal for consideration of whether the sum should be reduced on account of the financial circumstances of those partners liable to pay it).

Commenting on the Court of Appeal ruling, Margaret Cole, the FSA's director of enforcement, said that the

FSA hoped it would “send a strong message of deterrence to other firms and individuals that may turn a blind eye to the legitimacy of their clients in exchange for fees or commission.”

Natalie Stopps
 Fountain Court Chambers

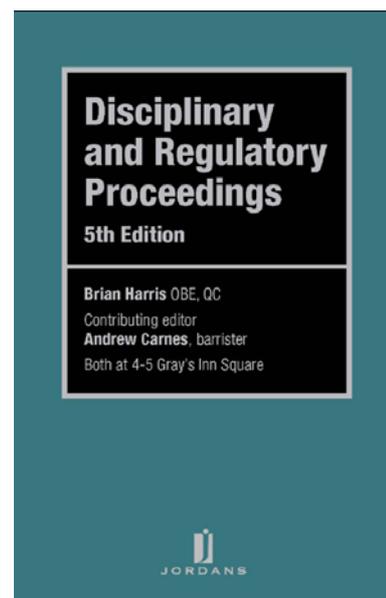
BOOK REVIEW

- *Disciplinary and Regulatory Proceedings, 5th Edition*, by Brian Harris OBE QC. Contributing editor Andrew Carnes
- *The Solicitor's Handbook 2009* by Andrew Hopper QC and Gregory Treverton-Jones QC
- *Solicitors' Code of Conduct 2007, June 2009 Edition*, by Solicitors Regulation Authority
- *Solicitors' Accounts Manual, 11th Edition*, by Solicitors Regulation Authority

2009 has been an important and fruitful year for those practising in the fields of regulation and disciplinary law. March saw the publication of the 5th Edition of *Disciplinary and Regulatory Proceedings* by Brian Harris OBE QC and Andrew Carnes, both of 4-5 Gray's Inn Square and leading practitioners in this dynamic area of the law with considerable experience of tribunals both as chairmen and lawyers. In June the *Solicitor's Handbook 2009* was released. This authoritative guide to the rules and regulations governing solicitors is written by Andrew Hopper QC, a solicitor who has specialised in the field of professional regulation and discipline since 1979, and Gregory Treverton-Jones QC of 39 Essex Street who has practised in the field of professional discipline and regulation since the early 1990s. Also the Solicitors' Regulation Authority has helpfully produced the 2009 Edition of the *Solicitors' Code of Conduct 2007* which provides coverage of changes made to the rules governing solicitors since publication of the 1st Edition in 2007, and the *Solicitors' Accountants Manual*, 11th Edition, which is fully updated and revised and takes account of changes to the Solicitors' Account Rules up to the 31 March 2009.

Harris and Carnes on *Disciplinary and Regulatory Proceedings* is one of the leading textbooks in this important field. It provides an authoritative examination of the general principles that apply to all the regulatory and disciplinary tribunals, including coverage of the basis of the tribunal's authority and extent of its jurisdiction, natural justice, human rights, grounds for disciplinary action, investigations, the decision to prosecute, hearings, evidence, appeals and

enforcement. It is regularly cited and to this reviewer's knowledge it has been described traditionally as one of the leading textbooks in the field of disciplinary and regulatory proceedings. The 5th Edition, like its predecessors, is divided into two parts. Part 1, dealing with disciplinary and regulatory proceedings, contains 22 chapters of core commentary on the legal framework and practice of tribunal hearings, with specific working of three major professional bodies: the enforcement powers of the Financial Services Authority, healthcare regulation and, for the first time, the regulation of legal services. In addition to this core commentary, which also includes a chapter on data protection and freedom of information, Part 2, under the heading of "Disciplinary and regulatory arrangements in practice", contains a wealth of practical advice for the prosecution and defence lawyer in disciplinary proceedings and advice for the lay member of a tribunal. The disciplinary arrangements for the most prominent regulators are also described in outline.



This excellent and authoritative work is an invaluable aid not only to regulatory enforcement lawyers but to anyone working in a regulatory industry or dealing with public bodies. Published by Jordans, price £95 and available from Jordan Publishing Limited, Bristol: www.jordanpublishing.co.uk.

The Solicitors' Handbook 2009 is precisely that. It sets out with great clarity the relevant position and up-to-date developments in the rules and regulations governing solicitors, and does so in a user friendly way. The 2009 edition provides expert commentary by Andrew Hopper QC and Gregory Treverton-Jones QC, both experienced and recognised leading practitioners, on the practical reality of the regulatory and

disciplinary environment in which solicitors operate, and discusses all of the relevant decided cases in the field. The work, like its predecessor, is helpfully divided up into five parts comprising an overview of the regulatory and disciplinary landscape, the rules, fraud and money laundering, the regulatory and disciplinary system in practice, and in part 5 a wealth of appendices giving the reader all the relevant rules at his or her fingertips. The 2009 Edition also includes the SRA Recognised Bodies Regulations 2009 which came into force on 31 March 2009, the Solicitors' Financial Services (Scope) Rules 2001 (Revised 31 March 2009) the SRA Warning Cards (May 2009), the Law Society's Anti-Money Laundering Practice Note and extracts from the Legal Services Act 2007.

A feature of the Handbook is that it is updated annually, thereby ensuring that it remains a vitally important and practical guide. The 2009 Edition is an invaluable resource to assist practitioners in high professional standards and enabling them to identify and deal quickly and effectively with regulatory and disciplinary issues.

The accompanying *Solicitors Code of Conduct 2007, June 2009 Edition*, by the Solicitors Regulation Authority, follows the format established by the 2007 Edition. It sets out the 25 mandatory rules and core duties and standards of service and conduct expected of solicitors. Each rule is accompanied by guidance notes which explain the rule and aid compliance. The June 2009 Edition contains key changes made to reflect the Legal Services Act 2007 regarding firm based regulation and legal disciplinary practices, and ensures that the rules apply to all managers and employees in firms.

An up-to-date version of the Solicitors' Accounts Rules 1998 is reproduced in the *Solicitors' Accounts Manual, 11th Edition* along with notes and appendices including SRA guidelines on accounting procedures and systems and accountant's checklist and report forms. This material is also reproduced in the Handbook.

Published by The Law Society Publishing. Handbook price £69.95 (paperback, 1,208 pages). Code of Conduct price £29.95 (paperback, 336 pages). Accounts Manual price £24.95 (paperback, 144 pages). Copies can be obtained from the Law Society's Bookshop: www.lawsociety.org.uk/bookshop.

Kenneth Hamer
Henderson Chambers

LEGAL UPDATE

Coke-Wallis v Institute of Chartered Accountants in England and Wales [2009] EWCA Civ 730

In this case, the appellant was an accountant and a member of the Institute of Chartered Accountants in England and Wales (ICAEW). In September 2003 he was convicted in Jersey of an offence contrary to Article 20(9) of the Financial Services (Jersey) Law 1998. ICAEW's disciplinary tribunal dismissed a formal complaint of discreditable conduct based on the Jersey conviction on the apparently mistaken belief that there was no corresponding offence in England and Wales. In March 2006 a second complaint (the conduct complaint) was preferred based on the appellant's contravention of directions given by the Jersey Financial Services Commission. It was agreed that the conduct complaint relied on the same nexus of facts as the conviction complaint. In December 2006 a second tribunal held in substance that the two complaints did not allege the same thing. The discreditable act for the purpose of the conviction complaint was the fact of the conviction: the discreditable act for the purpose of the conduct complaint was the underlying conduct. The appellant's claim for judicial review was dismissed by Owen J, and by the Court of Appeal on 15 July 2009.

In giving judgment in the Court of Appeal, Sir Anthony May P (with whom Arden and Jacob LJ agreed) said that the appeal raised two main points: first, whether by virtue of the first tribunal dismissing the conviction complaint the principles of *autrefois acquit* or *res judicata* applied to the conduct complaint; and, second, if not, whether bringing the conduct complaint was an abuse. The leading authority on the principle of *autrefois acquit* is *Connelly v DPP* [1964] AC 1254. Applying the principles in that case, Sir Anthony May P said that the conduct complaint did not charge the same offence as the conviction offence. Both complaints were admittedly brought under the same bye-law and arose out of the same nexus of fact. But the discreditable conduct alleged in the first indictment was being convicted on indictment. The discreditable conduct alleged in the conduct complaint was acting contrary to the directions of the Jersey Financial Services Commission. The facts relied on are not the same, nor the legal characteristics, because what was alleged under the umbrella of discreditable conduct was not the same offence. As Owen J correctly observed, the mere fact of conviction on indictment would have constituted discreditable conduct without proof or consideration of the underlying conduct. That by itself is sufficient to show that the principle of *autrefois acquit* did not apply. The modern leading authority on abuse of process in this field is *Johnson v Gore Wood*

[2002] 2 AC 1, and the bringing of the second conduct complaint was not an abuse. Just as there is a strong public interest in the finality of litigation, including disciplinary proceedings, so there is a strong public interest in bringing professional disciplinary proceedings in order to maintain professional reputation and integrity both in individuals and in the profession as a whole. The first proceedings did not proceed to any adjudication on the merits, and there was nothing unfair, unjust or oppressive in bringing the second conduct complaint, and there was a compelling public interest in doing so.

In the Matter of the Solicitors Act 1974 (No 4 of 2009), Afsar [2009] EWCA Civ 821

Mr Afsar appealed to Lord Clarke of Stone-Cum-Ebony, the Master of the Rolls, against the dismissal by a Solicitors Regulation Authority appeals panel directing the cancellation of his student membership of the Law Society pursuant to regulation 32(3)(ii) of the Training Regulations 1990. In November 2006 Mr Afsar was charged with dangerous driving and remanded on bail. Whilst still on bail he applied for enrolment as a student member of the Law Society, and indicated on the enrolment form that he had never been convicted of an offence in a UK Court (which was true), but also that there were no other factors which might call into question his character and suitability to be a solicitor. On 30 April 2007 he was granted student membership, and on 20 June 2007 he pleaded guilty to the offence of dangerous driving and was sentenced to six months' imprisonment, suspended for 12 months and ordered to do 240 hours unpaid work and disqualified from driving for 12 months. When he subsequently supplied details of the offence to the Law Society, he omitted to state that a pedestrian had been hit in the accident and had been seriously injured. The appeals panel held that by being subject to a suspended sentence of imprisonment there was also a substantial risk to the reputation of the profession if he were allowed to continue as a student member of the Law Society.

The Master of the Rolls said that the form asking the appellant to indicate that there were no other factors which might call into question his character and suitability was in very broad terms. It was without doubt wide enough, on an objective assessment, to encompass the need to declare that criminal prosecutions were pending at the time of application and to provide a full explanation of the matter and its surrounding circumstances. The appellant did not, as he ought to have done, provide the Law Society with full details of the matters relating to the prosecution and the circumstances that gave rise to it. Mr Afsar did

not give full and frank disclosure. His failure to disclose his pending criminal prosecution and his subsequent failure fully and frankly to disclose the nature of the matters giving rise to the prosecution called into question his integrity and probity: see ***Bolton v Law Society*** [1994] 1 WLR 512. However, given the fact that this was not deliberate dishonesty, permanent exclusion from the profession would be disproportionate. In the light of subsequent events and good references which attested to his character, reliability and honesty, Mr Afsar did not now pose a risk to the public or the reputation of the profession and a direction was made to reinstate his student membership.

Jatta v Nursing & Midwifery Council [2009] EWCA Civ 824

In this case a fitness to practise panel of the NMC proceeded to hear and determine disciplinary proceedings in the absence of the registrant. Notice of the proceedings had been duly and properly served by sending to the registrant's registered address in Didcot in accordance with the Nursing & Midwifery Council (Fitness to Practise) Rules 2004, although the council was aware the registrant was no longer living at the address and was travelling in Thailand. Posting of the notice of hearing was duly proved: it was sent by recorded delivery but was returned undelivered. A copy was also sent by first class post to the address in Didcot but the registrant was unaware of, and did not attend, the hearing before the disciplinary tribunal.

The Court of Appeal (Maurice Kay and Lloyd LJ and Sir Simon Tuckey) allowed the Council's appeal from Beatson J who had allowed an appeal by the registrant to the Administrative Court setting aside the disciplinary tribunal's order that he be struck off the register. The Court of Appeal held that there had been no procedural irregularity that vitiated the decision to proceed in Mr Jatta's absence.

The panel had been satisfied that all reasonable efforts had been made in accordance with the rules to serve the notice of hearing on the registrant, and that notice of the hearing had been duly served. The only available address was the registrant's registered address, albeit that it was known Mr Jatta was no longer there. The panel could have adjourned and required that an email be sent to Mr Jatta to his known contact email address, but they did not do so and could not properly be criticised for that failure.

The Court of Appeal observed that it was a fair comment that the process of giving notice was followed on what could be described as a mechanical fashion, but in the absence of a notified fresh address for service

the Council was bound to send notice to the only registered address it had. He could have given the Council a new address and the rules did not provide for service by email.

Yeong v General Medical Council [2009] EWHC 1923 (Admin)

In this case Dr Yeong's registration with the GMC was suspended for 12 months by reason of misconduct following a sexual relationship with a former patient. Dr Yeong obtained an expert report from an experienced psychiatrist who assessed that Dr Yeong did not have a psychological disposition to engage in sexual relationships with patients, the likelihood of recurrence was extremely low and that Dr Yeong did not pose a risk to patients in his capacity practising as an obstetrician and gynaecologist. On appeal Dr Yeong contended (amongst other grounds) that the fitness to practise panel had failed to deal properly with the expert psychiatric evidence, and had wrongly determined that he posed a risk to patients, and that the panel applied an incorrect test of impairment of fitness to practise.

In dismissing Dr Yeong's appeal, Sales J said that the basic approach in law to the question of the adequacy of reasons where a tribunal rejects the evidence of an expert witness was common ground. A coherent, reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent, reasoned rebuttal, meaning that the tribunal should provide an explanation as to why it has rejected that opinion: cf ***English v Emery Reimbold & Strick Limited*** [2002] EWCA Civ 605 at [20]; ***Phipps v General Medical Council*** [2006] EWCA Civ 397. Sales J considered that it was incumbent on the panel to refer explicitly to the opinion of the psychiatrist and in that context give its reasons why it did not accept or propose to act upon his opinion. However, although the reasoning of the panel could be criticised as deficient, the panel was entitled to draw upon its own experience and judgment in forming a view as to whether Dr Yeong presented a present risk to his patients. Whilst the expert's evidence was to the effect that Dr Yeong did not suffer from any psychological disorder which underlay his misconduct, the question of the possibility of a recurrence of such misconduct by Dr Yeong was a matter of the ordinary assessment of likely human behaviour in relation to which a psychiatrist's expertise conferred no special privileged insight. The assessment of risk of any particular form of future behaviour is the sort of task which courts and tribunals regularly perform without needing to refer to expert psychiatric evidence. The reasons given by the panel were sufficient to indicate to Dr Yeong why the panel considered he did still pose a

risk of future misconduct. Far more importantly, the panel's view was that the general public interest in clearly marking proper standards of behaviour for doctors in respect of relationships with their patients so as to uphold public confidence in the medical profession was by far the weightiest factor pointing in favour of the finding of impairment of fitness to practise and the sanction which was imposed.

As to the criticism that the panel failed properly to consider whether Dr Yeong had subsequently taken adequate remedial action in relation to his misconduct and whether his current fitness to practise was impaired, Sales J considered that ***Cohen v General Medical Council*** [2008] EWHC 581 (Admin), ***General Medical Council v Meadow*** [2007] QB 462, and ***Azzam v General Medical Council*** [2008] EWHC 2711 (Admin) fall to be distinguished from the present case on the basis that each of ***Cohen***, ***Meadow*** and ***Azzam*** was concerned with misconduct by a doctor in the form of clinical errors and incompetence. In relation to such types of misconduct, the question of remedial action taken by the doctor to address his areas of weakness may be highly relevant to the question of whether his fitness to practise is currently (ie at the time of consideration by the panel) impaired. But the position in relation to Dr Yeong's case, that is, improperly crossing the patient/doctor boundary by entering into a sexual relationship with the patient was different. In such a case the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence.

A v B (Investigatory Powers Tribunal: jurisdiction) [2009] 3 All ER 416 CA

The claimant, a former member of the Security Service, brought proceedings seeking to overturn the refusal of the Director of Establishments of the Security Service to consent to the publication of a book written by the claimant containing a description of his work for the Security Service. The director asserted that matters such as the claimant's claim should be dealt with by the Investigatory Powers Tribunal set up under the Regulation of Investigatory Powers Act 2000 and that the court had no jurisdiction to deal with the claim. The Court of Appeal (Laws and Dyson LJ, Rix LJ dissenting) agreed and held that the tribunal was the only judicial entity having jurisdiction to entertain the claimant's article 10 claim that the director's decision was contrary to the claimant's right to freedom of expression. The creation of convention rights under the Human Rights Act 1998 and the assignment of disputes about them to the appropriate courts or tribunals were

all part of the same legislative scheme. The relevant rules were carefully drafted so as to achieve a balance between fairness to a complainant and the need to safeguard the relevant security interests. It was inherently unlikely that Parliament had intended to create an elaborate set of rules to govern proceedings against the Intelligence Service and had yet contemplated that such proceedings might also be brought before the courts without any such rules.

Financial Services Authority v Information Commissioner [2009] EWHC 1548 (Admin)

The appeal by the FSA raised a short but important question of construction as to the true meaning and effect of section 348 of the Financial Services and Markets Act 2000 (FSMA). Section 348 of FSMA provides that confidential material relating to the business or other affairs of a person must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of the person concerned to whom the information relates. The purpose of section 348 is to protect confidential information that has found its way into the FSA's hands. The information may have been volunteered. Alternatively it may have been given to the FSA in pursuance of a request made by the FSA in exercise of its statutory functions. Once the information has reached the FSA's hands, the FSA is restricted from disclosing it to third parties and must use one of the gateways available to it in section 349 or regulations made thereunder.

In the instant case, in October 2006 the Information Tribunal had held that the FSA was not entitled to withhold disclosure sought under the Freedom of Information Act 2000 by two persons, firstly, of the names and identities of certain firms involved in the provision of selling endowment mortgages where higher charges had been applied after the policies had been taken out, with the consequence that the original quotation or projection would not be sufficient to produce the returns sought by the customer; and, in a separate case, the names of firms selected by the FSA for mystery shopping to find out how advisers were explaining equity release schemes to consumers, and the names of the firms that were further investigated.

In allowing the FSA's appeal in the first case, and in part in the second case, Munby J held that the starting point was that the substance or effect of any disclosure under section 348 of FSMA must necessarily and in the nature of things be affected by the context of the disclosure; although the appeal turns on the true meaning and effect of section 348 one needs to bear in mind that the issue arises in the context of request for

information under the Freedom of Information Act 2000, specifically in the context of questions to the FSA. The true substance, meaning, effect and significance of the answer to a question can only be ascertained by reference to the question to which it is the answer. Any disclosure cannot be regarded in isolation but must be considered in the light of the request which instigates it. In the first appeal what was being asked related to information which, in the nature of things, was known only to the relevant firm itself, and can therefore only have come to the knowledge of the FSA as a result of information supplied to it by the relevant firm. The second appeal proceeds in precisely the same way insofar as disclosure of the list of firms investigated and found to have failed to explain to customers the advantages and disadvantages of equity release schemes would have meant disclosure of matters relating to the business or other affairs of the firms, and contrary to section 348(2)(a) of FSMA. However, disclosure of the list of firms used for the mystery shopping exercise was quite different and did not involve disclosure of confidential information contrary to the statute.

Kenneth Hamer
Henderson Chambers

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This essay competition has been set up in memory of the late Marion Simmons QC, who sadly died on 2 May, 2008, aged 59.

Marion was a barrister, recorder, arbitrator and, latterly, chairman of the Competition Appeal Tribunal. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on the Committee of the Association of Regulatory and Disciplinary Lawyers for two years and was committed in her support of young lawyers.

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Entrants must be in undergraduate study at a recognised educational establishment in the United Kingdom. Entries must be no longer than 3,000 words and should be type-written in the English language. Essays must be submitted so as to be received by 5pm on Friday 18 December 2009 by post or email to:

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Proof of eligibility may be required. A maximum of one essay may be submitted per entrant. The judges' decision is final and no correspondence will be entered into in relation to entries. We regret that entries cannot be returned.

Please provide a cover page with full name, contact address, email and daytime telephone contact number together with the name of the educational establishment at which you study. The cover page should state the number of pages included. If providing a hard copy, please use A4 sized paper.

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REQUEST FOR COMMENTS AND CONTRIBUTORS

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