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COMPANIES INVESTIGATIONS BRANCH

Enforcement agencies such as the Police, Serious Fraud Office, Trading Standards and Financial Conduct Authority (FCA) have a higher public profile, but Companies Investigation (CI), formerly known as Companies Investigation Branch (CIB) is often overlooked as a powerful agency in the fight against fraud and corporate misconduct.

CI does not restrict itself to any particular type of business. If a company's bad practice appears on the radar of the CI, although not as well-resourced as some other agencies, its powers are such that an investigation can be much quicker and more effective. The investigation won't end in any criminal convictions but the information gathered under the wide powers of the Companies Act 1985 can be passed to other enforcement bodies as a near-completed case for criminal proceedings to follow if appropriate.

What is the CI?

The CI is part of the regulatory arm of the Insolvency Service.

Investigations are conducted under civil procedure and are, essentially, fact-finding exercises, so the Police and

Criminal Evidence Act (PACE) 1984 does not apply. CI's investigative powers are set out in Part XIV Companies Act (CA) 1985, a regime that many find unexpectedly draconian in comparison to that arising out of a criminal investigation, as will be explained below. It is worth noting that while the CI cannot conduct criminal investigations itself, it can refer its findings to another enforcement agency that does have the necessary powers.

When will the CI Investigate?

CI receives complaints from a wide range of sources: the public, Trading Standards, other regulators and other parts of the Insolvency Service. These complaints are assessed to decide whether an investigation is both in the public interest and the prospect of follow up action is likely. Generally, there must be reasonable grounds to suspect fraud, serious misconduct or material irregularity in a company's affairs for an investigation to be initiated.

The remit of the CI is quite clear – it will investigate a company if the following criteria are met:-

- There has been a complaint of corporate abuse, serious misconduct, fraud or general sharp practices;
- The target is a limited company or limited liability partnership (LLP);
- The target has a business address or addresses in England, Wales, Scotland or Northern Ireland; and
- The business is actively trading, or has ceased trading without going into formal insolvency proceedings.

There are also circumstances where the CI will not investigate and these include the following:-

- The business is a sole trader, partnership (without limited liability) or dissolved company;
- The business is already being investigated (including for criminal matters) and CI's involvement would provide no additional benefit;
- The only issue is non-payment of a debt, or a commercial dispute; the issue is internal to the

company, its management or shareholders and there is no wider public interest in investigating;

- The complaint is better dealt with by another public body; or
- The complaint is about the quality of goods or services, or a delay in supplying them.

A complaint made to the CI by an individual or a company will be assessed for risk, which will indicate how quickly an investigation should commence. Factors contributing to this risk can include more than one complaint against a particular target or the alleged fraud being of significant monetary value.

Once a complaint is made to the CI, the complainant can expect to receive an acknowledgement of it in writing. After this, there is likely to be no further contact with the complainant, who will be offered no updates, compensation or any other remedy by the CI. Following acknowledgement of a complaint, background research is undertaken to determine whether an investigation is warranted and if so, with what priority. The company that is the subject of the complaint will not be approached at this stage. In some circumstances, the CI may contact the complainant for further information. A decision is then taken as to whether an investigation should commence. The CI may decide that there is insufficient reason to investigate or there is no wider public interest.

What happens in an Investigation?

If an investigation is initiated, there are a range of powers in CA 1985 allowing the Secretary of State, or someone authorised by them, to enquire into the affairs of a company and any related matters. The CI is empowered to investigate on behalf of the Secretary of State. An enquiry will generally involve a request for information and explanation. It could also extend to a visit and forced entry to a premises without notice.

Section 447 details the powers available to the CI in an investigation:

- 1) The Secretary of State may give directions to a company requiring it:
 1. to produce such documents (or documents of such description) as may be specified in the directions; and
 2. to provide such information (or information of such description) as may be so specified.

- 2) The Secretary of State may authorise a person (an investigator) to require the company or any other person:
 1. to produce such documents (or documents of such description) as the investigator may specify; and
 2. to provide such information (or information of such description) as the investigator may specify.

An investigator can therefore request documents (in any form) and also a statement from any person. The CI can also make conditions that these requests be complied with at any time or place as they instruct. The powers under s447 provide that the production of a document does not affect any lien that a person has on the document and a ‘document’ includes any information recorded in any form. If the documentation is illegible or relies on specialist understanding then the investigator may impose a requirement that a legible form be provided or an explanation.

An investigation initiated without warning can be unsettling for individuals involved. Some simple measures can be taken to manage the investigation and maintain some control over disclosure. Any person receiving a request for documents or information is therefore entitled to ask the investigator to provide evidence of their authority, the production of which is provided for under subsection 4. The reasonableness of the CI’s request will then be considered, as will the time frame in which the request should be complied with.

Representations can be made to the CI or an appeal to the High Court lodged. If a requirement is not complied with then the CI will refer the case to the High Court. If the court is satisfied that a person failed without reasonable excuse to comply with a requirement of the CI, they will be dealt with as if they were guilty of contempt of court. As mentioned previously, these powers are far stricter than PACE, where a right to silence exists, allowing for non-self-incrimination and putting the burden of the investigation on the investigating authority.

The CI also has powers to enter and remain on company premises. Usually CI does not give a company any warning of an investigation before serving authority under s447 and requesting entry to the premises. Surprise is often essential to avoid giving the company the opportunity to remove or destroy records. The power to enter premises is provided in s448A. If it is considered that entry to a premises will materially assist in the exercise of the investigation then an

investigator may, at all reasonable times, require entry to relevant premises and remain there for such period as they think necessary. Any person who intentionally obstructs a person lawfully acting under these powers is guilty of an offence and is liable to pay a fine on conviction.

Care should therefore be taken, as in all regulatory investigations, to be co-operative with an investigation to minimise the risk of criminal sanctions or contempt proceedings.

For someone under investigation by the CI, an interview situation can be difficult. The interview is not governed by PACE, as this is not a criminal matter. However, failure to co-operate could result in contempt of court proceedings being brought. There are no safeguards allowing co-operation to be declined for fear of self-incrimination; again, failure to co-operate could lead to contempt proceedings and the company being wound up. However, s447A does contain some safeguards against self-incrimination because statements made by persons in compliance with a requirement under s447 may not be used against the person in any subsequent criminal proceedings.

There are certain protections provided to a company under investigation, including provisions at ss448-449. Immunity from legal liability for breach of contractual or other duties of confidence is provided to anyone volunteering information to the CI.

Immunity will only arise if the disclosure is:

- volunteered and not made in compliance with a requirement imposed under the CA 1985;
- relevant to the investigation;
- made in good faith and in the reasonable belief that it will assist the investigation (i.e. must not be a malicious complaint);
- not more than is reasonably necessary for the purpose of assisting the investigation; and
- not in breach of a statutory duty of confidence (e.g. the Data Protection Act 1998) or of legal professional privilege.

No disclosure should be made by a person carrying on the business of banking or by a lawyer if an obligation of confidence is owed in that capacity.

Possible Outcomes of an Investigation

The aim of the CI is to stop disreputable companies from being able to trade. Once a company has been investigated, the CI must determine whether it is being operated contrary to public interest (e.g. in a manner

likely to cause harm, detriment or loss to third-party consumers, investors or traders). In those circumstances, an application can be made to the High Court to make a winding up order, which the court will make if it is of the opinion that it is just and equitable to do so. The petition to wind up the company in the public interest is provided for under the provisions of s124A of the Insolvency Act (IA) 1986.

If it is deemed that the behaviour of the directors is such that they appear 'unfit' to act in that role, the CI can additionally apply to the court for them to be disqualified from acting as company directors.

In addition to these civil remedies, any information obtained by the CI may be passed to BERR prosecution lawyers, the police or other investigatory agencies, with a view to them carrying out a criminal investigation, if it appears that a criminal offence has been committed by the company or its officers.

If the CI considers that breaches can be remedied, it may simply send out a warning letter to the company concerned.

It is also possible that the investigation shows the original concerns to be unfounded and no other concerns have arisen, in which case no further action will be taken.

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THE LONELINESS OF THE REGULATORY PROSECUTOR - A guide to the practical pitfalls of prosecuting the well armoured respondent

Any conversation with those who regularly prosecute for disparate regulatory bodies more often than not, results in some tale of horror. The prosecutor, usually supported by a solitary solicitor, is confronted with a respondent who is well resourced enough to deploy an array of lawyers, who come and go in depleting or increasing numbers, delivering drafts of Skeletons and a plethora of applications.

The loneliness of the regulatory prosecutor is therefore well attested in anecdotal evidence. Not all of the applications and submissions which are made on behalf of the respondent are well founded- and some of these applications have the ring of trial wrecking exercises. In a trial in which the inequality of arms becomes apparent for the lonely prosecutor, and where the armour of the respondent consists in seemingly

limitless support, it bodes well to examine some of the pitfalls.

Disclosure

The first area of discord is likely to be the extent of the disclosure required in pre-trial disclosure. It is axiomatic that the first test in disclosure is one of relevance. This is of critical importance, as usually any regulator who has seized documents will be in possession of a mass of documentation, not all of which will be relevant. If however, a party is intent on a trial wrecking exercise, there is no better way to achieve it than by a call for disclosure which increases in clamour as the trial date approaches.

How then to deal with these calls? The initial response, in writing, should be to set out the fact that the regulator has applied the test of relevance and the relevant law on which the regulator relies. Regulatory proceedings are neither purely civil nor criminal, but quasi-criminal proceedings in the sense that the burden and standard of proof may be the same in regulatory proceedings as they are in criminal proceedings. Thus, the regulatory prosecutor bears not only the burden of proving the case he brings but, in tribunals in which the criminal standard is applied¹ proving it to a standard so that the adjudicating body will be sure. However, since the regulator is discharging a public function, the better disclosure test to be applied in regulatory proceedings is that applied in criminal cases

The statutory duty for the prosecutor in criminal proceedings to disclose material is set out in S.3 of the Criminal Procedure and Investigations Act 1996 and consists in disclosure of material “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”. Whilst the original provisions under this Act for secondary disclosure have been repealed, S. 7 specifically provides that there is a continuing duty to review the issue of disclosure at “any given time”. Because the provisions of S.3 may apply to any material which the prosecutor has seen in the course of his investigations, it is tempting to think that the disclosure which has to be made is vast. However, the test of relevance has always remained uppermost. Even in the case where the right to a fair trial under the European Convention was brought into play to argue for more extensive disclosure, the Court of Appeal have stated that disclosure being tied to the issue of relevance to guilt or innocence does not violate the Convention. (See **R –v- M. (Michael) unreported**,

¹ The criminal standard is still applied in proceedings brought by the SRA and the BSB but the civil standard is applied in other spheres – e.g. the GMC

November 4, 2003 CA [2003] EWCA Crim. 3764). Cases in which it has been decided that the non-disclosure may result in an unfair trial also apply stringent tests; disclosure should be made where the material may prove the defendant’s innocence or avoid a miscarriage of justice (See **R –v- Keane** 99 Cr. App. R. 1, CA and **R –v- Brown (W)**. [1995] 1 Cr. App. R. 191, CA) and where the material will assist the defendant in putting forward a tenable case in the “the best possible light” (See **R –v- Agar** 90 Cr. App. R. 318).

Any letter refusing to provide disclosure after the initial request should also invite the respondent’s representatives to make a formal application to the court, specifying the basis for the disclosure sought. The reason for so doing, apart from the obvious need for the case for disclosure to be clearly articulated, is that there is then a paper trail for the trial court if the application for disclosure is made during the actual trial itself. Where the resources of the regulator and the regulated are uneven, a late application for disclosure may have the effect of trial wrecking. Thus, the paper trail answers, in short form, the point that any application for disclosure should have been made at the preliminary stage.

Strike Out

At the next stage, the well-resourced respondent may submit that a case has not been made out on a *prima facie* basis. As a matter of practicality and in order to avoid trial wrecking at a later stage, it may well be advisable to invite a strike out application, so that this application can be dealt with at a discrete preliminary stage. The disadvantage for the regulator of not having such an application dealt with before the trial commences is that the inequality of arms at trial may create unnecessary stresses and strains. If it is to be said that the regulator has insufficient evidence to make out even a preliminary case then this is a matter which should be argued at the outset.

Otherwise, to await the trial, itself, is to allow the prosecution to be ambushed with a multitude of applications which are simultaneous. The applications may be rendered more numerous by a further rolled up application, loosely called an Abuse of Process application. Whichever side the lawyer may be on, it is always worth checking what jurisdiction there is (if any) for the Tribunal to hear a strike out application on its merits. Summary determination of cases on their merits requires a provision within the rules of the relevant tribunal. Many Tribunals, unlike the High Court, do not have a summary jurisdiction.

Abuse of Process

Generally speaking all tribunals have an inherent power to prevent abuse of their own process. There are two broad categories where an abuse of process application may be made; firstly, in cases where it will be impossible for the prosecuted person to have a fair trial and secondly, where there has been some irregularity which has tainted the trial process. In the regulatory context, the way in which the abuse of process argument has been deployed has been to re-open the disclosure issue on the basis that some non-disclosure leads to an inference that there is a fundamental irregularity which so taints the trial process that only a stay of proceedings will result in fairness. However, this attempt at resuscitating a stale argument has been recognised by the Court of Appeal for the trial wrecking exercise it really is. In R-v- Childs The Times November 30, 2002, the court observed: “Abuse of process arguments distort the trial process where they are not warranted; they should not be put forward as mere embroidery of a case that could be advanced equally well without them, and if they are advanced without justification the court should make it clear that such conduct is inappropriate and take appropriate steps where court time has been wasted”.

Additionally, the power of the court to stay criminal proceedings for an abuse of process is sparingly exercised. A stay will not normally be granted where the trial process itself is equipped to deal with the matters complained of, for example where issues arise as to improper obtaining of evidence or tampering with evidence. Judicial control on the admissibility of such evidence is a matter which can deal with such situations within the trial process itself. The test whether there ought to be a stay on the grounds of fair trial usually involves a finding by the court of bad faith on the part of the prosecutor or at the very least “serious misbehaviour”.

In respect of cases where a stay of proceedings has been granted in criminal trials, on the grounds that it is necessary for preserving the integrity of the justice system, examples exist in cases where there has been delay in bringing the prosecution (although in R-v- Sawoniuk (2000) 2 Cr App R. 220 CA, a delay of 56 years was apparently insufficient to render a trial unfair- although this would not pass muster under the Human Rights Act because of Article 6); and proceeding to a third re-trial in circumstances where a defendant had been held in custody whilst his trials were pending. Further, where the abuse application is one based on delay, the court must consider to what extent the delay is attributable to prosecution

inefficiency. If the prosecutorial delay is substantial then, if the defendant has been prejudiced by the delay, there may be a stay for abuse of process.

Other examples of abuse applications in criminal trials involve cases in which there has been adverse publicity affecting the fairness of the trial, situations which are akin to the old doctrine of *autrefois acquit* (before the statutory reform of the doctrine), cases where the prosecution has held out a promise not to proceed, cases where there has been a manipulation of court process or where the prosecutor may be contributing to the commission of the offence, abuse of executive power and misconduct by the prosecutor. However, examination of these cases all disclose that there is a high threshold which has to be passed before there will be a stay granted for abuse of process.

On the practical side, it is very likely that the factual matrix for such an application is readily identifiable. If it is to be treated seriously, then it should be argued as a preliminary matter, rather than be used as an ambush weapon when the trial has commenced with all its attendant pressures. A useful way to proceed therefore is to attempt to identify at an early stage the issues between the parties, so that if there is to be an issue, matters can be argued at a preliminary stage. If intensification of these issues is not undertaken at an early stage, the regulator is at risk of an ambush application, with little or no notice.

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LEGAL UPDATE

***Ashiq v. Bar Standards Board* 27th March 2013 PC 2010/0185/A**

A, a barrister, was charged with professional misconduct in failing to pay a judgment debt against him. A claimed to have sent a cheque in settlement. A gave evidence but refused to produce his bank documents, and the tribunal found the charge proved. A’s primary submission on appeal was that tribunal had in effect reversed the burden of proof by requiring A to prove his innocence. Held, appeal dismissed. A’s duty under Code of Conduct was to respond promptly to any request from the Bar Standards Board. “Response” plainly means to respond positively, not by way of a refusal. The evidence before the tribunal was thus an unjustified refusal. It was for the tribunal to consider what inference they should draw from the refusal. That was not a reversal of the burden of proof.

***R (May) v. Chartered Institute of Management Accountants* [2013] EWHC 1574 (Admin)**

M, a member of the governing council of CIMA, received a letter from the chief executive of CIMA headed “Strictly Private & Confidential” in response to an email circulated by her to members of the council. The chief executive’s letter recorded that M’s actions were wholly inappropriate and asked her to desist forthwith from sending emails of this nature. M sent the chief executive’s letter onto others and was found guilty of professional misconduct and a breach of CIMA’s Code of Ethics in failing to respect confidentiality in relation to the dissemination of the chief executive’s letter. In allowing M’s appeal the court (Stadlen J) held that the language of the Code of Conduct meant that it was a necessary precondition of a breach of duty that there should be identified confidential information acquired by M as a result of her professional relationship with the chief executive. In the instant case this was lacking.

***Rahman v. Bar Standards Board* [2013] All ER(D) 156 (Feb)**

R, a barrister, pleaded guilty in June 2010 to two charges of professional misconduct, and was suspended for 18 months. He filed notice of appeal in relation to sentence in July 2010, but the appeal did not come on for hearing until February 2013. The court considered the effect of the delay. Had the sentence taken effect straightaway, the appellant would have been back at work in January or February 2012. However, the proceedings had cast a shadow over him for the past two-and-a-half years. The delay had been in no sense the fault of either the appellant or the respondent. Whatever the reason, it would be wholly unfair to ignore it. Accordingly the sentence would be reduced to three months’ suspension.

***Perry v. Nursing and Midwifery Council* [2013] EWCA Civ 145**

P, a registered mental health nurse, suspended by panel following allegations that he had acted inappropriately towards a patient. P accepted some of the allegations against him and that the panel could properly have imposed a conditions of practice order. P gave evidence to panel. On appeal, High Court ordered termination of suspension subject to NMC convening a panel to consider the imposition of suitable conditions of practice: [2012] EWHC 2275 (Admin). Court of Appeal dismissing P’s appeal that fairness required that registrant must be given an opportunity to give evidence as to the substance of the allegations before the tribunal. Held, that Article 6 was engaged by the

hearing before the Investigation Committee; that the committee must permit both parties to make their submissions on the need for an interim order and its nature and its terms; that the committee must consider the nature of the evidence on which the allegation made against the registrant is based; that it is entitled to discount evidence that is inconsistent with objective or undisputed evidence or which is manifestly unreliable; that it may receive and assess evidence on the effect of an interim order on the registrant, and the registrant is entitled to give evidence on this; and that the registrant may also give evidence to establish that the allegation is manifestly unfounded or manifestly exaggerated, but the committee is not otherwise required to hear his evidence as to whether or not the substantive allegation is or is not well-founded. That is not the issue on the application for an interim order; per Sir Stanley Burnton at [19], [31]-[35].

***Houshian v. General Medical Council* [2012] EWHC 3458 (QB)**

H, a consultant orthopaedic surgeon, sought the termination of an interim suspension order. The central allegation arose from a finding made against him by the Employment Tribunal that he had forged documents in relation to his claim for unfair dismissal against Lewisham NHS Trust. Interim order made to protect the reputation of the profession and maintain public confidence. On appeal, the importance of proportionality was stressed. A suspension has potentially three important consequences for a practitioner: (1) its impact upon the person’s right to earn a living: in this case the applicant’s pre-suspension salary was in the region of £150,000; (2) the obvious detriment to him in terms of his reputation; and (3) it deprives the practitioner of showing that during the relevant period he has conducted himself well and competently. Held, that the panel did not expressly focus upon the likelihood of *serious* damage to the public interest. It is not sufficient simply to reiterate the seriousness of the allegations faced by the applicant. It is necessary to consider the degree of risk and the likelihood of *serious* damage to the public confidence in the profession and hence the reputation of the profession. Coupled with the delay the court terminated the interim suspension order.

***R (Rhodes) v. Police and Crime Commissioner for Lincolnshire* [2013] EWHC 1009 (Admin)**

R, Temporary Chief Constable of Lincolnshire, was suspended by the Police and Crime Commissioner pursuant to section 38 of the Police Reform and Social Responsibility Act 2011 which provides that the police and crime commissioner for a police area may suspend

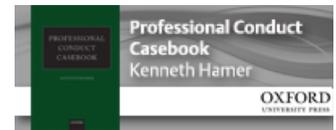
from duty the chief constable of the police force for that area. Regulation 10 of the Police (Conduct Code) Regulations 2012 provides for suspension only where “the public interest requires” it. That carries the implication that the public interest leaves no other course open. When considering the test to be applied the court must bear in mind that the PCC has been appointed by statute to be the primary decision-maker and has been charged with considering the public interest. The court must not interfere simply because it thinks it would have made a different decision if it had been the primary decision-maker. R’s application challenging the defendant’s decision was a rationality challenge and the *Wednesbury* unreasonableness test sets the bar high. R must show that the defendant’s decision was irrational or perverse. Held, the decision would be quashed. It is a remarkable and disturbing feature of the case that there is no mention of R’s character or reputation anywhere in the decision documents. This was a serious omission and R’s 27 years of unblemished service should have been weighed in the scales when considering the likelihood that he had engaged in a dishonest enterprise on the basis of a letter and an attendance note.

R (I) v. General Medical Council [2013] EWHC 522 (Admin)

Held, that the panel’s decision in relation to voluntary erasure and a stay should be quashed. Doctor I, a paediatrician, was 67 years of age suffering with mental health problems. In July 2012 his registration was suspended by the interim orders panel. At the outset of the fitness to practise hearing, the question of voluntary erasure was before the panel to be considered, alternatively whether the proceedings should be stayed as the health of I was such that he was unable to participate in any hearing. The medical evidence was central to the decision-making process of the panel. The panel had evidence from I’s treating psychiatrist and two experts and there was no discernible disagreement between any of the experts. Although I had cognitive capacity his depressive condition meant he lacked any effective or meaningful participation in the proceedings. Held, a panel has a difficult balancing exercise to perform when faced with an application for voluntary erasure in these circumstances, and on review a court should be reluctant to interfere in the absence of any clear indication that the panel has misdirected itself or considered irrelevant matters. Issue as to what extent the interest of complainants, or the public interest, is a relevant factor. In the instant case, there was an identifiable risk of suicide or serious self-harm, and a conclusion that the public interest outweighed the latter

required far more cogent justification than that which was given by the panel.

**Kenneth Hamer
 Henderson Chambers**



EXTRACT OF SPEECH BY KENNETH HAMER AT THE BOOK LAUNCH OF PROFESSIONAL CONDUCT CASEBOOK 18 APRIL 2013

A few days ago, I was asked which eight cases on professional conduct I would take with me to read if I were on a desert island. If I was on a desert island I am not certain I would want any judgments to read. But here briefly is my selection.

1. First, I think I would have to choose something on misconduct. I would choose *Meadow v General Medical Council*, where Auld LJ said that misconduct following amendment in 2003 to the Medical Act, which now recognizes misconduct as a separate category of impairment, did not signify a lower threshold for what previously was covered by serious professional misconduct. In that way *Meadow* follows *Roylance v. GMC*, and before that stretching back to the Court of Appeal’s judgment in 1894 in *Allinson v. General Council of Medical Education and Registration*, where Lord Esher gave guidance on what might constitute “infamous conduct in a professional respect” under the Medical Act of 1858.
2. Impairment. To me the judgment of Mrs Justice Cox in the *Grant* case in 2011 stands out as significant. This was the case, you may recall, where the conduct committee of the NMC found the registrant midwife was guilty of misconduct in a number of respects including relating to the care of a baby who died and another who was born premature but whose fitness to practise was not currently impaired. The critical part of the judgment is where after reviewing *Cohen*, *Zygmunt*, *Azzam* and *Yeong*, Mrs Justice Cox said it was essential, when deciding whether fitness to practice was currently impaired, not to lose sight of the need to protect the public, and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession. She added that a panel

should consider not only whether the practitioner continued to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made.

3. The absent practitioner, requests for an adjournment, and the unrepresented practitioner all call for the most careful handling whether one is the case presenter, a panellist or the legal assessor. The case I would take here to this desert island, if I had to, would I think be *Yusuf v. Royal Pharmaceutical Society of Great Britain*. In that case, Mr Justice Munby, as he then was, following the criminal cases of *Heyward* and *Jones*, and *Tait v. The Royal College of Veterinary Surgeons* identified, at least in that case, that the test was whether the practitioner had voluntarily chosen not to attend the hearing. The decision also shows the need to ensure that the case of the absent or unrepresented practitioner is put and tested to an appropriate extent, but it is not the function of the committee to probe or cross-examine the account of a witness in the way an advocate for the practitioner might. On this, the question ultimately is whether there is any unfairness in the process adopted by the committee.
4. Health cases and deficient performance cases raise their own problems. *Calhaem* and *Remedy* are both important cases on deficient performance. Both seek to identify the respects in which deficient performance or incompetence differs from misconduct. This is an area where perhaps more thought could be given to ensure that only the more serious cases have the label attached to them of misconduct, which to a professional person inevitably carries a stigma. Often we are restricted by the need for a lengthy and expensive assessment to be carried out in order to charge deficient performance when in truth the conduct concerned is little more than inadequate performance or poor judgment by the doctor or nurse concerned, and its gravity does not justify charging it as misconduct.
5. Interim Orders. The judgment of Mr Justice Davis, as he then was, in *Sheikh v. General Dental Council* reminds one of the high threshold test that is required to be satisfied before the making of an interim order. In my experience panels take their task seriously and on many occasions the need for an interim order is not made out. Interim orders were introduced following the Shipman inquiry as a protective measure pending the substantive hearing of an allegation against the practitioner. But like Topsy, they have grown in alarming numbers. An

unintended consequence is that the period of 18 months intended as the optimum period of time between the making of any interim order and the substantive hearing is now the norm with the inevitable consequence that many applications are routinely made to the High Court for one - or more - extensions of time in circumstances where either through lack of resources or otherwise the case has not been got on.

6. For my sixth choice I move to a very different topic, namely that of registration. There is a series of little known cases – they are in the book – and I choose *Jideofo v. Law Society* in 2007, where Sir Anthony Clarke MR set out the relevant principles on an appeal against a decision refusing registration. The learned judge said that the same underlying principles in *Bolton v. Law Society* that apply to post-admission may often apply to pre-admission, and it would be irrational to hold that a different test applies where matters come to the attention of a regulatory body pre-admission from the case in which those same matters come to its attention post-admission.
7. On this desert island if I am going to read about misconduct and impairment, perhaps I should also have something on sanction. There are so many cases it is difficult to choose just one. There are the important principles in *Bolton v. Law Society* to consider. There are cases such as *Marinovich* which stress the public interest and the need to maintain confidence in the profession, and there are cases such as *Raschid v. GMC* and *Salsbury v. Law Society* which emphasis that absent any error of law, the High Court should pay respect to the sentencing decision of the tribunal. There is a raft of dishonesty cases on sanction and there are cases dealing separately with suspension, conditions of practice orders, and for some regulators fines and reprimands. But if I were restricted to one case on sanction, I would take with me the decision of Mr Justice Collins in *Giele v. GMC*, the case of the doctor found guilty of SPM based on a relatively short sexual relationship with a patient. The case although decided in 2005 reviews many of the principles that remain in force today and whilst recognising the appropriateness of erasure on the one hand, and that erasure might have been merited in this case, the learned judge drew attention also to the fact that the maintenance of public confidence should not outweigh the interests of the individual doctor when it comes to sanction, and the existence of a public interest in not ending the career of a competent doctor may also play a part.

8. So I come to my final choice. It is a case that has not yet been heard. It is the case in which the judge says that this book *Professional Conduct Casebook* has been of help to the Court. That, after all, is what we are all about.

Kenneth Hamer
Henderson Chambers

ARDL ANNUAL DINNER 2013

The annual ARDL dinner on 16 May 2013 was a great success, with approximately 360 members and their guests enjoying the impressive surroundings of the River Room at the Savoy Hotel. Murray Rosen QC gave a light-hearted yet thought-provoking after-dinner speech on the future of judicial review applications; and ARDL took the opportunity to say good-bye and a huge “thank you” to Irene Rumble, who has worked extremely hard as ARDL’s administrative assistant for many years. She will be greatly missed and we wish her well.

FORTHCOMING EVENTS

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

Please check the ARDL website for further details.

REQUEST FOR COMMENTS AND CONTRIBUTORS

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

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