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## FORTHCOMING EVENTS

Tickets are now available for our Manchester seminar on 3 March 2015: The trials and tribulations of arm's length adjudication. Please visit <https://www.eventbrite.co.uk/e/manchester-seminar-the-trials-and-tribulations-of-arms-length-adjudication-tickets-15635735907> to book your space.

## REGULATION AND THE HUMAN RIGHTS ACT - RICHARD CLAYTON QC<sup>1</sup>

The impact of the Human Rights Act (the HRA) on regulatory work has been significant. In no other field of practice has Article 6 has played such a large role. Article 8 has been invoked rather less frequently and to less effect, whereas implications of the right to property under Article 1 Protocol 1 on regulatory activity has been marginal.

<sup>1</sup> Barrister, 4-5 Grays' Inn Square. Richard is the joint author of Clayton and Tomlinson *The Law of Human Rights* (OUP, 2nd edn). This based on a seminar given on 4 February 2014 and the full paper is available on the ARDL website.

## THE SCOPE AND APPLICATION OF ARTICLE 6

Article 6 creates the right to a fair trial and states applies to proceedings which constitute a determination of a 'criminal charge' or of the 'civil rights and obligations' of parties to proceedings. The Convention provides no definition of 'criminal charge', 'civil rights and obligations' or 'determination' and all these terms have been interpreted as having an 'autonomous meaning'.

Article 6(1)(2)(3) creates some specific express rights in relation to 'criminal charges', whereas the rights which arise in relation to the 'determination of civil rights and obligations' are contained in Article 6(1). Fair trial rights can be divided into two categories. Express rights are 'absolute'; it will always be unfair if a person is deprived of them. However, implied rights to eg the right of access to court<sup>2</sup> or the right to equality of arms<sup>3</sup> require the fairness of the proceedings as a whole to be considered, and to balance an individual's interests with society as a whole.

In *Engel v Netherlands* the ECtHR set out three criteria for a 'criminal charge':<sup>4</sup>

- the categorization of the allegation in domestic law;
- whether the offence applies to a specific group or is of a generally binding character;
- the severity of the penalty attached to it.

The distinguishing feature of a criminal charge is that it may lead to punishment.<sup>5</sup> In *Wickramsinghe v United Kingdom* a doctor disciplined by the GMC was not subject to an Article 6 criminal charge.<sup>6</sup> Nor

<sup>2</sup> See Clayton and Tomlinson *The Law of Human Rights* (2<sup>nd</sup> edn, OUP) paras 11.372 ff

<sup>3</sup> Clayton and Tomlinson paras 11.430 ff

<sup>4</sup> (1976) 1 EHRR 647; *Oztürk v Germany* (1984) 6 EHRR 409; *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165; *Weber v Switzerland* (1990) 12 EHRR 508.

<sup>5</sup> *R(Smith v Parole Board)*, [2005] 1 WLR 350 per Lord Bingham

<sup>6</sup> [1998] EHRLR 338; see also in relation to solicitors *Brown v United Kingdom* Application Number 38644/97.

were disciplinary proceedings brought by the Securities and Futures Authority criminal.<sup>7</sup>

Article 6(1) also applies to the determination of civil rights and obligations. Disciplinary proceedings do not ordinarily involve disputes over civil rights and obligations,<sup>8</sup> but the right to continue in professional practice is a ‘civil right’.<sup>9</sup> Article 6(1) applies to eg a temporary suspension of a doctor from practice<sup>10</sup> or disbaring a barrister,<sup>11</sup> but will not where the professional is not at risk of being prevented from practising,<sup>12</sup> like a reprimand to a solicitor<sup>13</sup> or a doctor.<sup>14</sup>

## THE INVESTIGATION PROCESS

In *General Dental Council v Rimmer* the PCT had alleged that a dentist had retrospectively amended computer records.<sup>15</sup> The GDC wanted to copy and interrogate computer hard drives. The Court may order confidential disclosure if sufficient justification exists under Article 8, by assessing competing public interests in confidential records against the public interest in the effective pursuit of professional disciplinary proceedings.<sup>16</sup>

Article 6 does not prevent public authorities from requiring regulated persons to co-operate with disciplinary inquiries, and in *Saunders v United Kingdom* Article 6 did not prohibit DTI inspectors from exercising their statutory rights to question individuals.<sup>17</sup> But *R v Hertfordshire County Council ex p Environmental Industries* confirms Article 6(1) is firmly anchored to the fairness of the trial, not with extrajudicial inquiries;<sup>18</sup> and the use of compelled evidence in criminal proceedings is prohibited under Sch 3 to the Youth Justice and Criminal Evidence Act 1999.

## THE TRIBUNAL AND ARTICLE 6

<sup>7</sup> *R v Securities and Futures Authority Ltd, ex p Fleurose* [2001] IRLR 764.

<sup>8</sup> *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 para 25.

<sup>9</sup> *Ibid* para 28; *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 para 48.

<sup>10</sup> *Albert and Le Compte v Belgium* above para 28.

<sup>11</sup> *Ginikanwa v United Kingdom* (1988) 55 DR 251.

<sup>12</sup> *X v United Kingdom* (1983) 6 EHRR 583, EComm HR (barrister reprimanded, Art 6 inapplicable).

<sup>13</sup> *Thompson v Law Society* [2004] 1 WLR 2522

<sup>14</sup> *R v General Medical Council ex p Nicolaidis* (2001) EWHC Admin 625.

<sup>15</sup> [2010] EWHC 1049 (Admin)

<sup>16</sup> See *A Health Authority v X* [2010] EWCA Civ 2014 para 19

<sup>17</sup> (1996) 23 EHRR 313

<sup>18</sup> [2000] 2 AC 412 at 423

Article 6(1) requires a hearing before an ‘*independent and impartial*’ tribunal. Ensuring independence can take many forms, depending on the nature of the regulator, and may include:

- tribunal members drawn from outside the profession;
- Lay members being in a majority;
- Appointing tribunal members from outside the profession.
- Security of tenure. Note that in the Scottish sheriff’s case of *Starrs v Ruxton* the appointment of temporary sheriffs for 12 months was insufficient to guarantee independence.<sup>19</sup>

In *R v Gough* the House of Lords decided that the correct test for bias or impartiality is whether there was a real danger of bias.<sup>20</sup> However, *Re Medicaments and Related Classes of Goods (No. 2)* suggested that Article 6 required a ‘*modest adjustment*’ to the test in *Gough*, the court should ask whether ‘*a fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased,*’<sup>21</sup> which was approved in *Porter v Magill*.<sup>22</sup>

1. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally,<sup>23</sup> without any particular, specialised knowledge or experience to make a dispassionate judgment.<sup>24</sup> The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.<sup>25</sup> A fair-minded and informed observer was described in *Helow v Secretary of State for the Home Department*;<sup>26</sup> he is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument, will take the trouble to inform herself on all matters that are relevant before taking a view and will look at the issues in context.

<sup>19</sup> 2000 SLT 42 approved by the Privy Council in *Millar v Dixon* [2002] 1 WLR 1615.

<sup>20</sup> [1993] AC 646

<sup>21</sup> *Gillies v Secretary of State for Work and Pensions* [2000] 1 WLR 700. [2002] 2 AC 357.

<sup>22</sup> [2006] 1 WLR 781 at para 17 per Lord Hope

<sup>23</sup> *Belize Bank Limited v The Attorney General of Belize* [2011] UKPC 36 para 39 per Lord Kerr

<sup>24</sup> *Prince Jefri v State of Brunei* [2007] UKPC 62, para 16 per Lord

Bingham

<sup>25</sup> [2008] 1 WLR 2416

## PRE-TRIAL ISSUES

Article 6(1) requires that a hearing determining civil rights and obligations or a criminal charge must be held within a reasonable time.<sup>27</sup> *Dyer v Watson* emphasised that the threshold for a breach is a high one,<sup>28</sup> unless that period gives grounds for real concern. Three main areas call for particular inquiry: the complexity of the case, the conduct of the defendant and manner in which the case has been dealt with by the administrative and judicial authorities. However, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

In *Perry v Nursing and Midwifery Council*<sup>29</sup> the Court of Appeal considered *Micallef v Malta*,<sup>30</sup> where the Grand Chamber decided that Article 6 could apply to an interim injunction, although it could not ‘*determine*’ the applicant’s civil rights. A nurse argued a decision to suspend his registration determined his civil rights under Article 6. The Court of Appeal accepted they were engaged, but rejected the submission that fairness required an opportunity for the nurse to give evidence for the investigating committee to decide the merits of the allegations, because this was inconsistent with the statutory scheme.

## THE HEARING

In *White v Nursing and Midwifery Council* the panel admitted 3 anonymous letters into evidence.<sup>31</sup> However, the apparently permissive wording of the practice rules was constrained by the requirements of fairness and the opportunity to test the evidence, that hearsay evidence could not be tested in cross-examination and the charges based on the anonymous evidence were quashed.

In *R(Adesina) v Nursing and Midwifery Council* an appeal against a disciplinary decision to the High Court which was made outside the statutory time limit of 28 days.<sup>32</sup> However, the Supreme Court in *Pomieczowski v Poland* had said that the right of access to the Court under Article 6 could override statutory time limits.<sup>33</sup> However, if Article 6 and section 3 of the HRA requires the time limit to be read

<sup>27</sup> See eg *Okeke v Nursing and Midwifery Council* [2013] EWHC 714 (Admin)

<sup>28</sup> [2004] 1 AC 379, para 52; (and see eg *Department of Work and Pensions v Costello* [2006] EWHC 1156 (Admin)).

<sup>29</sup> [2013] 1 WLR 3423

<sup>30</sup> (2009) 50 EHRR 92

<sup>31</sup> [2014] EWHC 520 (Admin)

<sup>32</sup> [2013] 1 WLR 3156

<sup>33</sup> [2012] 1 WLR 1604

down, it must be to the minimum extent necessary to secure Convention compliance. A discretion must only arise “*in exceptional circumstances*” and where the appellant “*personally has done all he can to bring [the appeal] timeously*”,<sup>34</sup> and that the discretion would arise in only a very small number of cases.

**Richard Clayton QC, 4-5 Gray's Inn Square**

## LEGALLY QUALIFIED CHAIRS

### Legally Qualified Chairs Without Legal Assessors

The Department of Health has recently published its Consultation Response Report, following the consultation about proposed changes to the way in which the GMC, as the Medical Practitioners Tribunal Service (MPTS), makes decisions about doctors’ fitness to practise. Included in their latest proposals are:

- Limiting the MPTS’ discretion to not appoint a legal assessor to only those circumstances where the chair of the panel is legally qualified.
- Introducing a rule making power to require the parties to be informed of certain advice provided by a legally qualified chair to the other tribunal members, including while they are considering issues in private, in line with that applicable to legal assessors.
- Specifying the legal qualifications and experience required for a legally qualified chair to be the same as required for a legal assessor as determined by the MPTS.

The proposal which interests me is that the legally qualified chair might be required to inform the parties of “certain advice” provided to the other tribunal members. It appears to be proposed to make one member of a three person tribunal breach the confidentiality of the tribunal’s deliberations. There appears to be some suspicion that legally qualified chairs might think of a legal argument “while they are considering issues in private”, and then persuade the other members of the tribunal to decide the case according to that argument, without giving the parties an opportunity to make submissions on that argument.

Many tribunals are already chaired by legally qualified chairs sitting with professional or lay members. I do not think it has ever been suggested that Employment

<sup>34</sup> Above, para 39

Judges should disclose the contents of the tribunal's deliberations. Judges sitting with magistrates in the Crown Court hear appeals against Magistrates Court decisions without informing the parties of "certain advice" given by the Judge to the other members of the court. Why has this never caused a problem? Surely it is because a legally qualified chair can be expected to be aware of the rules of natural justice, including the principle ("*audi alteram partem*") that the tribunal must hear what the parties have to say before making a decision? If the chair thinks of a relevant legal question, at whatever stage of the proceedings, he or she will immediately realise that the hearing must be convened so that the parties can make representations. Certainly, that is the practice of everybody I know who sits as a legally qualified chair, judge or arbitrator. As for routine legal considerations, such as the burden and standard of proof, they are invariably covered in the judgment or determination.

This proposal appears to arise from a misunderstanding of the position of the legal assessor. It is sometimes said that if a tribunal has a legally qualified chair, then the chair is doing the job of two people: the chair, to chair the hearing, and the legal assessor, to give legal advice to the tribunal. But the two functions are quite different. The chair does not give legal advice: his or her legal qualification may make it easier to understand legal arguments that are put forward by the parties, but the chair is just one member of a tribunal which has to make all decisions of law and of fact. The legal assessor is not a member of the tribunal, and the legal assessor's function is to give legal advice, when asked, and to intervene if it appears that a mistake of law may be going to be made by the tribunal. If there is a legally qualified chair, it is unlikely that a legal assessor will be required. The chair will be performing one function only, that of the chair, not that of the legal assessor.

The legal position was considered by the Privy Council in Re Chien Sing Shou [1967] 1 WLR 1155 (PC) which concerned the Architects Disciplinary Board of Hong Kong. The tribunal comprised three architects, a representative of the Building Authority, who acted as chair, and a legal adviser who "shall have the conduct of the inquiry". One of the applicant's grounds, on an application for judicial review to quash the Board's decision was:

*"The board failed to hold a " due inquiry " in that in breach of the rules of natural justice the legal adviser (who had the conduct of the inquiry) did not give, within the hearing of the parties, any or*

*sufficient legal advice to the board of which he was a member, on the many points of law arising in the course of the said inquiry, or in such a manner that his advice could form part of the record or be ascertained from the record for the purposes of the parties either at the hearing before the board, or of appeal."*

In their judgment, the Privy Council pointed out that the legal adviser was a full member of the board and said:

*"If some special point is raised the legal adviser will doubtless give the parties or their legal representatives every opportunity to make submissions in regard to it. After deliberation the legal adviser will doubtless state what conclusion the board has reached in regard to it. If in the course of deliberation some new point emerged with which the parties or their representatives had not had opportunity to deal such opportunity would doubtless be given them. At all times however the legal adviser occupies the position of being a full member of a body charged with the duty of acting judicially in making due inquiry. There was no obligation on him to make a summing up of the case to his colleagues on the board in the presence of the parties."*

The Privy Council went on to contrast the position of the legal adviser to the Architects Disciplinary Board with that of the legal adviser to the Medical Board of Hong Kong, who was not a member of the tribunal.

This decision helps to distinguish two different principles, which are at risk of getting confused:

- (1) The tribunal must ensure that any legal arguments upon which it might act are raised with the parties and discussed in open session, and then the decisions which the tribunal has made on those legal arguments should

form part of the tribunal's decision.

- (2) Where a legal assessor gives advice to the tribunal, that advice should be reported to the parties so that they can make representations upon it.

It may be suggested that it is not a bad idea to reinforce these principles by a rule that a legally qualified chair must inform the parties of "certain advice". However, the practical working of such a rule could be very complicated. How do you define the "certain advice"? In the event of an appeal, should there be a transcript of the "certain advice" given to the tribunal "while they are considering issues in private", which the Court could consult? The Privy Council came close to suggesting this in *Walker v GMC* (No. 94 of 2002) [2002] UKPC 57 where there was an allegation that a legal assessor had given advice privately to the Professional Conduct Committee. What would be the knock-on effect of such a rule for other tribunals which have legally qualified chairs?

### Douglas Readings, St Phillips Commercial Chambers

#### **BRETT –V- SRA**

***Brett v SRA* [2014] EWHC 2974, Wilkie J & Thomas LCJ (Divisional Court).**

**In a fascinating judgment about the unmasking of the blogger 'Nightjack' by *The Times*, the Divisional Court considered the relationship between a lawyer's duty to their client and their overriding duty to the court and whether knowingly misleading the court can ever be anything other than dishonest (answer: possibly, but it is not easy to say when or how). In addition, the Lord Chief Justice summarised a lawyer's duty to the court generally and gave an implicit warning about the reasonableness of costs incurred by a regulator.**

#### *Facts*

Until 2009, H published a blog chronicling his life as a police officer under the pseudonym 'Nightjack'. The blog won the Orwell prize for journalism in April 2009. B was the Legal Manager for Times Newspapers Limited (TNL) for over 30 years.

In May 2009, B's colleague F told B that he had accessed H's private email account and had identified him as Nightjack. B told F that unless the story could be 'stood up' on the basis of lawfully obtained information, it could not be published. F subsequently advised B that he was able to use publicly available information to verify that H was Nightjack. By this point, B had been advised that F's unlawful access of H's emails may be a crime but that there may be a public interest defence.

F contacted H to tell him that *The Times* was planning to publish an article exposing him. H instructed solicitors to seek an urgent injunction prohibiting publication. B did not tell counsel for *The Times* that F had initially identified Nightjack through email hacking. H's solicitors wrote to B asking him to confirm that F did not at any time make any unauthorised access of H's email account. H's solicitors suspected that F may have hacked into H's email and indicated that they were aware that F had previously done this. B became aware that access to H's email account could be a criminal offence under the Computer Misuse Act 1990 (to which there is no public interest defence).

B replied that the suggestion that F accessed H's email account was '*a baseless allegation*'. F provided a witness statement to this effect. In spite of further requests from H's solicitors to confirm that F had not accessed H's email account, B did not do so and F's witness statement was not amended or supplemented. At the substantive hearing, the parties proceeded on the explicit basis that F had identified H from publicly available material. Ultimately, H was unable to obtain an injunction on the basis that, as blogging was an essentially public rather than private activity, H could have no reasonable expectation of privacy in relation to the information in question.

The matter rested there until *the Times* was required to disclose material to the Leveson inquiry (where B appeared as a witness); it became apparent that B had known about F's actions at the time. The SRA brought disciplinary proceedings against B alleging that he (i) failed to act with integrity and (ii) knowingly allowed the court to be misled. The SRA's statement summarising the conduct alleged did not make any specific allegation of dishonesty (which must be explicitly alleged, see e.g. *Singleton v Law Society* [2005] EWHC 2915). The SDT made clear that it had not proceeded on the basis that B had acted dishonestly, found the allegations proven, and directed that B be suspended for six months and that he pay costs of £30,000.

#### *Grounds of Appeal*

B appealed to the High Court on the basis that (i) the SDT failed to have due regard to the relationship between himself, as solicitor, and F as an employee of TNL, (ii) the SDT failed to give effect to the protection given to communications subject to legal professional privilege, (iii) the SDT failed to have regard to PF's privilege against self-incrimination, (iv) the SDT failed to identify what it is that was omitted from PF's witness statement, which could have been included without breaking such professional privilege, (v) the SDT failed to take into account B's honestly held belief concerning his obligations towards TNL and PF, and (vi) the costs awarded were excessive.

### *Judgment*

The court did not accept that legal professional privilege in circumstances where F might enjoy a privilege against self-incrimination were incompatible with B's duty not to mislead the court. Wilkie J concluded that B was in a position to avoid misleading the court without breaching privilege and that there had been a number of options open to him. One was to obtain the agreement of F to waive privilege. A second was to correct the misleading impression given by the witness statement by making it clear that the statement only intended to convey that the identity of Nightjack as H could have been revealed through publicly available sources. A third was for B to disclose to his counsel the true position and to invite them to make a statement which would similarly avoid giving a misleading impression to the court. A fourth was for B, on behalf of his client TNL, to abandon defending the claim without revealing the information given to him by PF on an occasion of legal professional privilege.

Notwithstanding this, the court allowed the appeal to the extent of quashing the decision of the SDT that he was guilty of a breach of "knowingly" misleading the court and substituting for it a finding that he was guilty of "recklessly" misleading the court. The court concluded that the SDT had made an error in explicitly discounting dishonesty yet finding that B had knowingly misled the court. Whilst it may be that a solicitor who knows he is misleading the court but does so because of a mistaken belief that he is obliged to do so in order to protect the confidence of a witness may not be acting 'dishonestly', it is by no means an obvious conclusion and would in the present case have needed to be spelled out before the reader of the decision would be prepared to draw the conclusion that B had not been found guilty of a charge of dishonesty. That had not happened and the finding had to be quashed. However, the court used its power under s.49 of the Solicitors Act to substitute this with a finding that B had recklessly allowed the court to be misled.

The Lord Chief Justice gave a concurring judgment. In addition, he reviewed a number of the authorities relating to a lawyer's overriding duty to the court and the need for lawyers to be alive to the fact that circumstances can arise during the course of any lawyer's professional practice when matters come to his knowledge (or are obvious to him) which may have the effect of making his duty to the court his paramount duty and to act in the interests of justice. Moreover, he made clear that misleading the court '*is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence.*'

In relation to costs, the Lord Chief Justice commented on the fact that costs of proceedings which a person may be ordered to pay must be proportionate and that '*It may well be that in a particular case, the regulatory authority bringing proceedings will wish to instruct a person or firm who in the current state of the legal market can command high fees which the regulatory authority may be prepared to pay. However the fact that the market enables such persons or firms to command such high fees does not mean that it is proportionate to make an order for costs by reference to the rates which the legal services market enables such persons or firms to command from the regulatory authority.*'

### *Comment*

The judgment is an interesting one for a number of reasons. It is often the case that there is spirited negotiation between a regulator and an individual under investigation to avoid the regulator making specific allegations of dishonesty. This particularly arises in relation to lawyers and accountants, who have specific duties in relation to documents (and, in the case of lawyers, to the court). Notwithstanding this, it is often the case that, while there is no specific allegation of dishonesty against a registrant, there is an allegation of preparing or being associated a document knowing that the effect of the document will be to mislead the reader. In many cases, it is difficult to see the difference, save for the fact that the word 'dishonesty' is not used. Whether this represents a victory for the registrant or is an example of the regulator seeking to have their cake and eat depends on the circumstances of the case. However, *Brett* suggests that a conscious decision by a regulator not to plead dishonesty may preclude an allegation of knowingly acting in a misleading fashion and that it would often be more appropriate to allege recklessness.

In addition to the dishonesty issue, the case provides useful guidance to practitioners about legal professional privilege and difficulties that may occur in practice. Regulators and prosecutors have to deal with the issue frequently (since a failure to disclose privileged material may constitute an abuse of process whereby it would be unfair for the proceedings to continue) and Wilkie J's suggestions of actions that B could have taken are illustrative of steps lawyers might take where there is a potential conflict between the duties to the client and to the court. It would be unsurprising if the case becomes required reading for all LPC and BPTC students in learning to reconcile these duties.

**David Northfield**  
 Senior Associate (Barrister)  
 Fieldfisher

## ADR FOR CONSUMERS

This article summarises the outcome of the Government's consultation on the implementation of the Alternative Dispute Resolution (ADR) Directive. ARDL had formed a working party which responded to the consultation last June and the outcome was published on 18 November.

The ADR Directive requires EU member states to have independent redress systems in place by July 2015 for all contractual disputes between a consumer and a business. The Government intends to achieve this by:

- retaining existing ADR schemes, as they already operate well
- introducing a residual ADR scheme to plug the gaps in the existing landscape, targeting those sectors which generate a significant number of complaints
- appointing an external supplier to provide the residual scheme
- creating and funding a consumer complaints helpdesk, to be provided by Citizens Advice alongside their existing consumer service
- establishing the Trading Standards Institute (TSI) as the competent authority to vet, certify and monitor ADR providers in non-regulated sectors
- legislating to allow regulators to act as competent authorities in their sectors, building

on their existing relationships with statutory ADR providers

- gathering evidence on the costs and benefits of broader simplification of the UK landscape in the long term
- designating an Online Dispute Resolution (ODR) contact point to facilitate communication between parties and a certified ADR provider in online cross-border disputes.

An interesting summary of how the Government expects the residual ADR scheme to be run, including the expected volume of cases, is at <http://ted.europa.eu/udl?uri=TED:NOTICE:394225-2014:TEXT:EN:HTML&src=0>.

Some other key points:

- participation by businesses in the residual ADR scheme will be voluntary, as the Government believes the cost to business of mandatory participation would outweigh the benefits
- the operating model will need to cover a range of industry sectors, with appropriate understanding of those sectors to give the scheme credibility
- the body who wins the contract to run the scheme will be free to impose minimum and maximum settlement values at whatever level it deems to be appropriate
- the Government will provide funding to help with start-up costs, but expects the scheme to become self-financing through fees charged to business users which are consistent with market rates. It has not expressed a view on the balance to be struck between annual fees and case fees
- ADR providers will be able to use all of the procedural barriers permissible under the Directive to reject inappropriate disputes
- ADR providers will be able to make binding decisions if they decide it is appropriate for their sector
- the Government intends to extend the statutory six-year limitation period for bringing a court

claim by eight weeks in cases where the ADR process is still ongoing.

The full Government response document is at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375978/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375978/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf) and the response which ARDL submitted is at <http://www.ardl.org.uk/wp-content/uploads/2014/07/Response-to-ADR-consultation-by-ARDL.docx>.

**Nicole Ziman, ARDL Committee member**

## LEGAL UPDATE

### *Re a Solicitor* [2014] NIQB 46

Despite the unblemished long history of practice by the appellant solicitor until 2010 and the absence of any loss to clients, the conclusion of the Solicitors' Disciplinary Tribunal of Northern Ireland ordering the appellant to be restricted from practising on his own account and permitting him to work in partnership only with a solicitor of at least seven years post-qualification experience was correct in light of the persistent failure of the appellant to successfully address bookkeeping issues. The restriction was postponed for three months to allow the appellant to put his affairs in order. Following an inspection of the appellant's accounts it was discovered that his books of account were not up-to-date and there was an unreconciled deficit in client accounts. In August 2012 the appellant had been admonished in relation to similar matters. The tribunal had regard to the fact that the appellant was a solicitor of 36 years standing, and there was no suggestion of any dishonesty on his part and he rectified the deficits identified by the Law Society's accountant at the earliest opportunity. Morgan LCJ said that the task upon which the court was engaged in cases where the appeal is from a refusal to issue a practising certificate was different from the determination of an appeal from the tribunal. In the first case the power to refuse a practising certificate was purely protective; see *In re Crowley* [1964] IR106. The factors to be taken into account are the interests of the public, the interests of the profession, and the interests of the clients of the solicitor in question and the interests of the solicitor himself. There is no presumption that the Society's view was correct: *Re A Solicitor* [2001] NIQB 52. In an appeal from the tribunal issues of protection remain relevant considerations. To these must be added the punishment of misconduct and the deterrence of repetition by others. The court should also give weight to the tribunal's decision.

### *Moseka v. Nursing and Midwifery Council* [2014] EWHC 846 (Admin)

In dismissing M's appeal on charges of dishonesty, Green J said it was not necessary for him to delve into the exact definition and meaning of dishonesty in the particular case. However, the learned judge said he agreed with the observations of Singh J in *Uddin v. General Medical Council* [2012] EWHC 2669 (Admin) that (i) these are not criminal proceedings; (ii) the standard of proof is different being the civil standard of a balance of probabilities. Green J said he would make one additional observation:

The consequences for an Appellant of being struck off are particularly severe. They entail the loss of livelihood. This can be a much more severe sanction than many a low level criminal punishment. The severity of the consequences is a factor that a regulatory authority will need to bear in mind when applying the civil standard of proof. It is trite that the standard of proof can adjust to the context. In a regulatory case where dishonesty is the issue even on the civil standard the CCC should apply particular care. If dishonesty is found then the likelihood of a severe sanction being imposed (including striking off) is quite high.

### *Fuglers LLP and Others v. Solicitors Regulation Authority* [2014] EWHC 179 (Admin)

Fines of £50,000 against a West End firm of solicitors and £20,000 and £5,000 respectively against its two equity partners upheld. Four charges against the appellants were upheld, namely, making use of the firm's client account by using it as a banking facility for a client; operating the client account contrary to rule 15 of the Solicitors' Accounts Rules 1998; providing services to a client other than those a recognised body is permitted to provide contrary to rule 14 of the Solicitors' Code of Conduct 2007; and acting in a way which was likely to diminish the trust the public placed in them and the profession contrary to rule 1.06 of the Solicitors' Code of Conduct 2007. All the charges arose in relation to the same conduct. The gravamen of the charges was that the appellants had allowed the firms' client account to be used by a client of the firm, Portsmouth City Football Club Limited, as a banking facility over a period between 5 October 2009 and 8 February 2010. A total of about £10 million passed through the account over the four month period, and throughout the Club was in a

perilous financial state and subject to negotiations for its purchase by a consortium of potential buyers, for whom the firm was also acting.

***Goodchild-Simpson v. General Medical Council* [2014] EWHC 1343 (Admin)**

In November 2006 the appellant’s fitness to practise was found to be impaired by reason of aversive mental health and he was subjected to 18 month conditions. Further fitness to practise hearings were convened in 2008, 2009 and 2011 which found that the appellant’s fitness to practise continued to be impaired by reason of adverse mental health. In the course of 2011 the GMC received negative feedback regarding the appellant’s abilities and performance which appeared to be unrelated to his health. At a hearing in August 2013 the panel found that the appellant’s fitness to practise was impaired by reason of adverse mental health and deficient professional performance, and imposed a sanction to suspend the appellant’s registration for nine months. In dismissing the appellant’s appeal, Green J at [12] said that the fitness to practise panel was required to ask itself whether the conduct of the appellant gave rise to a risk of harm to patients. In relation to health the panel concluded that bearing in mind its duty to consider the public interest which included, inter alia, the protection of patients, the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct and behaviour within the profession, the appellant suffered from a serious condition which was at risk of relapse. The key matters which led the panel to choose the option of suspension, and not the imposition of conditions, were the oral evidence of certain medical experts to the effect that the appellant had a “serious mental illness” and that residual symptoms remained. The panel was swayed by the medical evidence which linked the appellant’s mental illness to problems associated with the exercise of good medical judgment. The panel was also swayed by the evidence which suggested that patient safety was at risk of being compromised. It also took account of the medical evidence of Dr D that in her view the appellant needed a complete break.

***Hayat v. General Medical Council* [2014] EWHC 1477 (Admin)**

H’s registration was suspended for 18 months following a review of his GP practice records. The review concluded that there was a consistent and persistent lack of evidence that he had documented relevant and important findings in patient records that would allow reasonable safeguarding of patients and would contribute towards their continuity of care. It

was evident that the standards of medical care provided by H were significantly deficit in the entire core principles expected of a GP applying *Good Medical Practice*. Charles J said that the report makes troubling reading. However, the court was concerned with the length of the suspension which was the maximum period of 18 months. The learned judge observed that as soon as you stopped to think of what you are doing to a doctor who is suspended, and when you identify what is being done to H; given the mortgage that he has taken out to buy the premises for his practice and the expenditure he has, the considerable significance of depriving somebody of being able to make his living by exercising his professional qualifications as a doctor is very apparent. It follows that there is a real need to identify what the next steps are, and how long they are going to take and thereby to seek to minimise the period of any suspension. Any panel charged with a regulatory exercise such as this should be asking itself those sorts of questions, when exercising its discretion as it needs to properly inform itself. The suspension would be shortened to just over 13 months.

***R (Crawford) v. Legal Ombudsman* [2014] EWHC 182 (Admin)**

N complained to the Legal Ombudsman about the service provided by C, a barrister, at a conference which took place in September 2012. N had paid £780 (including VAT) in advance for advice at the conference. The Ombudsman held that only limited advice had been given, as a result of which half the fee should be repaid. Popplewell J said that at the heart of the challenge to the decision was the submission that the Ombudsman’s process of reasoning was in three stages: first that C had not provided any note of the conference or advice thereafter which evidenced what advice was given; secondly, that the inference to be drawn from that failure was that he had provided only limited advice; thirdly that the provision of only limited advice constituted poor service for which C should be deprived of half the fee. Decisions of the Legal Ombudsman are to be read with a degree of benevolence (see *R (Siborurema) v. Office for the Independent Adjudicator* [2007] EWCA Civ 1365) and should not be construed as if they were statutes or judgments, nor subjected to pedantic exegesis (see *Osmani v. Camden LBC* [2005] HLR 325 at [38(9)] per Auld LJ). Nevertheless, it was impossible to read the decision in any other way than as adopting an illogical process of reasoning as the sole basis for its conclusion. Counsel for C submitted that a barrister in C’s position would not be expected to have a note of the conference (a) because if he took a note it would record what he was being told, not what he was saying

and (b) because such notes as would be taken would be for the barrister's use and benefit, not for the use and benefit of the client; a failure to provide the Ombudsman with a note of the advice allegedly given cannot support an inference as to whether any and if so what advice was given. The court agreed that the decision of the Ombudsman was irrational and must be quashed, and the matter remitted for further consideration.

**Kenneth Hamer**  
**Henderson Chambers**



## **REVIEW OF "THE SOLICITOR'S HANDBOOK"**

**THE SOLICITOR'S HANDBOOK 2015** by  
**Andrew Hopper QC and Gregory Treverton-Jones QC**

The *Solicitor's Handbook 2015* is the essential guide to the regulatory maze that governs the conduct of solicitors. The 2015 edition, now the 6<sup>th</sup> edition of this important work, has been thoroughly updated to take account of all significant regulatory changes. When its experienced authors, Andrew Hopper QC and Gregory Treverton-Jones QC, embarked upon the first edition of their book in 2007, the Solicitors' Code of Conduct 2007 and the Legal Services Act 2007 were hot off the presses, and the Solicitors Regulation Authority had been newly created. Since then, we have seen the creation of the Legal Services Board, the demise of the 2007 Code and its replacement with the concept of outcomes-focused regulation since enshrined in the Code of Conduct 2011, and the advent of Alternative Business Structures. The 2015 edition is up to date and contains recent amendments to the 2011 Code, the developing case law in this field, changes in the workings of the Solicitors Disciplinary Tribunal, the solicitors' relationship with the consumer credit legislation, and a great deal more. The 6<sup>th</sup> edition runs to nearly 400 pages of commentary to guide the reader through the complexity of rules and regulations, followed by a further 350 pages containing some 20 crucially important appendices. In all the book contains everything the reader needs set out in a comprehensive and user-friendly way. It is the 'must have' book for all who practise in this field. The book's authors specialise in the field of professional discipline and regulation and together they bring to the

work their considerable knowledge and a wealth of experience.

The *Solicitor's Handbook 2015* is published by Law Society Publishing and can be ordered from all good bookshops or direct (telephone 0370 850 1422, email [law.society@prolog.uk.com](mailto:law.society@prolog.uk.com) or by visiting [www.lawsociety.org.uk/bookshop](http://www.lawsociety.org.uk/bookshop))

**Kenneth Hamer**  
**Henderson Chambers**

## **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:

**Nicole Curtis Penningtons Manches LLP**  
 (nicole.curtis@penningtons.co.uk)

**Kenneth Hamer Henderson Chambers**  
 (khamer@hendersonchambers.co.uk)