ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – SPRING 2017

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Introduction

Welcome to the Spring/Summer ARDL Quarterly Bulletin. Since the Winter edition of the bulletin, ARDL has had its Annual General Meeting and we have several new committee members. For full details of the annual report, the ARDL committee and our office bearers, please see the ARDL website: http://www.ardl.org.uk/2017/05/09/new-ardl-committee-following-2017-agm/

Seminar series 2017/2018

ARDL's seminar programme for 2017/2018 is underway. The next in the ARDL Seminar series continues on 20th July in London with: "Integrity Allegations in Disciplinary Proceedings". This seminar, chaired by Timothy Dutton CBE, QC and with speakers Richard Coleman QC, Paul Ozin QC and Gregory Treverton Jones QC, will be held at the offices of Herbert Smith Freehills LLP. Demand for the seminar is high and registering for attendance is recommended. Details of this seminar can be found on the ARDL website:

http://www.ardl.org.uk/category/events/

A full list of seminars for the next 12 months will be published on the website.

Annual Dinner – Friday 30th June 2017

More than 600 ARDL members and guests are set to enjoy the highlight of the professional regulation social calendar, the ARDL Annual Dinner. The Dinner is on 30th June, and, for the first time, is being held at the Guildhall. This year we have a venue which provides for greater numbers, a separate bar area before and after the event and even live music. Our speaker is Dominic

Grieve QC, MP. We are looking forward to hearing from him at a time of fast-paced political and legal change.

With more than 850 members, ARDL is going from strength to strength. As the next Bulletin will not be issued until after the summer, I wish all ARDL members an enjoyable summer break.

Catriona Watt, Anderson Strathern

Chair

Dishonesty and lack of integrity: the mental element

Dishonesty ought not to be a difficult concept to understand. All of us instinctively know where the boundary lies between honesty and dishonesty in the vast majority of cases. A white lie is a lie, even though it may be morally blameless. Yet in recent years, the law surrounding this comparatively simple concept has become studded with judicial pronouncements in civil and disciplinary cases which seem to carry us ever further from what ought to be a straightforward examination of a person's conduct and mental state at the time.

Let us start in the criminal courts. The word "dishonestly" was introduced in the Theft Act 1968: section 1(1) defined theft as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it. In the early days on the new statutory offence, judges were encouraged not to seek to define dishonesty in their summings-up: the general belief was that it was a simple word, easily understood by juries – see *R v. Feely* [1973] Q.B. 530.

Subsequent criminal cases threw the meaning of "dishonestly" into confusion, and this was ended by the Court of Appeal decision in *R v Ghosh* [1982] Q.B. 1053.

"This brings us to the heart of the problem. Is "dishonestly" in section 1 of the Theft Act 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem.

Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word "dishonestly" in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach."

So dishonesty in the Theft Act was held to be a subjective rather than an objective concept, descriptive of a state of mind rather than a course of conduct. The Court then laid down the so-called twin subjective/objective test of dishonesty in the following terms:

"In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be

morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

It is worth setting out the decision in *Ghosh* in some detail, as it is the font of the twin subjective/objective test of dishonesty. When it was decided, it was anticipated that the judgment would be relevant in only a small number of cases. In a multi-ethnic, multi-cultural society, some individuals might not realise that their conduct would be seen as dishonest by the ordinary standards of reasonable and honest people. The Court of Appeal later ruled that there is no need to give a *Ghosh*-based direction unless the defendant has raised the issue that he did not know that anybody would regard what he did as dishonest: *R. v. Roberts (W.) , 84 Cr.App.R. 117, CA*.

A case raising a *Ghosh* issue in the criminal courts was therefore – and remains - very much the exception. In the decades since *Ghosh* was decided however, the civil courts have also had to consider the meaning of dishonesty. Although the House of Lords in *Twinsectra v Yardley* [2002] UKHL12, restated the *Ghosh* test as the appropriate test for dishonesty in the context of accessory liability for breach of trust, subsequent decisions suggested that a purely objective test of dishonesty was to be preferred (see the powerful dissenting opinion of Lord Millett in *Twinsectra,* and then *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37; *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] 1 Lloyd's Rep. FC 102).

In the context of disciplinary proceedings, which occupy territory midway between the civil and the criminal law, the courts have rejected the suggestion that they should follow the *Barlow Clowes* line of authority and adopt a purely objective test: see *Bryant and Bench v Law Society* [2007] EWHC 3043 (Admin) in which the Solicitors Disciplinary Tribunal had found a solicitor guilty of dishonesty although he had firmly and genuinely believed that he was acting properly – the Divisional Court set aside that finding and emphatically held that the *Twinsectra* subjective/objective test should have been adopted. But in recent years, in subsequent cases, the Courts have questioned the applicability of the *Ghosh/Twinsectra* test, without providing any real consistency or clarity to help disciplinary tribunals to navigate to a decision on whether a professional man or woman has been dishonest: see *Uddin v GMC* [2012] EWHC 2669 (Admin), *Professional Standards Authority for Health and Social Care v Health and Care Professions Council, David* [2014] EWHC 4657 (Admin), *Hussain v GMC* [2014] EWCA Civ 2246, and *Kirschner v GDC* [2015] EWHC 1377 (Admin).

To my mind, the problems that have developed are due to a false debate between a "purely objective test" a la *Barlow Clowes*, and a "mixed subjective/objective test" a la *Ghosh/Twinsectra*. This is because there is already inbuilt into the concept of dishonesty an important subjective element, and because the subjective element described in *Ghosh* is only rarely encountered in practice.

Consider a number of examples. We would, I believe, all agree that a sleepwalker who picks a pocket is not acting dishonestly. Likewise, we would all agree that a shopper who leaves a store having inadvertently placed an item into her bag which has not been paid for and is not intending to defraud the store, is not acting dishonestly. The reason why we would reject the suggestion that they are acting dishonestly is that the sleepwalker's and the shopper's minds are not engaged with the acts that they are performing. It is not that they do not realise that what they are doing would be seen as dishonest by the standards of reasonable and honest people. This inbuilt subjective element in dishonesty (intention or recklessness) is all the more apparent when the dishonest act is the making of a statement. The making of a false statement (the objective conduct) does not of itself establish that the statement was dishonestly made: civil lawyers are well familiar with the distinctions between fraudulent, negligent, and innocent misrepresentations.

The inbuilt mental element in the concept of dishonesty is that of intention to do wrong, or recklessness (often referred to in this context as Nelsonian blindness). It will only be in a small minority of cases that the disciplinary tribunal will have to go on to consider whether the Respondent appreciated that honest and reasonable people would regard what (s)he has done as dishonest. The majority, in contesting an allegation of dishonesty will be saying "I didn't intend to do what I did/ I wasn't thinking clearly/ I was ill and/or under financial or other pressure at the time that I did the act alleged/ I didn't turn my mind to the honesty or dishonesty of what I was doing" rather than "I knew what I was doing, but I didn't think anyone would consider it to have been dishonest". The Respondent who has not turned his or her mind to the honesty of the relevant actions is at risk of a finding of dishonesty by recklessness. Yet, despite the fact that few if any solicitors rely upon a true *Ghosh* defence, disciplinary tribunals are routinely and formulaically applying the *Ghosh/Twinsectra* test on a daily basis.

I would therefore advocate that in considering the issue of dishonesty, disciplinary tribunals should simply ask themselves firstly whether the Respondent intended to behave dishonestly, or was reckless as to whether (s)he was behaving dishonestly. That would suffice in the vast majority of cases. It would only be in the comparatively rare case where the Respondent asserted that although (s)he intended to do what (s)he did, (s)he did not think anyone would consider such behaviour to be dishonest, that the tribunal would then have to go on to consider the *Ghosh/Twinsectra* subjective test.

Lack of integrity

Principle 2 of the SRA Principles requires solicitors to act with integrity. Allegations of lack of integrity have become popular with the SRA in recent years, as a means of alleging serious misconduct short of dishonesty: it has become a sort of "poor man's dishonesty", easier to allege than dishonesty, because easier to prove. The meaning of the phrase "lack of integrity" is difficult to define, and was explored in a series of cases arising out of the provision of financial services. The most frequently cited case is *Hoodless & Blackwell v FSA* (3 October 2003), in which the Financial Services and Markets Tribunal described it as such:

"In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)"

Although it is often cited, this seems to replace one concept that is hard to define ('integrity') with others that are equally elusive ('moral soundness', 'rectitude'). 'Steady adherence to an ethical code' is even more problematic because it does not make clear whether all departures from an ethical code show lack of integrity or, if not, which ones do. That the guidance in *Hoodless* should not be treated with too much reverence was made clear in *Vukelic v FSA* (13 March 2009), in which the FSM Tribunal observed:

"We do not disagree with what is said about integrity in Hoodless & Blackwell but we do not take [the description] as being a comprehensive test which is of application beyond the facts of that case. In an area of life giving rise to circumstances of great variety and complexity there may well be many other circumstances in which the FSA could fairly conclude that an applicant lacked integrity, a concept elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market."

Attempts by the SRA to persuade the Courts to expand upon the meaning of integrity have not been successful. Like the proverbial elephant, it seems that integrity is easier to recognise than to define. In *SRA v Chan and others* [2015] EWHC 2659 (Admin), Davis LJ said the following at [48]:

"As to want of "integrity", there have been a number of decisions commenting on the import of this word as used in various regulations. In my view, it serves no

purpose to expatiate on its meaning. Want of integrity is capable of being identified as present or not, as the case may be, by an informed tribunal or court by reference to the facts of a particular case."

When arguing cases before the Solicitors' Disciplinary Tribunal, the SRA invariably submits that the test for lack of integrity is a purely objective one. In my view, the SRA is wrong to see lack of integrity as being a purely objective matter. The sleepwalking pickpocket and the inadvertent shoplifter are no more exhibiting a lack of integrity than they are behaving dishonestly. The Divisional Court in *Scott v Solicitors Regulation Authority* [2016] EWHC 1256 (Admin) was equally reluctant to provide guidance as to the meaning of the term as had been the Divisional Court in *Chan and Ali*, although in his judgment agreeing with that of Sharp LJ, Holroyde J stated:

"To take a hypothetical example, suppose a solicitor had repeatedly taken monies from the client account, used them for his own purposes, and from time to time made good the deficiency when he found it convenient to do so. Suppose that when challenged by his professional body, his response was that he knew he was not supposed to treat the client account in that way, but did not think that it really mattered as long as the monies were repaid, and did not think that anyone would regard him as dishonest. He might on that basis be acquitted of subjective dishonesty; but it surely could not be suggested that he had not shown a lack of integrity."

I would agree, because the solicitor in the example knew he was not supposed to treat the client account in that way. It would surely be different if the same solicitor had told a trainee to arrange the transfer money from client account to office account in breach of the SRA Accounts Rules 2011, where, for whatever reason, the trainee was not aware that obeying this instruction would amount to a breach of the relevant rules. The trainee may well have committed a disciplinary offence, but I would not consider him/her to have exhibited a lack of integrity.

In my view, the mental element in lack of integrity should be seen as identical to that in dishonesty – an intention to do wrong, or recklessness. A solicitor who deliberately deceives a client or third party plainly exhibits a lack of integrity, whereas if (s)he makes a negligent misrepresentation that is not necessarily the case. In one case before the Tribunal, I agreed with my opponent (Andrew Tabachnik of 39 Essex Chambers) that "lack of integrity" could be summarised as a deliberate or reckless breach of professional rules, and to my mind this is as good a working definition as any, where the lack of integrity is said to arise from non-observance of particular rules.

Gregory Treverton-Jones QC
39 Essex Chambers

Book review of "Conduct and Pay in the Financial Services Industry: The Regulation of Individuals" (2017. Edited by Thomas Ogg and Richard Leiper QC. Published by Informa Law)

Who would have thought a few years ago that conduct and pay in the financial services industry could provide a coherent theme for a book? The connection between them is one of the lessons of the financial crisis. As the Parliamentary Committee on Banking Standards noted: "*Remuneration has incentivised misconduct and excessive risk-taking, reinforcing a culture where poor standards were often considered normal. Many bank staff have been paid too much for doing the wrong things, with bonuses awarded and paid before the long-term consequences became apparent. The potential rewards for fleeting short-term success have sometimes been huge, but the penalties for failure, often manifest later, have been much smaller or negligible.*" The aftermath of bank failures has also brought to the surface the difficulty of allocating individual responsibility within complex governance and management structures. The Parliamentary Commission on Banking drew the link between these two features of

the regulatory and commercial landscape in its final report: *"Too many bankers, especially at the most senior levels, have operated in an environment with insufficient personal responsibility. Top bankers dodged accountability for failings on their watch by claiming ignorance or hiding behind collective decision-making. They then faced little realistic prospect of financial penalties or more serious sanctions commensurate with the severity of the failures with which they were associated. Individual incentives have not been consistent with high collective standards, often the opposite."* (*Changing Bank for Good*, 19 June 2013)

Inevitably legislators and regulators, both European and domestic, have responded with major reforms regarding corporate governance, conduct and pay in the financial sector. Issues of conduct and remuneration are traditionally considered as separate matters. The arrival of *Conduct and Pay in the Financial Services Industry The Regulation of Individuals* (edited by Thomas Ogg and Richard Leiper QC, published by Informa Law), written by a team of barristers from 11 King's Bench Walk, is therefore timely. As the authors say, it is no longer possible to advise firms and individuals in the financial services industry on conduct matters without a proper understanding of employment law as well.

The focus of the book is the regulatory and employment law problems that arise in relation to individuals working in the UK financial services industry. As the title suggests, Part I is concerned with conduct-related issues, including regulatory control of who may perform particular functions in financial services firms, and individual accountability for misconduct. The reader is taken on a Cook's tour of the regulatory scheme, taking in the conduct regime, fitness and propriety, the approved persons regime, the certification regime, the senior managers regime, regulatory notifications, regulatory references and whistleblowing, misconduct, sanctions and enforcement. There are well-placed resting points along the way, where the authors provide valuable insights into issues that may need to be grappled with in due course (for example, whether by an analogy with *Spring v Guardian Assurance* [1995] 2 AC 296 an employee may have a cause of action arising from a negligent regulatory notification). Part II concerns remuneration from both a common law and regulatory perspective, taking in the unchartered terrain of malus (we are talking here about the opposite of bonus) and claw-back for the occasions when later events show that the employee's remuneration was not deserved. This section includes thought-provoking consideration of the judicial control of contractual discretion and of how it may differ from the approach taken in public law. The discussion throughout, though necessarily technical in places, is leavened by a pleasing style and appropriate reference to Voltaire.

I anticipate that this will become the standard work for those of us who advise on questions of regulatory authorisation, conduct and pay in the financial services field. The authors have certainly achieved their objective of filling the gap that existed in our law libraries.

Richard Coleman Q.C.*
Fountain Court Chambers, Temple
*barrister specialising in the regulation of financial and legal services

LEGAL UPDATE

Bittar v. Financial Conduct Authority **[2017] UKUT 82 (TCC)**

B, the former manager of the Money Markets Derivatives desk in London of Deutsche Bank AG during the relevant period, opposed the Authority's application to amend its Statement of Case in relation to a reference made by B to the Upper Tribunal. The approach to be taken by the Tribunal as to whether to permit amendments to a party's pleadings was governed by rule 5(3) (c) of the Tribunal Procedure (Upper Tribunal) Rules 2008. In his ruling Judge Timothy Herrington held that the proposed amendments had a realistic prospect of success, permitting the amendments would be compatible with the proper

consideration of the issues arising on the reference, B would be capable of fully understanding the case that was being made by the proposed amendments and be able to respond accordingly, and the amendment pleading that B had actual knowledge of impropriety should be permitted. However, the proposed amendment to make additional allegations of collusion with traders at other banks was a new case based on alleged anti-competitive conduct and would require investigation of complex matters such as market definition, the impact of the alleged conduct and its compliance with prevailing standards of permissible competition. It would be inappropriate to permit the Authority to introduce such a complex investigation into the present proceedings and to permit the amendment at this stage would be potentially prejudicial to B.

***R v. Hayes* [2016] 1 Cr.App.R.(S) 63**

Following a lengthy trial at Southwark Crown Court before Cooke J and a jury, the appellant a trader in a bank, was convicted of dishonestly manipulating for personal gain over a four-year period the LIBOR rate, the interest rate which banks could charge on commercial loans, and was sentenced to 14 years imprisonment. In reducing the sentence to 11 years the Court of Appeal (Criminal Division) (Lord Thomas of Cwmgiedd CJ, Sir Brian Leveson, President of the Queen's Bench Division and Gloster LJ) said that evidence in relation to market conditions was admissible and relevant to the jury's consideration of the second limb of the *Ghosh* direction but was not relevant to the jury's consideration of the first limb, that is to say, the determination of the objective standards of honesty. If the objective standards of honesty were to be set by a market it would gravely affect the proper conduct of business. The history of markets has shown that, from time to time, they adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. To depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets. Such evidence was irrelevant to the determination of the objective standards of honesty, but it was plainly relevant to the second limb, the subjective limb. The judge expressly directed the jury to have regard to it and summarised the evidence at length.

***Professional Standards Authority for Health and Social Care v. Nursing and Midwifery Council* & SM [2017] CSIH 29**

The NMC's Conduct and Competence Committee made a finding of misconduct against SM, a senior charge nurse in a busy NHS hospital. In particular, that SM had acted dishonestly after she became aware of a clinical error on her part. However, the committee concluded that SM's fitness to practise was not impaired. SM had administered the wrong drug to an end of life patient (phenobarbitone rather than morphine), thus depriving the patient of 24 hours of pain relief (the wrong drug itself caused no direct harm). In a dishonest attempt to cover up what had happened, SM destroyed two vials of morphine; made incorrect entries in the controlled drugs book, including a false signature of a colleague; and failed to report the drugs error to her manager. At interview SM admitted what had happened. She was issued with a first and final written warning and was demoted from a band 7 to a band 5 nurse. Her employers were supportive, and the testimonials before the committee and the evidence of the nurse manager attested to SM being a good and competent nurse. The committee considered that this was a single incident in an otherwise long and unblemished career. SM had full insight and had undertaken appropriate remediation with regard to clinical issues. The committee noted that SM also had health issues at the time of the incident. In dismissing the PSA's appeal, supported by the NMC, against the finding of no impairment, Lord Malcolm, giving the opinion of the Inner House, said that not every case of misconduct will result in a finding of impairment. An example might be an isolated error of judgment which was unlikely to recur, and the misconduct was not so serious as to render a finding of impairment plainly necessary. On the other hand, the

misconduct may be so egregious that, whatever mitigating factors might arise in respect of insight, remediation, unlikelihood of repetition, and the like, any reasonable person would conclude that the registrant should not be allowed to practise on an unrestricted basis, or at all. In the instant case, the committee committed no material error of law or procedure. It might be different if a clear mistake was made, such an overlooking a significant factor, but there was nothing of that nature. The court could identify no compelling reason to disagree with the committee.

***Banerjee v. General Medical Council* [2017] EWCA Civ 78**

In dismissing B's appeal from the order of Walker J dismissing her application for judicial review of the GMC's refusal to restore B to the medical register: [2015] EWHC 2263 (Admin), Sir Terence Etherton MR (with whom Rafferty and Sharpe LJJ agreed) said he would reject the overarching submission for B that the hearing before the panel was unfair in view of the number, nature, tone and content of questions asked by the panel members. So far as concerned overall fairness, at the heart of B's case lay the complaint that the panel members wrongly persisted in repeatedly questioning her in a hostile and forceful way about the circumstances in which she made her application for voluntary erasure, in circumstances where the GMC had said it did not intend to revisit the probity of her conduct in relation to the voluntary erasure application. The panel was required to reach a decision which fulfilled the main object of the GMC to protect, promote and maintain the health and safety of the public: Medical Act 1983 s.1(1A). It was common ground that the panel was not precluded from investigating the matters which had been considered on the first restoration application. Indeed, it would have been entitled to do so whatever the parties and their representatives had agreed between themselves about the conduct of the hearing. The fact that the panel's questions about the voluntary erasure application may have been aske din a direct, even robust, way did not undermine the fairness of the proceedings.

***Ballard v. Solicitors Regulation Authority* [2017] EWHC Civ 164 (Admin)**

B's practising certificate for 2012/2013 was granted and approved by the SRA subject to a condition that he was not to act as a sole practitioner or sole director of a registered body. In August 2013, B represented Mr DE in relation to criminal proceedings and appeared on his behalf at Brighton and Hove Magistrates' Court. Mr DE complained about B's conduct to the Legal Ombudsman who directed B to repay £750 and to pay Mr DE £250 compensation for distress and inconvenience. B claimed that in relation to the conduct charged he had not been practising as a solicitor for the purposes of the Solicitors Act 1974 and the Legal Services Act 2007, but had acted as a McKenzie Friend or an authorised exempt person on behalf of Mr DE, and that the Legal Ombudsman had no jurisdiction. The SDT rejected these claims and held that B had acted in breach of the conditions on his practising certificate and had breached the Code of Conduct 2011. The SDT held that B attended Brighton and Hove Magistrates' Court; sat in the rows used by advocates; spoke to several people at court; addressed the bench on his own account without prefacing his remarks by indicating that he needed permission to do so as a McKenzie Friend; and the record of the hearing noted that he was present as Mr DE's solicitor. B had been and was held out to be a solicitor. In dismissing B's appeal Beatson LJ (with whom Nicol J agreed) said that a solicitor on the roll must comply with the Principles in the SRA Code of Conduct 2011 at all times. They are mandatory Principles which apply to all and solicitors who remain on the roll cannot opt out of their regulatory duties simply by calling themselves something else and making a private arrangement. The SRA's Rules and Principles are designed to protect clients and the public and cannot be side-stepped in this way. As to the Legal Ombudsman's jurisdiction, section 128 of the Legal Services Act 2007 makes clear that a person about whom a complaint is made to the Ombudsman is subject to the jurisdiction of the Ombudsman Service if he or she was an authorised person in relation to an activity which was a reserved legal activity. B, a solicitor on the roll, was an authorised person in relation to a

reserved legal activity, albeit subject to a condition on his practising certificate.

Kenneth Hamer
Henderson Chambers

Request for Comments and Contributions

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact either of the joint editors with your suggestions. The joint editors are:

Nicole Curtis, Penningtons Manches LLP
(nicole.curtis@penningtons.co.uk)
Kenneth Hamer, Henderson Chambers
(khamer@hendersonchambers.co.uk)