

ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – AUTUMN 2017



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Introduction

Welcome to the ARDL Autumn Bulletin.

Annual Dinner

Save the Date: Friday 29 June 2018

This summer more than 630 ARDL members and guests from across every part of the regulatory spectrum enjoyed the ARDL Annual Dinner in the magnificent venue of the Guildhall. It was a real privilege to be part of what must now be one of the key events in the regulatory calendar and to see ARDL be able to realise the wish of its members to create an event which more people could attend.

Following on from the success of the move to the Guildhall, the ARDL Annual Dinner 2018 will be held on Friday 29 June 2018. Further information on booking tickets for the Dinner, on the guest speaker and additional highlights will be circulated early in the new year.

Financial Services Seminar

Our financial services seminar on The Senior Managers and Certification Regime took place on 2nd November at Blake Morgan's offices in London. The seminar was chaired by Richard Coleman QC with speakers Richard Leiper QC and Thomas Ogg, editors of Conduct & Pay in the Financial Services Industry.

Junior ARDL 'round table' Seminar

The next Junior ARDL seminar is on 22 November at 23 Essex Street Chambers and will give the more recently qualified members of ARDL the opportunity to hear from some senior members of the bar and experienced lawyers on topics of interest, including dishonesty, appeals, and key legal updates. The seminar will be on The format will be 'round-table' with attendees able to go to a table with a topic which interests them and take part in a discussion led by one of the speakers. An invitation flyer and sign up information will be sent out.

Seminar Programme 2018

As we head towards the latter part of the year, the Committee is completing the full 2018 Seminar Programme. Following on from recent feedback and requests, this programme will include some multi-attendance venues using video-link facilities, and also seminars outside of London, including in Manchester and Edinburgh. The full programme will be circulated to all ARDL members and will be available on the ARDL website ahead of the Membership Renewal date of 31 January.

Marion Simmons QC Essay Prize competition winners

We are delighted to include in this edition of the ARDL bulletin the essay by Ruth Keating, who won the ARDL 2017 Marion Simmons QC Essay Prize. The competition invited submissions with the title, *"What effect would the UK's exit from the European Union have on the law of regulation in the UK?"*

We would like to congratulate Ruth, who received our first prize of £2000 and whose winning essay is published in this edition. Congratulations also go to our two runners-up, Ailidh Callander and Nicholas Cottrell, who each won £750.

We would also like to thank our judges Professor Mary Seneviratne of Nottingham Trent University and Professor Tony Prosser Bristol University.

With best wishes for the remainder of 2017.

Catriona Watt, Anderson Strathern LLP
Chair, ARDL

Winning essay in the 2017 Marion Simmons QC Essay Prize competition: *'What effect would the UK's exit from the European Union have on the law of regulation in the UK?'*

The £600 Million Question - Ruth Keating

No one knows what will happen next. This must be kept in mind, when we ask the question – what effect will the United Kingdom's exit from the European Union have on the law of regulation in the UK? Therefore this essay is not a prediction. The long-term impact of the UK's decision to leave the EU is greatly dependant on the kind of deal which is ultimately struck between the UK and the EU.

The amount of perceived control that the EU has over UK law and regulation played no small role in the Leave camp's rhetoric. During the campaign Michael Gove said:

*"Outside the EU we wouldn't have all the EU regulations which cost our economy £600 million a week."*¹

Whether EU regulations are in fact that costly is debatable. However, there is no doubt that the breadth and scope of EU regulation is extensive. EU regulations span virtually every corner of everyday life – how products are produced, how many hours we work, the food we eat, how global business is conducted and how businesses compete. Leaving the EU will not mean these rules disappear. The question is what form they will continue in.

The full effect of Brexit on regulation in the UK will be extensive and as such would be impossible to discuss in this essay. Therefore, the below represents a snapshot of how the UK's exit from the EU will impact regulation. This essay considers first the immediate term effects,

¹ Michael Gove's essay for Today programme, "Why it is safer to take back control" 19 April 2016.

second the necessity of regulation and third future impact.

Immediate term effects

In the immediate term, UK regulation, derived from EU law, will remain in force until changes are made by the UK Government and Parliament. The Great Repeal Bill was announced on 10 October 2016.² The Government's White Paper on Brexit outlines the three primary elements of the Bill:

- (a) First, it will repeal the European Communities Act 1972.
- (b) Second, it will preserve EU law as it stands at the moment the UK leaves the EU. Parliament and the devolved legislatures will then be able to decide which elements of that law to keep, amend or repeal once the UK has exited the EU.
- (c) Finally, the Bill will enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly once the UK leaves the EU.

The House of Commons library have also suggested that ministers could import up to 19,000 EU rules and regulations into the British statute book.³

A similar strategy may also have to be applied to EU agencies. The UK may have limited options, in reality, but to accept that it will have to take part in some EU agencies after 2019.⁴ This is partially attributable to the small timeframe allowed by Article 50. In the long term, the Confederation of British Industry have estimated that Britain may have to set up domestic versions of as many as 34 regulatory agencies covering areas such as agriculture, transport, telecommunications and energy.⁵ The UK will also have to consider its relationship with regulators with an international focus such as the EU's nuclear regulator, Euratom. This will mean that the UK will have to negotiate new international agreements with the US, and other countries, to maintain its access to nuclear power technology.

As such, the immediate term effects of leaving the EU, in terms of regulation, will be less stark and will take several years to become fully clear. However, during the next two years the UK will have to address its priorities

in terms of regulation and markets. These questions will be necessary to settle negotiations with the EU.

Necessity of regulation

The first question to address is the necessity, or lack thereof, of EU regulation. Michael Gove's statement reflects public sentiment in many corners. The belief that EU regulation is costly, and flowing from that, that a post-EU UK will have less regulation. One estimate suggests that national regulation could be 2.5 times more cost effective than EU regulation.⁶ EU regulations have also been criticised for being hard to influence, particularly for SMEs.⁷ Open Europe put the cost of the one hundred most expensive EU regulations at a cost of £27.4 billion a year to the UK economy.⁸ However, these figures do not take full account of the financial benefits arising from regulation. These regulations are not only benefits, but in many cases represent necessities.

Post-EU, the UK will still be bound to regulate certain markets and products. Equally, parts of EU regulations reflect global standards and rules. Philippe Legrain noted that the second most costly regulation in the Open Europe study *"is the CRD IV package, which is largely transposing Basel III, which Britain would most likely continue to abide by even if it left the EU. Therefore, that is not an additional cost of being in the EU; it is a regulation that we will be bearing the cost of in any event"*.⁹

The EU is the world's largest internal market,¹⁰ but access requires compliance. As such, the UK's exit from the EU will not insulate the UK from these regulations. The two reasons for this are first that the EU will continue to be a significant market for UK goods and services – standing at approximately half of UK exports.¹¹ Second, the EU exercises control, albeit unofficially, in regulating global markets through a process described as *"the Brussels Effect"*.¹² It is of course possible for companies to adopt multiple sets of standards. However, scale economies and benefits of uniform production make this unlikely. This has had the effect that EU standards have spread beyond Europe,

⁶ Open Europe, "Still out of Control? Measuring Eleven Years of EU Regulation" June 2010.

⁷ HM Government, "Review of the Balance of Competences between the UK and the EU: Single Market – Free Movement of Goods" February 2014.

⁸ Open Europe, "Briefing note: Top 100 EU regulations cost the UK economy £27.4 billion a year" 21 October 2013.

⁹ House of Commons Treasury Committee, "The economic and financial costs and benefits of the UK's EU membership" HC 122 26 May 2016.

¹⁰ Single market, The world's largest Single Market, EU2016-ezine 04.

¹¹ Office of National Statistics, "UK Perspectives 2016: Trade with the EU and beyond" 25 May 2016.

¹² Anu Bradford, "The Brussels Effect" *Nw U L Rev* 107:1 (2012).

² *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, para 1.5.

³ House of Commons Library, "Legislating for Brexit: EU directives" 5 April 2017.

⁴ Financial Times, "UK set to keep EU regulations after Brexit" 26 May 2017.

⁵ Lexology, "Brexit: The UK's Great Reform Bill" 30 March 2017.

for example in America.¹³ This unilateral regulatory globalisation occurs when states externalise laws and regulations outside its borders through market mechanisms, resulting in the globalisation of standards. Practice indicates that companies often choose the most rigid standards to govern global conduct and production for their business to ease global regulatory compliance. In this way, market forces often convert EU standards to global standards. This will no doubt impact the UK.

Therefore, negotiations will principally have to focus on two things. The law which the UK must accept if it wishes to be able to operate within the EU marketplace and advantages which the UK can create to ensure the attractiveness of the UK market, and justify Brexit.

Future impact

On the 11th of July 2016 the Prime Minister Theresa May re-iterated that “Brexit means Brexit”. It is not clear what precisely this means and existing EU law offers little insight into what that arrangement might be. Article 50 simply envisages that an agreement will be negotiated and concluded with the Member State “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”.¹⁴

In the absence of certainty, commentators have hypothesised where the UK’s exit from the EU will fall on a scale of a “soft” to a “hard” Brexit. However, in all likelihood, the UK model will be a bespoke model, not entirely like anything seen before. This is owing to the fact that the UK is almost working with the EU in reverse, transitioning out rather than transitioning in like many others countries have done before.

This is particularly so in light of Mr Davis’ statement that “we do not seek to adopt a model already enjoyed by other countries.”¹⁵ A Swiss style model has been discussed. However, there are significant concerns about the possibility of securing an equally comprehensive deal in such a short two-year period, given that it has taken Switzerland years to negotiate 120 individual agreements.¹⁶ Equally, Swiss banks have no general access to the single EU market of financial services and do not benefit from the EU “passporting”

rights.¹⁷ On the other end of the spectrum the Norwegian model would be unlikely to offer the UK the political flexibility required to both justify Brexit and reflect the UK’s decision to leave the EU.

In terms of a bespoke model, the UK’s model will find itself somewhere along the scale of inclusion and exclusion, with all the obligations that go with it. Under all of the above scenarios the UK must choose to some degree between adopting EU rules or being excluded from the single market. No model avoids this dilemma in its entirety.

Priorities

The OECD stated that labour market regulation is comparable with the US, Canada and Australia and is much lower than other EU countries – having the second least regulated product market after the Netherlands.¹⁸ The UK has balanced having a highly-regulated market which offers certainty and access to a common market place, with a highly-liberal market economy. Brexit, in whatever form, will impact industry. This will have a far-reaching effect across regulated industries such as pharmaceuticals, transport, life sciences, automotive and aviation. Maintaining, or indeed improving, this balance will be a central focus of future negotiations with the EU. There are two areas discussed below which are used to demonstrate the interconnectedness between the EU and UK – illustrating both the past and future regulations the UK may have to negotiate. These areas are the financial sector and data sharing.

Financial sector

Brexit will have a significant impact on the UK financial sector which employs 1.1 million people, generates about 7% of the country’s GDP and acts as a hub of the international financial market.¹⁹ These services, such as wholesale and investment banking, place significant reliance on direct access to the single European market for financial services.²⁰ Equally the benefits of the financial sector flow between the UK and EU firms from these arrangements – there are over 5,000 UK firms that utilise passports to provide services across the rest of the EU and around 8,000 European firms that use passports to provide services into the UK.²¹

¹³ See above.

¹⁴ TEU, Article 50, para 2.

¹⁵ Fn, para 8.2.

¹⁶ Lexology, Brexit - The Swiss Model (24 August 2016).

¹⁷ Fn 15.

¹⁸ OECD “Compendium of Productivity Indicators” 2016.

¹⁹ House of Lords, “Brexit: financial services” 15 December 2016.

²⁰ European Parliament, “Briefing Brexit: the United-Kingdom and EU financial services” 9 December 2016.

²¹ Fn 2, para 8.23.

The EU has worked on a number of regulatory initiatives aimed at integrating EU financial markets and removing legal barriers to cross-border financial services activity across Europe. The current EU regulatory framework includes a significant body of directives, regulations, technical standards and common rules for EU banking, investment and insurance, making up the 'single rulebook'. The motivation behind this level of regulation is in part because past financial events have demonstrated the interconnectedness of markets, and that it is impossible for states to act in isolation.²² This level of interconnectedness means this is an area of mutual regulatory interest.

It will be a priority to maintain access to the European financial market post-Brexit. Conversely, to balance the costs of adjustment for businesses the UK may seek to gain advantages by rivalling the EU on taxation and support for business. To guarantee certainty, there will be a significant number of EU rules which would need to be retained or replicated to support "equivalence".

Looking further to the future, the UK will have to consider future liberalising initiatives such as the Capital Markets Union. The project aimed to increase access to capital markets.²³ As a result of Brexit it is likely that financial services may diversify to other countries. This will result in a "physical splintering" of capital markets each with its own capital markets regulator interpreting and applying rules. This has potential adverse implications for consistency and efficiency. Some level of participation in the CMU will in all likelihood be something that is negotiated as part of a free-trade arrangement for financial services. Integrated capital markets would lower the cost to the financial system and make it more resilient.²⁴

The example of the financial sector demonstrates the necessity not only to integrate aspects of EU regulation now, but also consider how the UK may need to adapt to future EU regulations as they develop independently.

Data

The international exchange of data is a core feature of modern business and modern life. The Brexit White Paper has acknowledged this by saying that "as we

leave the EU, we will seek to maintain the stability of data transfer between EU Member States and the UK".²⁵ If the UK is to retain its place as a leading innovator for technology companies and business, meeting international requirements relating to data will be vital. In the immediate term a coordinated approach will decrease the costs to business.

Looking to the future, cooperation in this area will continue to be important. The UK has said that it intends to implement the General Data Protection Regulation in time for the 2018 deadline.²⁶ However, continuing this relationship of maintaining equal standards across data sharing will be important. The Safe Harbor Principles and its successor, the EU-US Privacy Shield, demonstrate that it can take years to negotiate arrangements around the flow of data and that these arrangements may even then be vulnerable. Equally cases such as *Google Spain*²⁷ and *Schrems*²⁸ illustrate how EU decisions, much in the same way as goods and products, can significantly change the practices of non-Members.

Again this example illustrates important areas of regulation where the UK will have to accept global standards and work with the EU into the future. This will be necessary to ensure the UK's position as a leading country to do business is maintained.

Loss of UK influence and a globalised world

The concern is that the UK may be termed what Switzerland has been – more "a rule taker, rather than a rule maker".²⁹ As discussed above given both the amount of exports to the EU and the "Brussels effect", EU regulations will continue to shape economic life in the UK. A post-Brexit UK will want to retain full access to the single European market, which will almost certainly mean abiding by the accompanying rules.³⁰

The difficulty is with the kind of rules the UK may now be "taking". For instance, when EU states debated how tightly to regulate banks, the UK was usually on the side of lighter regulation.³¹ The UK has adopted an interventionist and risk-averse approach to EU regulation. For instance, initiatives such as the Financial Transactions Tax and the cap on banker bonuses would

²⁵ Fn 2, para 8.39.

²⁶ European Scrutiny Committee, "Data Protection and the EU institutions" 8 February 2017.

²⁷ *Google Spain v AEPD and Mario Costeja González*; Case C-131/12.

²⁸ *Maximilian Schrems v Data Protection Commissioner* Case C-362/14.

²⁹ Davis Polk, Issue 6: Lex et Brexit 16 September 2016.

³⁰ The Economist, "Common market economics" 15 October 2015.

³¹ Financial Times, "UK loses legal challenge to EU financial transaction tax" 30 April 2016.

²² Fn 2, para 8.26.

²³ Financial Times, "How a post-Brexit redesign can save the capital markets union" 13 February 2017.

²⁴ Cheryl Jones, "Brexit and the future of the Capital Markets Union" 24 August 2016.

likely have had a smoother passage in an EU without the UK.³² Along with Ireland, the Netherlands and the Nordics the UK is one of the EU's most economically liberal states and typically proposes liberal proposals in the European Council and opposes illiberal measures.³³ If Germany also joins this group in voting along liberal lines, this provides enough votes to achieve a 35% blocking minority.³⁴ This liberalisation has had a strong impact on EU policy. However, outside the cloisters of the EU, the UK will no longer be a powerful advocate of market liberalisation. A likely tension will be a loss of influence over EU regulation without the much hoped for gain of regulating independently.

Global crises mean that certain areas require coordination. In a post-Brexit UK global initiatives will continue to impact the regulatory landscape in the UK as global influencers.

Conclusion

At the beginning of this essay the words of Michael Gove during the Leave campaign were highlighted – that outside of the EU the UK would not have “all the EU regulations” which cost the economy £600 million a week. This will not be the case. This heroic assumption ignores the old adage – that no man is an island. So too, is no country an island.

Theresa May states in her Brexit address that the UK has “voted to leave the EU and become a fully-independent, sovereign country”.³⁵ This new path will no doubt involve sacrificing in some areas, just as the UK carves a new legal future in a post-Brexit landscape.

In the modern world the possibility of an island of a country, at least in regulatory terms, seems unlikely.

Ruth Keating

Marion Simmons QC Essay Prize 2018

We are delighted to announce that the annual Marion Simmons QC Essay Prize competition for 2018 is now open to entrants, with the following title:

The purpose of regulation is the protection of the public, not to act in the public interest: discuss.

The first prize is £2,000, the second £1,000 and the third £500. The judges will include leading academics in the field of regulation and members the ARDL Committee.

The essay competition was set up in memory of the late Marion Simmons QC, who sadly died on May 2, 2008, aged 59. Marion was a barrister, recorder, arbitrator and, latterly, chairman of the Competition Appeal Tribunal. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on ARDL's Committee for two years and was committed in her support of young lawyers.

Essay prize competition Terms & Conditions:

To be eligible, an entrant must fall into at least one of the following categories (subject to the discretion of the competition organisers to extend eligibility on a case by case basis as they see fit):

- undergraduates or postgraduates in study at a recognised educational establishment in the United Kingdom;
- trainee solicitors in the UK;
- pupil barristers in the UK;
- those training in the UK as part of a Chartered Institute of Legal Executives' approved training programme;
- solicitors who qualified in the UK and who have been so qualified for fewer than three years;
- barristers called in the UK fewer than three years ago;
- those who qualified with Cilex in the UK and who have been so qualified for fewer than three years;
- those who are taking a period of up to sixteen months as a sabbatical or “gap year” within their undergraduate or postgraduate study or after such study and before starting a confirmed place as a pupil barrister in the UK,

³² House of Lords European Union Committee, “Towards a Financial Transactions Tax” HL Paper 287, 30 March 2012.

³³ Global Counsel, “Brexit: the impact on the UK and the EU” (June 2015), p 15.

³⁴ Fn 33.

³⁵ Theresa May, Brexit speech at the Conservative conference, 2 October 2016.

trainee solicitor in the UK or Cilex training in the UK.

Entries must be no longer than 3,000 words (word count includes footnotes but excludes bibliography) and should be type-written in the English language. The judges' decision will be final. Essays must be submitted so as to be received by 5pm on Friday 20 April 2018 by post or email to Nicole Curtis:

nicole.curtis@penningtons.co.uk

Penningtons Manches LLP, 125 Wood Street, London EC2V 7AW

Nicole Curtis
Penningtons Manches

Same facts, different outcomes: the SRA cases against Philip Shiner & Leigh Day

After the dust settles on the SDT's longest ever hearing, Helen Evans and Clare Dixon of 4 New Square ask why the outcome in *SRA v Day, Malik, Crowther and Leigh Day* was so different to that of *SRA v Philip Shiner*.

Background facts

The Battle of Danny Boy took place in Southern Iraq on 14 May 2004. British forces were ambushed by the Mahdi Army. They took a number of those killed to Camp Abu Naji where their bodies were released the next day. 9 Iraqis were detained by the British Army. Rumours began to circulate that a number of Iraqis had been murdered or tortured by the British forces.

Mr Shiner's practice, PIL, was instructed by the detainees and some of the relatives of the deceased, to bring judicial review proceedings against the Ministry of Defence. Leigh Day was instructed by the same clients to bring claims for damages.

The judicial review claim was stayed pending a Public Inquiry. The Inquiry concluded in December 2014 that the most serious allegations against the British soldiers were "wholly without foundation and entirely the

product of deliberate lies, reckless speculation and ingrained hostility".

SDT proceedings

The SRA commenced an investigation into the activities of Mr Shiner and four Leigh Day Respondents. Both those investigations culminated in hearings before the SDT.

Mr Shiner applied for his SDT hearing to be adjourned. When that application failed, he did not attend or send representation to the hearing. He made various admissions. The SDT found that almost all the allegations were proved and struck Mr Shiner off.

The Leigh Day hearing took place next. Although confronted with the problem of Mr Shiner's admissions and the SDT's findings against him, the Leigh Day Respondents successfully defeated all of the allegations. Considering the full scope of the cases against Mr Shiner and the Leigh Day Respondents is beyond the scope of this article. We focus on two matters of significant overlap between the two sets of proceedings where there were strikingly different outcomes. These matters are: the press conference and the tri-partite fee sharing arrangement.

The press conference

Both PIL and Leigh Day participated in a press conference on 22 February 2008 in the course of which it was said that Mr Shiner and Mr Day had improperly endorsed allegations that the British army had unlawfully killed, tortured and mistreated Iraqi civilians and, consequently, were in breach of Rule 11 of the

Solicitors' Code of Conduct ("SCC") 2007. Rule 11 requires a solicitor making a statement to the media to "exercise your professional judgment as to whether to make a statement....and, if you do..., about its content". Mr Shiner admitted that he had material in his possession which should, have caused him to doubt the veracity of the evidence which he was endorsing at the press conference. By way of example, Mr Shiner was in possession of inconsistent witness evidence.

Similar allegations of a failure to appraise the evidence were made against Mr Day. Arguably the case against Mr Day went further because Leigh Day had a copy of a list which demonstrated that some of the claimants were not innocent civilians but member of the Mehdi Army (although Mr Day had not at that stage seen this

list himself). Further it had obtained an opinion from Counsel which said that Leigh Day should be “wary about [the] death claims”.

Nevertheless, the SDT reached a different conclusion against Mr Day to the outcome in the Shiner case. The panel had the advantage of hearing Mr Day give evidence and justified their determination on the basis that the allegations made against Mr Shiner and Mr Day related to their respective states of mind and actions, and the evidence from Mr Day was that his statements at the press conference had been based on his genuine beliefs about the evidence he had.

The divergent outcomes demonstrate how fact sensitive such findings are. Mr Shiner and Mr Day held a joint press conference. Each had evidence in front of him which arguably undermined what they were saying. Nevertheless, the approach taken by the SDT to the way in which Mr Day exercised his judgment resulted in a different finding to that made in respect of Mr Shiner.

The Tri-Partite Fee Sharing Arrangement

Given the overlap between the work being done by PIL and Leigh Day, they entered into a fee sharing agreement between them. This also involved Mazin Younis (“Mr Younis”) who was described as PIL’s Iraqi agent.

A number of allegations were made against Mr Shiner and the Leigh Day Respondents arising out of this arrangement. However one allegation levelled against both was that the fee payable to Mr Younis pursuant to the tri-partite agreement was a contingency fee within the meaning of rule 9.01(4) SCC 2007 which provided “You must not in respect of any claim arising as a result of death or personal injury...enter into an arrangement for the referral of clients with... any person whose business, or any part of whose business, is to make, support or prosecute... claims arising as a result of death or personal injury, and who in the course of such business, solicits or receives contingency fees in respect of such claims”.

Mr Shiner admitted breaching this rule and the SDT was satisfied that the admission was appropriate. In short, in the Shiner case it was accepted that Mr Younis was a person whose business was to support claims arising out of death or personal injury and the method of calculation of the sum payable to him pursuant to the tri-partite agreement amounted to a contingency fee. By contrast, the Leigh Day Respondents defended the allegation on two grounds. First, Mr Younis did not make or prosecute any claims. Second, Mr Younis did

not solicit or receive contingency fees in the course of a business of supporting claims because his business was a client referral service which was a service to Leigh Day. There was evidence that Leigh Day had considered the ambit of rule 9.01(4) before entering into the fee sharing agreement and believed that they had complied with that rule. In ruling in the Leigh Day Respondents’ favour, the SDT was apparently influenced by the fact that the SRA had not raised this issue prior to the Rule 5 statement. The SDT found that there had been no breach of rule 9.01(4) and, if there was, then it did not amount to professional misconduct.

It is difficult to reconcile the two decisions on this point and the SDT in Leigh Day did not really attempt to. The panel simply pointed out that the SDT in Mr Shiner’s case had not had the interpretation issue brought to its attention (even though the SRA was on notice at the time that the point would be taken by Leigh Day).

Conclusion

It is not uncommon for a respondent to disciplinary proceedings to be concerned about admissions made by other respondents, or findings made against those respondents, in earlier connected proceedings. The concern is typically that a subsequent tribunal will be influenced by the outcome of an earlier case. A common way of meeting this concern is to attempt to agree with the regulatory authority that it will not seek to rely on the earlier judgment or settlement agreement as having any probative value in the second case. However, the SDT cases against Mr Shiner and the Leigh Day Respondents demonstrate that the second case will not necessarily be tainted by the first.

Helen Evans and Clare Dixon
4 New Square

LEGAL UPDATE

Oyesanya v. General Medical Council [2017] EWHC 409 (Admin)

Application granted by Holman J for an adjournment of the substantive appeal hearing so that the appellant could obtain legal representation by a barrister provided through the Bar Pro Bono Unit. In advance of the hearing, the appellant issued an application on notice to the GMC. He produced material indicating that his application to the Bar Pro Bon Unit had received relatively favourable consideration, although they

inevitably stressed that as they rely entirely on volunteers they could not guarantee the find or make available any representation. The learned judge said that this was the appellant's first application for an adjournment. Pending the substantive hearing of his appeal, he is, and will remain, suspended so that the public will remain protected from him.

General Medical Council v. Jagjivan and Professional Standards Authority for Health and Social Care [2017] EWHC 1247 (Admin)

This was the first appeal brought by the GMC under its new powers to appeal the sanction of the tribunal pursuant to the provisions of section 40A of the Medical Act 1983. The GMC invited the Administrative Court (Sharp LJ and Dingemans J) to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the Act, and the court considered it was right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including *Meadow*; *Fatnani and Raschid*; and *Southall*) as appropriately modified, can be applied to section 40A appeals. The appeal, in the instant case, was allowed on the basis that the tribunal's failure to find that the doctor's actions were not sexually motivated was wrong and unsustainable.

Solicitors Regulation Authority v. Libby [2017] EWHC 973 (Admin)

The respondent cross-appealed against the order that he pay the SRA £46,577 given that the tribunal found all the allegations against him not proven. The SRA applied for costs in the sum of £79,881 and submitted that the case was properly brought and that the respondent had brought the proceedings on himself and it was in the public interest to pursue them. The Administrative Court set aside the tribunal's order on costs. The fact was that the tribunal found all the allegations unproven. The position was one where the respondent successfully resisted all the allegations, and there was nothing in his conduct of the proceedings to justify making a cross-order against him. That position was not materially altered by the fact that the Administrative Court had remitted to the tribunal one part of one of the allegations. That was not the central thrust of the way in which the SRA put its case in the allegations or before the tribunal.

Salem v. General Medical Council [2017] EWHC 840 (Admin)

A complaint was made to the General Medical Council in relation to an incident which occurred at the mental health unit where the appellant was employed on 16 April 2008. That complaint was investigated at a hearing commencing on 12 December 2011 and lasting for several days. The tribunal found the allegations proved against the appellant and imposed the sanction of a 12-month suspension. The sanction was extended at various review hearings until on 1 June 2016 the tribunal directed that the appellant's name should be erased from the register. The tribunal said that it had been left wholly unconvinced that any progress could be made on a journey to remediation. The tribunal was persuaded that the dismissive way in which the appellant had approached the purpose of the review hearing demonstrated a persistent lack of insight into the seriousness of his actions. In dismissing the appeal, Dove J said it was apparent that the appellant had never accepted the validity of either the proceedings or the findings of the tribunal in 2011. The appellant had been consistently of the opinion that the 2011 proceedings did not have the complete documentation available to the hearing and, further, that there was no proper criticism which could be made of his actions on 16 April 2008. In resisting the reopening of these matters, counsel on behalf of the GMC contended that it was now too late for the appellant to seek to disturb the findings and conclusions of the 2011 panel and that the appeal against the findings in 2011 was the subject of an issue estoppel preventing the re-litigation of the points which were decided by the panel in 2011; see *Arnold v. National Westminster Bank Plc [1991] 2 AC 93*; and *R (Coke-Wallis) v. Institute of Chartered Accountants of England and Wales [2011] UKSC 1*, where the Supreme Court held that the doctrine of issue estoppel applied with equal force in the context of disciplinary proceedings. Dove J said he accepted the GMC's submissions in relation to the relevant legal principles which apply. Only if the appellant could bring himself within the scope of the exception provided by *Arnold* could his appeal in relation to the merits of the 2011 decision be examined. There may be an exception to issue estoppel in special circumstances where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. On the facts, the appellant could not come within either test.

Professional Standards Authority v. Health and Care Professions Council and Doree [2017] EWCA Civ 319

Lindblom LJ (with whom Sharp LJ agreed) said at [38] that he did not accept that, in principle, a professional disciplinary committee may only reasonably find that a registrant has shown insight or remorse after he has given oral evidence to demonstrate it, and has made himself available for cross-examination or other questioning on that evidence – even if it has rejected his evidence on some or all of the allegations he faced. Whether a registrant has shown insight into his misconduct, and how much insight he has shown, are classically matters of fact and judgment for the professional disciplinary committee in the light of the evidence before it. Some of the evidence may be matters of facts, some of it merely subjective. In assessing a registrant’s insight, a professional disciplinary committee will need to weigh all the relevant evidence, both oral and written, which provides a picture of it. This may include evidence given by other witnesses about the registrant’s conduct as an employee or as a professional colleague, and, where this is also relevant, the quality of his work with patients, as well as any objective evidence, such as specific works he has done in an effort to address his failings. Of course, there will be cases in which the registrant’s own evidence, given orally and tested by cross-examination, will be the best evidence that could be given, and perhaps the only convincing evidence. Any such evidence may well be more convincing if given before the findings of fact are made. But this is not to say that in the absence of such evidence a professional disciplinary committee will necessarily be disabled from making the findings it needs to make on insight, or bound to find that the registrant lacks it.

R (Wilson) v. Independent Adjudicator [2016] 4 WLR 27

The Young Offender Institution Rules 2000, made pursuant to section 47 of the Prison Act 1952, were made for the purpose of prison order and discipline, and not for the creation of criminal offences. Breach of the rules were not classified as criminal offences and disciplinary offences under the rules were designed to be resolved quickly. Accordingly a defence of duress was not available to a disciplinary offence under the rules unless expressly provided for within the wording of the relevant offence. The role of duress as mitigation leaves much more to the experience and judgment of the governor or the Independent Adjudicator.

**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:

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