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Introduction

Welcome to the Winter Edition of the ARDL Bulletin. The pace of development within regulation and discipline shows no sign of relenting. In this edition there is a summary of a bumper crop of new cases including *Bawa-Garba* and *FRC v Sports Direct*. We are also grateful to those contributors who have taken the time to write interesting and insightful articles on various aspects of professional regulation.

As we approach the end of the year, it has been another hugely successful year for ARDL. Membership now stands at just under 1000 members. Membership renewal starts early in the new year. The ARDL Committee has decided to keep membership at £35 for next year. We already have in train a series of seminars based in London and around the UK. Along with that we have some exciting plans in 2019 which we will share shortly. I look forward to another excellent year and hope that we will be able to exceed 1000 members. Can I also take the opportunity to thank the hard work of the ARDL Committee in making all of this possible.

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Legal Update

***Bawa-Garba v. General Medical Council* [2018] EWCA Civ 1879**

At the start of its judgment in allowing the appeal of Dr B-G against the sanction of erasure substituted by the Divisional Court in place of suspension imposed by a Medical Practitioners Tribunal, the Court of Appeal said that the central issue was the proper approach to the conviction of a medical practitioner for gross negligence manslaughter in the context of fitness to practise proceeding under the Medical Act 1983 when the registrant does not present a continuing risk to patients. On 13 June 2017, following her conviction in 2015 for gross negligence manslaughter in respect of which she was sentenced to a term of two years' imprisonment suspended for 2 years, the tribunal suspended Dr B-G's registration for a period of 12 months with a review. On an appeal by the GMC, pursuant to section 40A of the Medical Act 1983, the Divisional Court quashed the sanction of the tribunal and substituted in its place a direction that Dr B-G's name be erased from the medical register. The tribunal had heard evidence on impairment over the course of three days followed by further evidence on sanction over the course of 2 days. The Court of Appeal (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Rafferty LJ) set aside the decision of the Divisional Court, restored the decision of the tribunal and remitted the matter to the MPTS for review of the doctor's suspension. The court, at [60], said that an appeal by the GMC from the tribunal to the Divisional Court pursuant to section 40A of the 1983 Act was by way of review and not re-hearing. In that respect it differed from an appeal by a practitioner pursuant to section 40 which is conducted by way of rehearing. However, whether the appeal is pursuant to section 40 or section 40A, the task of the High Court is to determine whether the decision of the tribunal was "wrong". In either case, the appeal court should, as a matter of practice, accord to the tribunal the same respect: *Meadow v. General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462 at [126]-[128]. The decision of the tribunal that suspension rather than erasure was the appropriate sanction for the failings of Dr B-G, which led to her conviction for gross negligence manslaughter, was an evaluative decision based on many factors: [61]. After a review of authorities the court said that an appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide: [67]. Bearing in mind the respect due to such an expert body in reaching its evaluative judgment, there were no grounds for allowing the appeal under section 40A on the basis that the sanction guidance was wrong because the only sanction properly and reasonably open to the tribunal was erasure.

***Solicitors Regulation Authority v. James; Solicitors Regulation Authority v. Macgregor; Solicitors Regulation Authority v. Naylor* [2018] EWHC 3058 (Admin)**

These three appeals under section 49 of the Solicitors Act 1974 by the SRA against decisions of the SDT were ordered to be heard together. In each case, the SDT made findings of dishonesty against the solicitor in question, but went on to find that there were "exceptional circumstances", in part because of issues as to the mental health of the solicitor in question, justifying the imposition of a lesser sanction that striking the solicitor of the roll. In each case the sanction imposed was one of suspension which was itself suspended. The Divisional Court allowed the appeal of the SRA in all three cases, quashed the sanction of suspension imposed and substituted a sanction of striking off. Giving judgment, Flaux LJ (with whom Jeremy Baker J agreed) said that in the context of solicitors' cases, striking off is the almost invariable sanction for any dishonesty and whilst dishonesty at the lowest end of the scale may mean that the case falls within the small residual category of cases justifying a lesser sanction, it will not do so unless the overall assessment is that that there are "exceptional circumstances": [51]. Although it is well established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in *Solicitors Regulation Authority v. Sharma* [2010] EWHC 2022 (Admin), *R (Solicitors Regulation Authority) v. Imran* [2015] EWHC 2572 (Admin) and *Shaw v. Solicitors Regulation Authority* [2017] EWHC 2076 (Admin), that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty: [101]. What can be considered in an evaluation of whether exceptional circumstances exist will include matters of personal mitigation including mental health issues and workplace pressures: [102].

However, where the SDT has concluded that, notwithstanding any mental health issues or work or workplace related pressures, the respondent's misconduct was dishonest, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance: [103]. Therefore, whilst the mental health and workplace environment issues in any given case will not be a "trump card" in assessing whether there are exceptional circumstances, they can and should be considered as part of the balancing exercise required in the assessment or evaluation. The problem in the present cases is that the SDT has not engaged in that balancing exercise: [104]. It is striking that the only two reported cases where the courts have considered striking off not to be the appropriate sanction for dishonesty are cases of isolated dishonesty; see *Burrowes v. The Law Society [2002] EWHC 2900* (Admin) and *Imran*. On analysis both were cases of "a moment of madness", to be contrasted with the dishonesty and misconduct in each of the present cases, which was repeated and over a period of time: [106 - 109].

Khan v. Bar Standards Board **[2018] EWHC 2184 (Admin)**

K, a practising barrister of 20 years' call, faced three allegations of professional misconduct contrary to Core Duty 3 (failure to act with integrity) and Core Duty 5 (behaving in a way which is likely to diminish the trust and confidence which the public places in the barrister or in the profession) of the Bar's Code of Conduct (9th edition). In dismissing K's appeal against the finding of misconduct by the decision of the Disciplinary Tribunal, Warby J, at [36], said:

> The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable. There is, as Lang J [in *Howd v. Bar Standards Board, Bar Standards Board v. Howd* [2017] EWHC 210 (Admin); [2017] 4 WLR 54] put it, a "high threshold". Only serious misbehaviour can qualify. I am not sure that the threshold of gravity is quite as rigid or hard-edged as [counsel for K] suggests [namely, that the behaviour must be "seriously reprehensible" before it can amount to professional misconduct]. I do not believe that in *Walker* [*Walker v. Bar Standards Board*, unreported, 19 September 2013] Sir Anthony May was seeking to crystallise an exhaustive definition of professional misconduct. Rather, he was reaching for a touchstone to help distinguish the trivial or relatively unimportant from that which merits the "opprobrium" of being labelled as professional misconduct. Nor do I read Lang J's decision in Howd as seeking to set out precise parameters for what can and cannot qualify as professional misconduct. Indeed, [at para 58] she used three separate terms, "reprehensible, morally culpable or disgraceful". I think it is perhaps unhelpful for this principle to be tied too firmly to particular phraseology. But even on the footing that the right test is that of "seriously reprehensible" it seems to me that, when Mr Khan's behaviour is properly evaluated, it comfortably meets this standard, and that this is in effect the approach which the Tribunal adopted.

Solicitors Regulation Authority v. Day and others **[2018] EWHC 2726 (Admin)**

The allegations against the respondents alleged breaches of the Solicitors Code of Conduct 2007 and the SRA Principles 2011 including Principle 5 ("You must provide a proper standard of service to your client") and Principle 6 ("You must ….. behave in a way that maintains the trust the public places in you and in the provision of legal services"). The SRA submitted that in dismissing the allegations the majority of the tribunal had wrongly introduced considerations of professional misconduct instead of simply focusing on whether or not there had been a breach of the Code or Principle. Rejecting this argument, the court said:

> 156. As we have had cause to ask rhetorically before in this judgment: what was this particular allegation doing before the Tribunal if it was not a matter of professional misconduct? In truth, if such an allegation under Principle 5 is to be pursued before a tribunal then it ordinarily needs to have some inherent seriousness and culpability. It no doubt can be accepted that negligence may be capable of constituting a failure to provide a proper standard of service to clients. But even so, questions of relative culpability and relative seriousness surely come into question under this Principle if the matter is to be the subject of disciplinary proceedings before a tribunal. We do not, we emphasise, say that there is a set standard of seriousness or culpability for the purposes of assessing breaches of the core principles

in tribunal proceedings. It is a question of fact and degree in each case. Whether the default in question is sufficiently serious and culpable thus will depend on the particular core principle in issue and on the evaluation of the circumstances of the particular case as applied to that principle. But an evaluation remains a concomitant of such an allegation.

157. If authority is needed for such an approach, then it can be found not only in the observations of Jackson LJ (in the specific context of Principle 6) in *Wingate and Evans v. Solicitors Regulation Authority* [2018] EWCA Civ 366 but also in the decision of the Court of Session *in Sharp v. The Law Society of Scotland* [1984] SC 129. There, by reference to the applicable Scottish legislation and rules, it was among other things held that whether a breach of the rules should be treated as professional misconduct depended on whether it would be regarded as serious and reprehensible by competent and responsible solicitors and on the degree of culpability; see the opinion delivered by the Lord President (Lord Emslie) at page 134.

158. We consider that, though the statutory schemes are by no means the same, the like approach is generally appropriate and required for the English legislative and regulatory regime in the treatment of alleged breaches of the core principles. We appreciate that there may be some breaches of some rules – for instance, accounts rules: see, for example, *Holden v. Solicitors Regulation Authority* [2012] EWHC 2067 (Admin) – which can involve strict liability. But that cannot be said generally with regard to all alleged breaches of the core principles coming before the Tribunal; which in our view ordinarily will involve an evaluative judgment and an assessment of seriousness to be made.

***Financial Reporting Council v. Sports Direct International Plc* [2018] EWHC 2284 (Ch)**

In the course of an investigation into the conduct of Grant Thornton UK LLP, the auditors of Sports Direct International (SDI), the Financial Reporting Council (FRC) sought disclosure of various classes of documents from SDI, pursuant to regulation 10 of and Schedule 2, para 2 to the Statutory Auditors and Third Country Auditors Regulations 2016, and paragraph 10(b) of the FRC's Audit Enforcement Procedure. SDI claimed that all the documents attracted legal advice privilege. The FRC's investigation arose in relation to the non-disclosure in SDI's 2016 Financial Statements of its relationship with a related party namely, a subsidiary company of SDI, as part of a structure adopted on the advice of Deloitte LLP concerning VAT on its sales to EU customers. In granting the FRC's application, Arnold J held that: (1) a pre-existing non-privileged document could not be the subject of legal advice privilege merely because it was sent in a communication by a client to a lawyer seeking advice or by a lawyer to a client giving advice; (2) that SDI had not waived privilege in relation to additional privileged documents by sending them to Grant Thornton for the purposes of the audit; but (3) production of the documents to the FRC for the purposes of investigation would not infringe DSI's privilege. After reviewing, amongst others, *R v. Derby Magistrates' Court, ex parte B* [1996] 1 AC 487; *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563; *Parry-Jones v. Law Society* [1969] 1 Ch 1; *R v. Inland Revenue Commissioners, ex parte Taylor (No 2)* [1990] 2 All ER 409; *Simms v. The Law Society* [2005] EWHC 408 (Admin); and *B v. Auckland District Law Society* [2003] 2 AC 736, Arnold J, at [74], said that Lord Hoffmann's primary reason in *Morgan Grenfell* for supporting the decision in *Parry-Jones* was that there was no infringement of the client's legal professional privilege. His alternative reason was the same as that given by Lord Denning: the Solicitors Act authorised it. Arnold J continued:

84. In my judgment counsel for SDI is correct in his submission that Lord Hoffmann's primary reason in *Morgan Grenfell* for supporting the decision in *Parry-Jones* [namely, that there was no infringement of the client's legal professional privilege – [74]] was strictly obiter. Nevertheless, it was an important step in his reasoning in that case, and it has the persuasive force of a unanimous House of Lords. Moreover, it receives support from the subsequent case law. Notwithstanding the criticisms of it, there is no authority to the contrary. Accordingly, I consider that it must be taken to represent the current state of the law. Thus the production of documents to a regulator by a regulated person solely for the purposes of a confidential investigation by the regulator into the conduct of the regulated person is not an infringement of any legal professional privilege of clients of the regulated person in respect of those documents. That being so, in my judgment the same must be true of the production of documents to the regulator by a client.

Arnold J went on to consider differences between the relevant statutory regimes; section 29 of the Solicitors Act 1957 in the case of *Parry-Jones*, and the regulations

in the instant case, and said that Lord Hoffmann's primary reason in *Morgan Grenfell* avoids this difficulty. But if Lord Hoffman's alternative reason represents the law, then the FRC's interpretation of the legislation is correct and disclosure is authorised.

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Have we been doing it all wrong: Are Non-Statutory Regulators Arbitrators?

Background

The UK is lucky to have a broad and diverse range of private bodies of which membership bestows a livelihood (how easy is it to trade as a surveyor if not a member of RICS?) and yet are not formally part of the public sector (although many have a Royal Charter). They range from the Institute and Faculty of Actuaries to the English Cricket Board (as well as many other sports associations). They include political parties, ancient guilds and professional bodies of both accountants and mental health practitioners.

Membership of such bodies arises from a contract whereby the member agrees to pay subscriptions and to abide by certain standards, in return for the right to advertise, participate and trade as a member. If the member's conduct endangers the integrity, reputation and value of membership s/he will face disciplinary action. The formality and robustness of the disciplinary process varies widely between bodies. The contract places rights and liabilities on the parties but these will not usually be directly enforceable against non-parties (although a Royal Charter may mean the body has the exclusivity over the title "chartered").

Challenging Regulators

The traditional approach to challenging non-statutory regulators of well-recognised professionals is to bring either a JR or a private law claim for breach of contract (often with an application for an interim injunction restraining the body from imposing sanction along with an expedited trial on the merits).

In *Andreou v ICAEW* [1998] 1 All ER 14, the Court of Appeal said that the ICAEW performed some public functions, but this did not seem to mean that a challenge to its disciplinary role could only be by way of JR. Since then there have been a line of cases where members have challenged ICAEW decisions by way of judicial review but again the precise overlap of public and private rights and the question of forum does not appear to have been raised. CIMA has also been challenged in JR proceedings. RICS seems to have been challenged by both JR (R (Antino) v RICS [2015] EWHC 2457) and for breach of contract (see *RICS v Wiseman Marshall* [2000] PNLR 649). The recent double jeopardy challenge to the BACP (*R(Mandic-Bozic) v BACP* [2016] EWHC 3134) was also by way of JR. On the other-hand, the spate of litigation in 2016 concerning the election of the leader of the Labour Party were brought as private law claims for breach of contract.

Whether a regulator is being challenged in a JR or a private law claim does not, apart from procedure, make a huge difference. The JR challenge will have stricter time limits, but most effected members bring complaints to Court fairy promptly to mitigate their damage. Usually in a breach of contract claim the Court will carefully scrutinise the evidence to find out who is in breach and what damages flow. But in cases to do with regulatory bodies it is well established that a different approach is appropriate: on a claim for breach of contract against a regulator for unfair treatment, wrong findings of fact or a disproportionate sentence, the supervisory approach of the Court is not to make the decision afresh but instead to exercise a merely supervisory jurisdiction which is "very similar to that of the court on judicial review": *Bradley v Jockey Club* [2005] EWCA Civ 1056. So it seems that the question of JR v private law claim is largely one of form rather than substance.

What's the problem?

In the world of sports law it appears to be increasingly accepted that challenges are not by these traditional routes but instead by way of appeal to the Commercial Court from an arbitration.

In *England & Wales Cricket Board v Kaneria* [2013] EWHC 1074, Cooke J, in the Commercial Court, held that proceedings before the appeal panel of the ECB constituted an arbitration. In *Baker v British Boxing*

Board of Control [2015] EWHC 2469 Master Matthews of the Chancery Division (now HHJ Matthews) found the same when it came to Stewards of Appeal of the Boxing Board. Both Judges applied a decision of Thomas J (as he then was) in *Walkinshaw v Diniz* [2000] 2 All ER 237 which was about a decision by a body established by Formula 1.

Whether a particular dispute resolution process was an arbitration depended, said Thomas J, on the following criteria:

a) the parties had a proper opportunity to present their case;

b) the arbitrators did not receive unilateral communications from one party which they disclosed to the other;

c) proper and proportionate procedures were in place for the provision and receipt of evidence;

d) the tribunal's jurisdiction derived either from the consent of the parties, from an order of the court or from statute, the terms of which made it clear that the process was to be an arbitration (although it did not need to be formally called an arbitration);

e) the tribunal was chosen either by the parties or by a method to which they had consented;

f) the agreement of the parties to refer their disputes to the decision of the tribunal was intended to be enforceable in law; and

g) the agreement in issue contemplated (i) that the tribunal which carried on the process would make a decision which was binding on the parties; (ii) that the process would be carried on between those persons whose substantive rights were determined by the tribunal; (iii) that the tribunal would determine the rights of the parties in an impartial manner, owing an equal obligation of fairness towards both sides; and (iv) a process whereby the tribunal would make a decision on a dispute which had already been formulated at the time when the tribunal was appointed.

It seems likely that most properly organised and reputable dispute resolution systems – including the whole range of non-statutory professional regulators - will fall within this description and it is therefore, at the least, perfectly arguable that a non-statutory regulator's disciplinary process is an arbitration and thus subject to the 1996 Act.

Why would I want to call a regulatory process an arbitration?

An arbitration is a form of private dispute resolution which is much supported by the Courts. The Court has the power (and duty) to help the arbitration be effective. The Arbitration Act 1996 means that arbitrations differ from ordinary disciplinary proceedings in important ways. First, an arbitration tribunal has a lot of autonomy (subject to agreement of the parties or any applicable rules) to run its own procedure and admit evidence (s.34 of the Arbitration Act 1996). Second, agreements or rules as to costs prior to the arbitration being engaged are void and costs follow the event (ss.60 and 61 of the Act). This means that successful members are in a much stronger position to recover costs than under the traditional *Baxendale-Walker v Law Society* approach. Third, the Court can be asked to fortify and support the arbitration, in particular it can use the same powers to secure the attendance of witnesses or documents as would be available in ordinary litigation (s.43 of the Act). This is a powerful tool especially in more complex cases where professional members face difficulty getting information from third parties. Fourth, as long as the process has been fair, the rights of appeal are mutual but very limited. Fifth, arbitrations are usually seen as confidential.

So in particular cases – especially those with missing but important witnesses, or where costs recovery is to be sought - a member might want to say that a particular disciplinary process is, properly understood, an arbitration. A body seeking to resist an appeal might also want to take this point.

Is it a good argument?

There is a settled practice, at least in accountancy cases, of assuming JR is the appropriate method of challenge. Changing a settled practice is not easy. But this point does not seem to have been argued before and it has intellectual merit: if a disciplinary process looks like an arbitration (and they do), why should not it be treated as one? A clause can constitute an agreement to arbitrate without even referring to the process as an "arbitration": *Wilson v Survey Services* [2001] EWCA Civ 34.

It is therefore submitted that in appropriate case this argument should be taken and won.

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Privilege and Maxwellisation: what can we learn from recent FRC cases?

The same issues often crop up across an array of regulatory work. Legal professional privilege is the most obvious example, with a number of high profile cases arising out of SFO investigations. A second example concerns the rights of third parties to prevent the publication of adverse comment about them in regulatory reports and decisions ('Maxwellisation'). In this article, **Jamie Smith QC** and **Helen Evans** explain how these two issues have arisen in the context of disciplinary investigations and proceedings undertaken by the Financial Reporting Council (FRC), which plays an important role in the regulation of accountants.

Legal professional privilege

A starting point for any regulatory investigation is the request by the regulatory for documentation in the hands of the professional person or firm. What if that person or firm holds information that is arguably subject to client privilege? This problem is not exclusive to accountants, but it arises frequently in the audit context. Often, the auditor must have sight of, say, a legal opinion as to the prospect of success in a major piece of litigation, in order to test the accuracy of the financial statements. If the FRC demands sight of that legal opinion, as part of a regulatory investigation, is the auditor obliged to hand it over?

The answer to this question was given by Arnold J in FRC v. Sports Direct [2018] EWHC 2284 (Ch). In that case, the FRC applied for the arguably privileged material to be provided by the audit client directly, but the analysis applies equally to the auditor.

Arnold J addressed two separate questions:

- Is privilege lost when the client provides the document/information to the auditor? The Judge answered this question in the negative (para. 56). Privilege was not destroyed by being placed in the auditor's hands. Instead, the auditor was brought within the circle of confidence;
- Would it contravene client privilege for the auditor (or the client) to provide the document/information to the FRC? The Judge also answered this question in the negative. His primary reason for so going was that the provision of information to the FRC for the purposes of a confidential investigation into a regulated person was not an infringement of privilege (para. 84). Arnold J drew heavily on authorities relating to the regulation of the solicitors' profession, and in particular R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563. The Judge also accepted a secondary submission made by the FRC, namely that any infringement of privilege was authorised by the state (para. 92).

The *Sports Direct* decision is awaiting appeal. The case has attracted some criticism, on grounds of both principle and practice. The objections of principle include the argument that allowing disclosure for the purposes of a confidential investigation conflicts with the absolute nature of privilege. The practical objections include the lack of clarity about what a regulator granted access to a document for investigatory purposes is then allowed to do with it. What happens when the regulator brings a formal complaint? What if there are information sharing gateways with other regulators?

'Maxwellisation' and the protection of the rights of third parties

As with most regulatory disciplinary regimes, the FRC Accountancy Scheme and Audit Enforcement Procedure are designed to be public. The glare of publicity for the audit engagement partner and his/her team is an inevitable consequence of being regulated persons. But, what of the chief executive of the audited company? What if a key aspect of the disciplinary proceedings against the auditor is that dishonest practices are said to have taken place within the audited entity?

It may therefore be, and often is the case, that FRC disciplinary proceedings lead to a decision by the Tribunal that contains highly adverse comment as to third parties working within the audited entity. Settlement agreements, which are equally designed to be made public, may too contain such comment.

What rights do those third parties have to prevent publication of such adverse comment and the attendant reputational damage?

In general terms, this issue has been around for a while, not least in the context of financial regulation. Under s. 393 of FSMA 2000, where the FCA publishes a Warning Notice or a Decision Notice setting out a case against a regulated firm and that notice (a) identifies a third party and (b) may be prejudicial to that third party, a copy of that Notice has to be provided to him/her. The third party is then entitled to make representations, and often does so. The third party may also complain that, whilst he/she is not identified by name, there is enough detail in the Notice to enable his/her identity to be deduced. Recent cases on third party rights in the FCA context include: *FCA v Macris* [2017] 1 WLR 1095 (SC) and *FCA v Grout* [2018] EWCA Civ 71 (CA). In *UK Innovative TI Limited v FCA* [2018] UT 0136 (TCC), the Upper Tribunal held that Supervisory Notices are not caught by the third party rights procedure set out in s. 393 of FSMA 2000.

Turning specifically to the FRC disciplinary context, there is no underlying statute affording third party protection; nor do the FRC regimes yet cater explicitly for Maxwellisation or other measures of protection. Third parties must fall back on common law and ECHR rights.

In *R (Lewin) v FRC* [2018] 1 WLR 2867, the complainant was the subject of highly adverse comment in a Report produced by the FRC's Disciplinary Tribunal, following a lengthy disciplinary hearing arising out of an audit engagement. He had taken no part in the disciplinary proceedings; nor had been requested to do so. He became aware of the content of the Report immediately prior to its publication and sought judicial review of (a) the Tribunal's decision to hear the matter in his absence and/or to set down adverse comment about him in the Report and of (b) the FRC Conduct Committee's decision to publish the Report (without applying a suite of redactions to ensure his anonymisation).

The judicial review application was dismissed by Nicola Davies J. on the grounds that:

- The Tribunal had had to investigate the nature and extent of the fraud at the company in order to determine whether there had been any culpability on the part of the auditors;
- There was nothing in the FRC's Accountancy Scheme which permitted the sending of a draft Report to a third party in order to invite comments in advance of publication;
- Given the public nature of the scrutiny of the FRC, a director of a public company could have had no reasonable expectation of privacy arising from the disciplinary proceedings; and,
- There was a strong public interest in publishing the full Report.

The consolation for the complainant in *R (Lewin)* was the Court's acknowledgement that the Report should have on its front page a disclaimer stating that he had not been a party to the proceedings, had not been invited to provide evidence to the Tribunal and that it would not be fair to treat any part of the Report as containing findings made against him.

A few months after Nicola Davies J.'s judgment in *R (Lewin)*, on 12 June 2018 the FRC announced terms of settlement with PWC and the audit engagement partner in relation to audits of BHS and the Taveta Group. In accordance with its guideline publication procedures, the FRC wished to place the settlement documents on its website. As is routine, these documents included particulars of facts and misconduct agreed by the parties for the purposes of the settlement. Taveta (the audit client) sought an injunction to prevent the publication of what it regarded as "unwarranted criticism" of it.

This led to the judgment of Nicklin J. in *Taveta Investments Ltd v FRC* [2018] EWHC 1662 (Admin). The Judge held that there was a serious issue to be tried as to whether the agreed settlement documents were defamatory and whether the FRC owed a duty of fairness to Taveta. However, in the result, Taveta had not showed that there it was the sort of exceptional case that permitted the grant of an interim injunction restraining publication pending resolution of the substantive issues.

Although Taveta's application failed, Nicklin J rejected the submissions of counsel for the FRC that *R (Lewin)* was authority for propositions that:

- The FRC could include in published documents findings that were seriously defamatory of a third

party and was under no duty to permit the third party an opportunity to make submissions to the FRC before publication;

- The interests of the third party were adequately protected by safeguards such as the inclusion of a disclaimer upon publication.

Alternatively he suggested that if *R (Lewin)* was authority for those propositions, then it was contradicted by earlier authorities.

We therefore currently have a fluid situation for third parties. *Both R (Lewin)* and *Taveta* recognise that third parties facing adverse comment by regulators do have common law and ECHR rights to fair treatment. What is not yet clear is what practical steps are needed by regulators by way of adequate protection of these rights. Watch this space!

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Client accounts not bank accounts: common problems and pitfalls

On 6 August 2018 the SRA updated its warning notice on the improper use of a solicitors' client account as a banking facility. **Ben Hubble QC** and **Clare Dixon** of **4 New Square** look at how the prohibition on solicitors using their client accounts as banking facilities started, the way in which the rule is now interpreted and the proposed future wording of this aspect of the account rules.

The Past: the Solicitor's Account Rules 1998 ("the SAR 1998")

In *Wood and Burdett* (Case No. 8669/2002) solicitors offered, what were obviously, banking facilities to clients - cashing their cheques and making payments at their direction. However, the old SAR 1998 did not expressly prohibit the use of a solicitor's client account as a banking facility. Nevertheless, the Tribunal found that the solicitors' conduct was in breach of their good reputation and the good reputation of the solicitors' profession stating that *"it was not a proper use of a solicitor's client account to allow it to be used by clients...as a bare banking facility. The proper use of a solicitor's client account was to hold money and disburse it as required in connection with a client matter of which the solicitor has conduct on behalf of that client"*. They also explained the rationale for this as being that (although it had not occurred in this case) an *"unscrupulous person"* could seek to utilise the facility as a *"vehicle for money laundering"* which was *"a mischief which solicitors should actively seek to obstruct"*.

A note about *Wood* was attached to the commentary on rule 15 of the SAR 1998. This rule was concerned with money going into and out of client account but said nothing about using the client account as a banking facility. Somewhat confusingly, however, the note specified that rule 15 fell to be *"interpreted in light of"* the note on Wood.

The Present: the Solicitors' Account Rules 2011

The guidance arising out of *Wood* was formalized, and arguably extended, in Rule 14.5 of the Solicitors' Account Rules 2011 which states: *"You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities."*

Whilst the boundaries of rule 14.5 remain somewhat unclear what is clear is that changes in technology and increasing concern about money laundering mean that transactions, which were once acceptable by reason of their nature or frequency, may now be the subject of an SRA prosecution.

On 6 August 2018, the SRA issued an updated warning notice on the improper use of a client account as a banking facility which was accompanied by eleven case studies. The new release states that the intention was to help law firms understand *"the types of instances when paying money into the client account [that] may or may not be acceptable"*. It also stated that, in the preceding 12 months, the SRA had prosecuted 20 solicitors and three firms at the SDT for breaching rule 14.5 which had resulted in: 3 solicitors being struck off, two suspended and total fines of £763,000 which included the SRA's highest ever fine of £500,000.

The updated warning notice highlights 4 issues which we consider in turn.

<u>Providing Banking Facilities through a client account is objectionable in itself</u>

This has been clear since *Wood* and was reiterated in *Fuglers LLP v SRA* [2014] EWHC 179. The warning notice sets out the rationale for this proposition in the following terms: *"You are not regulated as a bank to provide such facilities. If you do provide banking facilities for clients, you are trading on the trust and reputation from your status as a solicitor in doing so".*

There must be a proper connection between the underlying legal transaction or advice and the payments you are asked to make and receive

Clarification of the second sentence of rule 14.5 was given in *Patel v SRA* [2012] EWHC 3373 where it was made clear that the relevant movement on the client account must be in respect of, not just an underlying transaction, but *"an underlying transaction which is part of the accepted professional services of solicitors".*

Whilst it may have once been the case that the SRA would not prosecute an isolated payment lacking an underlying legal transaction (see Walker & Nathan (Case No. 10640/2010)) this can no longer be relied upon with any certainty. As the warning notice makes clear, modern banking facilities mean that such practices can no longer be justified on the grounds of client convenience and in any event such convenience is outweighed by the risks inherent in such actions because it allows the client to *"evade [the] sophisticated controls and risk analyses that banks apply to money held for their customers".*

Risk of Insolvency

The well-known case of *Fuglers* exemplifies this issue. In *Fuglers*, the solicitors had allowed their client account to be used as a bank account for Portsmouth Football Club whose own banking facilities had been withdrawn upon the presentation by HMRC of a winding up petition. Over £10m passed through the solicitor's account over a four month period and the solicitor decided which creditors of the Club should be paid. This was found to be in breach of rule 14.5.

The risks inherent in a solicitor permitting a client to use its account when there is an insolvency situation are now set out in the warning notice. In short using the client account in this way allows the client to have a banking facility when their normal bank may have withdrawn such facilities and, by acting as *Fuglers* did, there is a risk that one creditor will be improperly favoured over another.

Risk of Money Laundering

Since *Wood* the risk of a solicitor being used as a vehicle for money laundering has been at the heart of rule 14.5. As the warning notice puts it, a solicitor's compliance with rule 14.5 *"offers an important 'first line of defence' against clients or others who seek to use your client account to launder money".*

This aspect of the warning notice also makes clear that *"multiple transfers of money between the ledgers of different clients or companies without evidence of the purpose or legal basis for the transfers"* will be a breach of rule 14.5 particularly if they are simply carried out on request. Solicitors should therefore refuse to transfer monies between internal ledgers for, say, inter connected client companies unless there is both a proper connection between the transfer and the legal work of the solicitors and documentary evidence (such as board minutes) of the rationale for the decisions of the relevant companies. Solicitors must focus on who is their client and whether there is a proper connection between each receipt or transfer and the legal work they are undertaking.

The future: the Solicitors Account Rule 2019?

It is likely that from April 2019 a new set of accounts rules will be in force. The most obvious change will be to their length – just 7 pages. However the prohibition on the use of client accounts as a banking facility remains in the form of rule 3.3 which provides: *"You must not use a client account to provide banking facilities to clients or third parties. Payments into, and transfers or withdrawals from a client account must be in respect of the delivery by you of regulated services".*

The prohibition on the use of a client account as a banking facility is, it is to be hoped, relatively well known. However, the breadth of its application and the rigorousness of its enforcement may not be. The updated warning notice is another step by the SRA to address any complacency or lack of understanding on the issue which still exists.

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Nursing & Midwifery Council Fitness to Practise Strategy update

A new direction for fitness to practise

> *The regulation of healthcare professionals must change in order to protect patients, to support the transformation of our healthcare services and to meet future challenges. It needs to be faster, simpler, better and less costly…This needs to be complemented by a culture that enables professionals to learn from their experiences, including from their mistakes. All too often professionals encounter a culture of blame rather than learning.*
>
> *Department of Health, Promoting professionalism, reforming regulation, a paper for consultation, October 2017.*

With the Government due to publish its next steps on reforming healthcare regulation any day now, healthcare professional regulators hope that long-awaited regulatory reform could become a reality. Most agree that there is a pressing need to think more radically about how to regulate, particularly in relation to fitness to practise.

The Nursing and Midwifery Council (NMC) has long realised this. It has consistently voiced its commitment to reforming its fitness to practise function. Some of this reform has been brought about by piecemeal legislative change, such as new powers for case examiners in the summer of 2017. However, in the absence of legislative reform, it has recognised its responsibility to make sure that its fitness to practise function remains relevant and fit for purpose.

In April of this year, it consulted on a new strategic direction for fitness to practise: *Ensuring public safety, enabling professionalism.* The consultation, which ran until June 2018, generated a high level of interest and received almost 900 responses.

During the same period, the NMC commissioned qualitative research with key stakeholders including members of the public, some of whom had been involved in the fitness to practise process. The research aimed to understand current perceptions of fitness to practise and the acceptability of the proposed strategy. The feedback was clear: people expect the NMC to protect patients and the public and to uphold the standards of the nursing and midwifery professions. The question for the NMC was how best to do this without legislative change within a system that most view as lengthy, confusing and unnecessarily adversarial.

The new strategy identifies many significant changes focused on learning and remediation which will see the NMC prioritising effective local action by employers and actively influencing workplace cultures. This should mean that only those cases that can't be dealt with at a local level will be referred to the regulator. Out of those cases that are referred, the NMC will encourage the nurse or midwife to be open and honest about what has happened as early as possible, and show what they've done to put things right. The NMC say this is important for patient safety as research indicates that each and every time someone is seen to be 'punished' for their actions through the intervention of the regulator, there is the risk that this contributes to a culture where it becomes more – not less – likely that the actions will happen again. The potential for registrants to focus on avoiding blame rather than acknowledging errors or weaknesses in their practice is increased. This will mean changes in when and how the NMC takes cases forward.

The when and the how involves two important changes that will pique the interest of the legal community. The first change, which is linked to resolving cases earlier on the process, is a move away from adversarial methods by only holding full hearings where there is an outstanding risk or a real dispute about what happened. To reach this position there has been a more fundamental shift in how the NMC interprets the concept of 'public protection'.

Making the best use of hearings

For those cases that have been investigated and where the nurse or midwife has a 'case to answer', there is a choice in how the case is resolved. It's a choice for the nurse or midwife and sometimes a choice for the Fitness to Practise Committee whether to have a matter dealt with a meeting or a hearing. If a nurse or midwife wants a hearing, they can ask for one and have one. However, the NMC strategy recognises that hearings best protect patients and the public by resolving central aspects of a case that the NMC and the nurse or midwife don't agree on. Full public hearings are not always required in order to reach a decision that protects the public. Their adversarial nature often has a significant negative impact on people, and they are slow and resource intensive.

So while the NMC maintains that any nurse or midwife who wishes to have a hearing will always be able to have a hearing, it says there is no public interest in holding a hearing where there is no material dispute

between NMC and the nurse or midwife. In this situation, the NMC says that a case is better dealt with by an agreed statement of case at a meeting. The full decision and reasons will be published and accessible, ensuring that the process is transparent.

The Fitness to Practise Committee has always had the power to deal with cases at meetings without members of the public, witnesses, registrants or lawyers attending. A meeting is a hearing on the papers. So, the Committee has all the same powers of sanction as it would have if it were sitting in public. There is an independent legal assessor present and the Committee can assess the written evidence as carefully as it would in a public hearing. The NMC publishes the decision (with the exception of matters concerning private matters), so anyone who wants to know what happened can find it online or request a copy of the decision.

Public protection

Public protection is a totemic concept. In 2015 the Health and Social Care (Safety and Quality) Act came into force and with it came an amendment to each healthcare regulators' legal framework to insert an overarching objective. The overarching objective for all regulators in exercising their functions is protection of the public. Linked to this are three sub-objectives of public safety, public confidence in the professions and the need to promote and maintain proper professional standards and conduct. How public protection is understood and achieved by a regulator is key to making sure that it's doing its job effectively and proportionately.

The NMC has recognised that one criticism of its fitness to practise function is that its regulatory remit had potentially gone too far beyond pure public protection issues and into a world where it was taking regulatory activity that may not be essential. This was done on the basis that it believed that others expected it.

The new strategic direction refocuses public protection and moves away from a culture of blame and punishment. This means that from now on it will always need to interpret these sub-objectives from a public protection viewpoint and has set a threshold for when action will be needed to promote and maintain confidence in the nursing and midwifery professions or uphold proper standards:

> *In cases about clinical practice, taking action solely to maintain public confidence or uphold standards is only likely to be needed if the regulatory concern can't be remedied.*
>
> *In cases that aren't about clinical practice, taking action to maintain public confidence or uphold standards is only likely to be needed if the concerns raise fundamental questions about the trustworthiness of a registrant as a professional.*

This is the first time a regulator has identified a threshold for taking action when it says a case raises a public confidence issues. What are the benefits of this? The new approach depends on whether or not the initial concern is about clinical practice. With this approach, decision makers will be able to focus more clearly on the nature of the conduct. It recognises that there are a small number of cases of very serious clinical harm that can't be remedied and that in cases that are not about clinical practice, it will only take action where trustworthiness is an issue.

Trustworthiness shouldn't automatically be equated with dishonesty though. While dishonest conduct could raise fundamental questions about the trustworthiness of a nurse or midwife as a professional, so could bullying and harassment where it is related to professional practice. Within a nurse or midwife's private life, convictions that relate to specified offences or result in custodial sentences are also likely to require regulatory action for the same reason.

The NMC is confident that having these thresholds will allow for a more consistent and proportionate approach, that moves away from a punitive approach to fitness to practise, and helps achieve a professional culture that prioritises openness and learning in the interests of patient safety

This refocus of public protection may prove controversial. However, the NMC points to the research undertaken with the professions, employers and members of the public, and the feedback to NMC's recent consultation. It shows significant support for an approach that defines a public confidence threshold and that action should only be taken to uphold professional standards when nurses or midwives do things that could affect their trustworthiness as a registered professional.

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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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