

ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

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Chair's Introduction

Welcome to the Summer Edition of the ARDL newsletter which includes the essay written by our Marion Simmons QC essay prize winner, Tom Watret. It was a pleasure to meet Tom in June and present him with his prize for winning the essay competition against strong opposition.

This bulletin also features a Book Review on the Guide to Good Practice, published by the Law Society, and a Legal Update from Kenneth Hamer.

As the memories of yet another highly successful ARDL dinner in June begin to fade ARDL is already organising a full program of seminars for the autumn and beyond in London Manchester and elsewhere.

Iain Miller, Kingsley Napley LLP
Chair, ARDL

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

Introduction

That regulators and regulation should act in the public interest seems self-evidently correct. After all, if regulators are not acting in the interests of the public, it rather begs the question of in whose interests they do act. Its obvious correctness is what makes it, without more, of little use: we can all agree that regulation should be in the public interest, but if we do not specify how that goal is defined and achieved, it is merely a vague aspiration. Only once we have a sense of what the "public interest" is are we able to say if "protecting the public" is a more suitable regulatory aim.

This essay approaches the idea of the "public interest" from three angles. It distinguishes private from public

interests, and "protecting the public" from protectionism, by explaining the concept of "regulatory capture". It acknowledges the inherently political question of the nature and degree of regulatory intervention, comparing the justification to "act" in the public interest, to "protect" the public, or not to intervene at all. Finally, it discusses the importance of clear, hierarchical, well-rationalised regulatory goals. The focus is on the fields of consumer protection and legal services regulation: two areas where the protection of the public and the public interest are tightly intertwined.

Regulatory capture

The notion of regulating in the public interest raises the question of who gets to decide who "the public" is and what their "interests" might be. Regulation is unlikely to benefit everyone equally. The private interests of different segments of the public may therefore be opposed. A regulator may not act in the general interests at all, but rather in the interests of a particular sub-group, or according to its own private incentives.

In 1851, the Attorney General, himself a barrister, successfully argued that attorneys instructed by other attorneys should be prohibited from appearing in court. Such an activity should be confined "a class of men who had enjoyed the highest education, and who were known to be influenced by the highest feelings": barristers. It would not be "for the benefit of the public that an inferior order of men should monopolise the practice". Indeed, "if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than those of an inferior class".¹ The public interest was invoked for an essentially protectionist purpose. This was despite the fact, as another member of the commons wryly pointed out, "no complaints had been made by the public of the manner in which the county courts conducted their business... was not the real fact this, that the public preferred attorneys as their advocates?"²

In modern terminology, we might describe this as a crude example of "regulatory capture". In broad terms, this means the process by which a regulated industry influences its regulator in pursuit of its own self

interest.³ Regulatory capture may occur not because the regulator is corrupt, but because the regulated industry has, as compared to the wider public, enhanced access to the regulator and influence in the policy-making process, by the movement of personnel from regulated firms to the regulator and back and the powerful incentives for the regulated industry to lobby, and by the ability of an industry lobby, as a concentrated, well organised and well-financed group, to do so.⁴ Regulators may also, quite naturally, rely heavily on the information and expertise of the regulated industry.

The financial services industry evinced some characteristics of regulatory capture prior to the global financial crisis. The closeness between regulators and the regulated, and the influence wielded by the latter, was rightly subject to scrutiny and scepticism as policymakers sought to refashion financial rules and institutions in the aftermath of the crisis. In 1998, the US Commodity Futures Trading Commission (CFTC) issued a consultation paper on regulating over the counter derivatives (OTCs). The financial services industry was vehemently opposed — so too were the Treasury Secretary and Chairs of the Federal Reserve and SEC. Legislation was almost immediately introduced to prohibit their regulation, and the Chair of the CFTC left her position shortly thereafter.⁵ OTCs are now regarded as having contributed to and exacerbated the global financial crisis, and their regulation has been a major target of reforms (most recently Mifid II) aimed at bolstering the stability of the financial system.

There are two points to be made. First, while regulatory interventions justified in the name of the "public interest" may seem inherently laudable, we should not accept that rationale uncritically: rather, we should scrutinise how that "public interest" has been determined, and indeed what part of the "public" is being protected. Second, the Attorney-General sought to legislate in a protectionist manner, while US financial regulators eschewed regulation that could have properly served a protective function. Neither act was in the public interest (though that is how they were justified). The underlying justification and rationale for regulatory (non-)intervention merits further enquiry.

¹ The Attorney General, Sir Alexander Cockburn, Hansard, 1851, July 15, 779-780; as noted in Legal Services Institute, *The Regulation of Legal Services*, August 2010.

² Fn 1, Mr Fitzroy MP.

³ J. Armour et al, *Principles of Financial Regulation* (OUP 2016), chapter 25.

⁴ *Principles of Financial Regulation*, chapter 25.

⁵ This example is taken from *Principles of Financial Regulation*, chapter 25.

Regulation and intervention

Regulatory capture goes to the question of a regulator's authority, legitimacy, and accountability. Given the immense power regulators can wield over the public, the public should require proper Bounds for wielding it. After all, to "act" in the public interest, or to "protect" the public, presupposes that a regulator is better able to know what is best for the public than the public itself. Regulation may be merited, but the "public interest" may also sometimes be best served by the operation of markets where regulators refrain from acting. This is a highly political question about the appropriate degree and basis for regulatory intervention.

The issues are concentrated in consumer contract law. The field is characterised by an increasingly interventionist approach by policy-makers, moving from a laissez faire stance founded in the view that the public interest is best served by unfettered freedom of contract to one that justifies increasing intrusion into the contractual bargain in an ethos of protection of at least one segment of the public: the consumer.

Classical liberal theory underpins the common law of contract in England.⁶ It is based in a notion of the right to individual self-determination, free from interference by the state —and thus accords due deference to the consensual agreement of two members of the public. The right of individuals to make free choices about with whom they contract and the content of those bargains, and the benefits by way of the efficient allocation of resources that accrue to all of society by their ability to do so, was also a central tenet of the influential Chicago School.

The prescription for the efficient operation of the market under this model is thus primarily information rights: a consumer simply has to be sufficiently informed about the nature of the contracts they can enter into, so they can select the most beneficial bargain. Similarly, vigorous competition should weed out those sellers who offer bad bargains, or are unscrupulous.

However, this paradigm was challenged by the insights of behavioural economics, which questioned the ability or inclination of "boundedly rational" consumers to

digest the increasingly voluminous amounts of information which sellers were mandated to supply.⁷ As a result, consumer protection legislation has increasingly moved away from a disclosure focus to more protective, paternalistic interventions in the content of contractual bargains themselves.

The difference between the two regulatory styles —one that aims to protect the consumer by rights-based interventions, the other that aims to maximise public benefit through the operation of free markets —came to the fore in the famous case of *OFT v Abbey National* [2009] UKSC 6.

The case concerned the application of Art 6(2) of the UTCCR 1999,⁸ which implemented Directive 93/13.9 The provisions of the legislation that were at issue in the case were as follows. UTCCR made unfair terms non-binding (regulation 8). A term was unfair if not individually negotiated and if it "cause[d] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (regulation 5(1)). However, "insofar as it is in plain intelligible language", a term relating to "the definition of the main subject matter of the contract" or "the adequacy of price or remuneration, as against the goods or services supplied in exchange" was exempt from the unfairness assessment (regulation 4(2)).

This sought to strike a balance between the two regulatory approaches. It excluded the price/quality relationship at the heart of the contractual bargain: a key term that was "in plain intelligible language" would disclose sufficient information for a consumer to make their own choice; at the same time, ancillary, standard form terms that a vulnerable, "boundedly rational" consumer might not pay attention to were subject to review.¹⁰

The terms at issue in the case were bank account overdraft charges. The court, overturning the Court of Appeal, held that these terms constituted part of the banking services provided. Without opining on the correctness of the court's decision, we can draw a number of implications for the proper purpose of regulation.

⁷ Richard Thaler published the "founding text" of behavioural economics, *Towards a Positive Theory of Consumer Choice* in 1980. He would later win the Nobel Prize in Economics for his work.

⁸ Unfair Terms in Consumer Contracts Regulations 1999 (SI 1994/3159).

⁹ [1993] OJ L95.

¹⁰ M. Schillig, *Directive 93/13 and the 'price term exemption': a comparative analysis in the light of the "market for lemons" rationale*, (2011) ICLQ 933.

⁶ P. Atiyah, *The Rise and Fall of Freedom of Contract* (OUP, 1979); Fairweather et al, *Consumer Credit, After the Global Storm* (Routledge 2017), chapter 1.

As the court itself noted, those that incur overdraft charges are perhaps those most of need in protection. Notwithstanding this, the court doubles down on a model of consumer autonomy and self-reliance, both in the sphere of contract and personal financial discipline. In fact, the model of banking services in the UK involves a significant cross-subsidy from those that incur such charges to those that do not. Indeed, the evidence in *Abbey National* was that such charges constitute 30% of the banks' total revenue from current account customers. The model in other European countries differs, with bank fees deriving from debit card transactions, for example. In other words, as noted in discussion of regulatory capture, not all regulations benefit everyone equally: the court's decision has significant distributional implications.

In fact, the significance of the charges to the banks' revenue stream were held to be indicative that they were "part of the core or essential bargain".¹¹ A more protective approach would not have assessed objectively whether the charges were part of the core bargain, much less have accorded weight to their materiality to the banks' revenue streams, but instead focused on what the consumer would have considered to be a price term.

This is not to say that, in not interpreting the regulations as protectively as they could have, the court wrongly identified the purpose of the regulation. There were other values at stake. The court adopted an interpretation of consumer contract law which privileged consumer choice, not consumer rights.¹²

To take a step further back, this case is only one instantiation of the complex regulatory undertaking that is the EU consumer acquis — to say nothing of the EU regulatory enterprise more broadly.

From pasta to plastic pipes, jet skis to jewelry sales, the EU courts have developed conceptions of the "average consumer", the "reasonably well-informed, circumspect, and observant consumer", or the "vulnerable consumer" against which to assess regulatory measures. Depending on which notional consumer is taken as the yardstick, the level of public protection and the part of the public that benefits varies. The important point, though, is that "protection"

is not the only value taken into account. The court must also weigh the different social, cultural and linguistic backgrounds of each member state; the rights flowing from the Charter of Fundamental Rights; the rights conferred by the four freedoms; the delicate constitutional balancing act between EU Treaty rights and member state sovereignty, and all this against the background of an integrating internal market.¹³

On the one hand, this myriad range of factors may result in decisions and regulations that are appropriately subtle, complex and tailored to the individual circumstances of the case or market failure the regulation is intended to correct. It also suggests that an exclusive focus on "protection" of the consumer — or the public — is plainly reductive. On the other hand, without a clear hierarchy of goals, there is a real difficulty for courts and regulators in balancing the competing priorities.

Legal Services: "Protecting and promoting the public interest"

This brings us to the regulation of legal services, which ties together several of the points discussed in this essay. It also has the distinction of being a field with the highly pertinent regulatory objective of "protecting and promoting the public interest". Furthermore, it is a field ripe for reform: the LSB published a September 2016 paper — "A vision for legislative reform of the regulatory framework for legal services in England and Wales" — which was followed shortly after by a CMA report on the sector recommending several reforms including a change to the regulatory objectives.

The regulatory objective of "protecting and promoting the public interest" is one of eight contained in section 1 of the Legal Services Act 2007. They are not presented in any hierarchy.

As the LSB itself observes, this has proved problematic.¹⁴ It results in a lack of focus and an absence of priorities. The objectives may impose excessive obligations that regulators have little power to effect: for instance, increasing public understanding of legal rights and duties.¹⁵ And when they conflict, the regulator is left with a high degree of latitude in justifying its decisions.

¹³ V. Mak, *The Consumer in European Regulatory Private Law*, in D Leczykiewicz, S Weatherill (eds), *The Images of the Consumer in EU Law* (Hart 2016).

¹⁴ LSB, September 2016, page 11.

¹⁵ CMA, *Legal Services Market Study*, December 2016, paragraph 6.15; LSB, September 2016, page 11.

¹¹ *OFT v Abbey National*, fn 8, Lord Walker, para 41.

¹² H. Collins, *Good Faith in European Contract Law* (1994) 14 OJLS 229.

The problem, it is submitted, is that the regulatory objectives at present do not have a sufficiently clear rationale.

What, then, is the proper purpose of regulation in the legal services field? The regulation of legal services is in one sense a sub-species of the general consumer law, where the need for consumer protection is particularly acute due to (i) the informational asymmetry inherent to a layperson-expert relationship, and thus the potential for exploitation; and (ii) the particularly severe consequences of the provision of a poor quality service (e.g. imprisonment). These powerful rationales might suggest a regulatory focus on "protection" is appropriate.

However, ensuring that the provision of legal services is properly regulated also clearly embodies broader values. The effective administration of justice. The independence of the legal profession. The rule of law. These cannot be neatly folded up into an overriding purpose of "public protection".

To use an example provided by the SRA, a single-minded pursuit of protection might impel a regulator to implement very comprehensive consumer protection measures, such as indemnity and compensation arrangements and very high entrance standards and continuing professional competence requirements.¹⁶ But the high costs (ultimately passed on to consumers) and restricted supply of sufficiently competent and adequately insured lawyers would be such as to impede access to justice and the effective operation of the law itself. "Quality" is raised, but the profession captures the majority of the benefits, not the public. In fact, economists view self-regulated industries as being prone to this very impulse (which is also borne out by the history of the profession): "public protection" can become protectionism, plain and simple.¹⁷

In short, protection of the recipient of legal services cannot be the sole purpose of legal services regulation. There are other values at stake. But it is also false to set protection of the public and the public interest at odds; it is primarily by doing the former that the latter is given effect. Accordingly, the proposals of the LSB are to be welcomed: they propose a single overarching objective to "safeguard the public interest by protecting

consumers and ensuring legal services deliver outcomes in the interests of society as a whole".¹⁸

Conclusion

This essay has aimed to give some content to the idea of regulators acting "in the public interest" — a goal that is inarguable only insofar as it is amorphous — so as to assess whether and in what circumstances "protecting the public" is more appropriate. It explored several ways in which the public interest can be assessed: (i) by taking a critical stance to whether regulators are acting in the public interest, or whether they are beholden to private ones; (ii) by questioning the appropriate degree of intervention, and acknowledging the distributional consequences on different parts of "the public"; and (iii) by identifying the rationale for regulation, and establishing and maintaining clear regulatory goals and a hierarchy between them.

This analysis demonstrated that even in areas in which "protection" of the public is paramount, a single-minded pursuit of that goal is too blinkered. There are always other values at issue. In regulatory fields that trend towards the increasingly complex, subtle, and sophisticated, the breadth of the public interest concept therefore becomes its strength — provided that it is always properly justified.

Tom Watret

Guide to Good Practice

Collected Law Society Practice Notes 2nd Edition

Solicitors are creatures of habit. I have lost count of the number of conversations I have had with solicitors who have lamented the demise of the Guide to Professional Conduct of Solicitors (the Guide). A publication, in hard copy, over several editions, which finally ended in 1999. Since then the gap has been filled partly by what is now the SRA Handbook. That publication contains rules but no guidance. Other publications do provide guidance most notably the Solicitor's Handbook and Cordery on Legal Services. However, solicitors really want the Guide back. Sadly, the separation of the Law Society from the SRA and the general developments in regulation means that this is not going to happen. The

¹⁶ SRA, Approach to Regulation and Its Reform, November 2015.

¹⁷ LSB, Understanding the Economic Rationale for Legal Services Regulation — a collection of essays, March 2011, page 8, pages 24-26.

¹⁸ LSB, September 2016, page 9.

SRA will provide some guidance and resources but not in the form of the Guide.

In the meantime the Law Society has assiduously developed, over a number of years, a series of Practice Notes which seek to deal with particularly difficult issues that arise in a legal practice. The first edition of the collective Practice Notes was published in paper form in 2009 and a second edition has now been published.

The volume itself now runs to 932 pages. Notably the first item is the Anti-Money Laundering Guidance for the Legal Sector which was published in March 2018. This runs for some 121 pages. This is followed by practice notes on other aspect of money laundering such as the Criminal Finance Act 2017. The range and depth of the subsequent notes are a treasure trove of advice for those involved in law firm management and compliance and indeed day to day practice. These range from “*Acting in the absence of a children’s guardian*” to “*Who owns the file?*”

These documents are available on the Law Society website so there is an element of selling in paper form what is available online. However, as a paper based resource the book is hugely valuable and a perfect companion to the SRA Handbook. It will provide an answer to almost every question.

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LEGAL UPDATE

Manak v. Solicitors Regulation Authority [2018] EWHC 1958 (Admin)

Following findings of breaches of the Solicitors Accounts Rules and a finding of want of integrity, the Solicitors Disciplinary Tribunal ordered that the appellant solicitor, the former senior partner of his firm, be suspended from practice as a solicitor for a fixed period of two years, and that upon the expiry of the fixed term of suspension he should be subject to conditions for an indefinite period. In addition to imposing restrictions which, in effect, prevented the appellant from being the proprietor of, or a partner in, a firm of solicitors the restrictions included: (1) holding client money, (2) being a signatory on any client account, and (3) working as a

solicitor other than in employment approved by the SRA; with liberty to apply to the SRA to vary the conditions. The appellant submitted that the continuing restrictions would limit him to work as an assistant solicitor, and would affect his prospects of employment because they implied that he had been involved in misappropriation of funds, when no such allegation had been proved against him. In setting aside the three additional conditions, the Divisional Court (Holroyde LJ and Nicola Davies J) said, at [62], that a number of features of the order troubled the court. First, the tribunal gave no reason for its decision that some continuing restrictions on practice were necessary and appropriate, and no reason for its decision that these particular restrictions were necessary and appropriate. There must be some basis for concluding that a defaulting solicitor, having paid the appropriate penalty by way of reprimand, fine or suspension, must be subject to restrictions on his or her practice in the future. Secondly, a tribunal contemplating the imposition of continuing restrictions should hear submissions about it from the solicitor concerned or his representative. That did not happen in this case. Thirdly, the conditions imposed (along with three other conditions) represented all six of the examples given in the SDT’s Guidance Note as types of restriction which may be imposed. The tribunal gave no reason why they were all regarded as necessary and appropriate. Lastly, if restrictions were regarded as necessary and appropriate, the tribunal had to determine whether they must be indefinite or be limited in time. No explanation was given for the decision reached in this regard. If no explanation is given of why a restriction is necessary or appropriate, there is no yardstick against which anyone considering a future application to vary or lift the restriction can measure the subsequent conduct of the solicitor. The solicitor would not be able to demonstrate any relevant change in his position since the restrictions were imposed, because he would not be able to identify the basis on which the restrictions were made. Whilst the circumstances set out in the judgment of the tribunal would justify the imposition of restrictions preventing the appellant from being the proprietor of, or a partner in, a firm of solicitors, the combination of the additional restrictions, continuing indefinitely unless and until a successful

application to vary is made, would impose a disproportionate restriction upon the appellant to earn his living. They are likely to be regarded by prospective employers as implying some form of misappropriation of funds. They went beyond what was necessary and appropriate in the circumstances of the case, and should be lifted: [63].

Dr B v. General Medical Council [2018] EWCA Civ 1497

In this case the GMC appealed the order of Soole J, in which the judge granted an injunction against the GMC restraining disclosure of an expert report. The respondent, Dr B, was a general practitioner and for a number of years he had a patient anonymised as “P”. Over a period of years P suffered difficulties in urinating, about which he consulted Dr B. In September 2013, P was diagnosed as suffering from cancer of the bladder. On 8 November 2013, he complained to the GMC about his treatment by Dr B. The nub of his complaint was that Dr B had examined him and dealt with him incompetently, leading to an avoidable delay of about one year in the diagnosis of cancer. The GMC commenced an investigation of Dr B’s fitness to practise and instructed an independent expert to review the matter and prepare a report. The report was critical of the care provided by Dr B in a number of respects, concluding that the care provided fell below, but not seriously below, the expected standard of care. A further conclusion was that most reasonably competent general practitioners would not have suspected bladder cancer, given two particular findings in the report. In the light of the report the GMC’s case examiners decided that the allegation against Dr B should not proceed further. The GMC wrote to P summarising the reasons given by the case examiners. P’s solicitors requested disclosure of the report and in due course the GMC took the decision to disclose the report to P, despite the objections of Dr B that disclosure would infringe his personal data and right to privacy. The Court of Appeal (Arden and Sales LJ, Irwin LJ dissenting), in allowing the GMC’s appeal and permitting disclosure of the report to P, said that the conduct of Dr B was dealt with under the GMC (Fitness to Practise) Rules 2004. The complaint was referred to case examiners pursuant to rule 8 for investigation. Under rule 12, P had a right

to seek a review of the decision not to proceed with his complaint, if he could persuade the registrar of the GMC that the decision was materially flawed or that there was new information available which may have led to a different decision: per Sales LJ at [62]. A person who makes a complaint about a doctor with respect to the medical treatment he has received has a legitimate interest in understanding, and being in a position to check, the basis in respect of his personal data for a decision by the GMC not to pursue the allegation by instigating a disciplinary procedure against the doctor. The complainant also has a legitimate interest in receiving information which will enable him to see whether there may be grounds for making a request for a reconsideration pursuant to rule 12. These were interests which are within the scope of the type of interest which the subject access rights under article 12 of Directive 95/46/EC and section 7 of the Data Protection Act 1998 (DPA) are intended to safeguard: [63]. The disclosure regime under section 7(4)-(6) of the DPA seeks to strike a balance between competing interests of the requester and the objector, both of which are anchored in the right to respect for private life in article 8 ECHR, as reflected in the Directive. The recitals to the Directive explain that data-processing must reflect the fundamental rights and freedoms of individuals, notably the right to privacy. Data subjects are accorded a right under certain conditions to have access to their personal data held by a data controller to check that those data are accurate. On the other hand, in a mixed data case, the objector may also have a right or interest in the non-disclosure of his personal data, in order to maintain his privacy in respect of it. Article 13(1)(g) of the Directive provides that a member state may adopt legislative measures to restrict the scope of access to personal data when such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others: [69]. The balancing act in section 7(4)-(6) of DPA does not include any presumptive starting point or hurdle which either requestor or objector has to overcome. The circumstances in which the balancing exercise has to be carried out from case to case will be many and varied, and where no consent has been given for disclosure (or where objection has been raised, as in this case) the outcome of the exercise

will inevitably depend on the particular facts and context. The question is simply whether “it is reasonable in all the circumstances to comply with the request without the consent of the other individual” (section 7(4)(b)): [70]. In the instant case, the GMC’s assessment under section 7(4)(b) that disclosure should be made of the report (on the basis that it comprises in its entirety personal data of P) was a lawful one: [95]. Arden LJ agreed with Sales LJ: [96]. Dissenting, Irwin LJ said that the order of the judge preventing the disclosure of further information to P was an appropriate order since P had already received sufficient information as to what of his own personal data was held by the GMC: [57].

R (Gray) v. Police Appeals Tribunal [2018] EWCA Civ 34, [2018] 1 WLR 1609

In May 2012, the claimant, a serving police officer with Nottingham police force, was tried and convicted of rape and sentenced to eight years’ imprisonment. In September 2012, following a fast track special case hearing held under Part 5 of the Police (Conduct) Regulations 2008, and chaired by the temporary chief constable, the claimant was dismissed from the force for gross misconduct with immediate effect. In July 2013, the claimant’s conviction was quashed by the Court of Appeal, Criminal Division because of fresh evidence. A taxi driver, who had collected the claimant from the complainant’s house the morning after the alleged offence recalled their intimate and affectionate parting. That evidence was deployed at the claimant’s retrial and in February 2014 he was acquitted of all counts. On 9 April 2014, the Police Appeals Tribunal (PAT) allowed the claimant’s appeal against the finding of gross misconduct made at the fast track special case hearing and ordered that the matter was not to be remitted to be decided again under rule 22 of the Police Appeals Tribunal Rules 2012. Prior to the appeal hearing, the solicitor for the appropriate authority, acting on behalf of the chief constable, gave notice that in view of the claimant’s acquittal, the basis for his dismissal through the fast track process had ceased to apply but that the appropriate authority had decided to refer the claimant to a gross misconduct hearing under Part 4 of the 2008 Regulations. On 11 April 2014, two

days after the PAT decision, the chief constable issued a notice to the claimant notifying him of a fresh referral of misconduct proceedings before an independent panel, appointed under Part 4 of the 2008 Regulations. The allegations of misconduct were precisely the same as those in the notice which had given rise to the first disciplinary proceedings. The panel rejected a submission of *res judicata* and, having considered the evidence, found that gross misconduct was proved, and the claimant was once again dismissed without notice. The claimant’s subsequent appeal to the PAT was dismissed on 27 May 2015. In judicial review proceedings brought by the claimant, in which the chief constable was joined as an interested party, Coulson J quashed the decision of 27 May 2015 on the grounds that the decision of the PAT given on 9 April 2014 was both final and on the merits and that the principle of *res judicata* was a bar to the second PAT decision: [2016] EWHC 1239 (Admin). The Court of Appeal (Sir Terence Etherton MR, Underhill and Holroyde LJ), said that at the heart of the appeal was the question whether the judge was correct to hold that the first PAT decision to allow the appeal and not to remit the matter again was a final decision on the merits for the purposes of cause of action estoppel and had the consequence that the second disciplinary proceedings were barred. It was common ground that the constituent elements of cause of action estoppel were specified by Lord Clarke JSC in *R (Coke-Wallis) v. Institute of Chartered Accountants in England and Wales* [2011] 2 AC 146 at [34], endorsing para 1.02 of Spencer Bower & Handley, *Res Judicata*, 4th ed (2009): amongst other things, the decision was (a) final and (b) on the merits. Sir Terence Etherton MR, at [47], said that it was difficult to identify, in the context of *res judicata* in general and cause of action estoppel in particular, an authoritative meaning of the expression “on the merits” applicable to all circumstances; see *The Sennar (No 2)* [1985] 1 WLR 490 HL. Reversing the decision of Coulson J, the court agreed that the decision of the first PAT to allow the claimant’s appeal against the finding of gross misconduct on the ground of new evidence, and not to remit the matter to be decided again under rule 22, was final and it concluded the first disciplinary proceedings. However, the decision not to remit was not based on any evaluation of the evidence as a whole in order to

assess whether the claimant, notwithstanding the complaint's evidence in the crown court, still had a case to answer in respect of misconduct or gross misconduct: [76]. The first PAT could not be said to have reached a decision "on the merits" about whether the claimant was guilty of the misconduct charged and did not involve any judicial decision that there was no case to answer. The first PAT was not asked to, and did not, make and decision on the merits, and simply acceded to the request of both parties not to remit the case for a hearing, although the claimant knew of the chief constable intention to start fresh misconduct proceedings and he raised no objection: [91] – [93]. Accordingly, the decision of the first PAT did not give rise to a cause of action estoppel precluding the commencement of the second disciplinary proceedings: [81].

***General Optical Council v. Clarke* [2018] EWCA Civ 1463**

C qualified as an optometrist in 1982. He set up his own business in 1992. Between 2004 and 2009, C performed a number of eye examinations on an individual referred to as Patient A. In total, he missed 4 opportunities to appreciate the significance of Patient A's visual fields defects. In the event, Patient A lost his sight. C made a full admission in civil proceedings which Patient A had brought against him and in July 2014 the GOC applied for and obtained an interim suspension order against C. Thereafter, C sold his optometrist practice and retired, informing the GOC that he did not intend to practise again nor renew his GOC registration. The matter proceeded to a substantive hearing in June 2015. The FTP committee found that C's fitness to practise was impaired by reason of misconduct, and imposed a 12-month suspension with a review. The committee said that the 12-month period would give C a period of reflection and the opportunity to consider whether he still wished to cease practise and if not to complete necessary Compulsory Education and Training. The committee stated that they considered erasure to be disproportionate to the impairment identified, which, although serious, related to a narrow area of practice. In advance of the review hearing in June 2016, C made a witness statement in which he restated that his business had been sold and that he did not intend to

work again as an optometrist. He asked to be allowed to come off the register with an agreed form of undertaking that he would never practise as an optometrist again. The GOC, however, sought C's erasure, and the committee so ordered. The review committee found that C's fitness to practise remained impaired. C appealed against this decision, and Fraser J quashed the decision of impairment and the sanction of erasure. The GOC, in turn, appealed to the Court of Appeal (Arden and Newey LJ). Shortly before the hearing, however, the parties very substantially narrowed the scope of the dispute. The GOC agreed to accept C's wish to withdraw from the register and not to ask the court to make any further order as to sanction. On that basis, C indicated that he would not oppose (while not agreeing) the appeal in so far as it related to impairment, the GOC wishing to pursue that aspect of the case. In the circumstances, the only issue that fell for consideration was whether Fraser J was right to substitute a decision of no impairment. The GOC submitted that the Opticians Act 1989 refers to an optometrist's "fitness to practise" being impaired. That meant that a judgment on impairment must be made by reference to whether, if permitted to practise, the optometrist would be fit to do so without restriction, not on the basis of whether the optometrist in fact proposed to continue to practise. An optometrist voicing an intention to retire could potentially change his mind and resume practice, or seek to work as an optometrist abroad. An optometrist could try to escape any finding of impairment by insisting that he had abandoned the particular area of work that had given rise to the allegation(s) against him. Newey LJ (with whom Arden LJ agreed) said, at [27], that the statutory language was crucial. Under section 8 of the Opticians Act 1989, a person must, to be registered as an optometrist, be "a fit person to practise" as such. The focus must be on impairment of fitness to practise. Whilst impairment was not the subject of definition in the 1989 Act, the references to fitness to practise in section 13D (under which an allegation that an optometrist's fitness to practise is or may be impaired can be referred to the FTP committee) and section 13F (empowering the FTP committee to do certain things if it finds that an optometrist's fitness to practise is impaired), are consistent with section 8. Definitions of

“fitness” given in the Oxford English Dictionary include “the quality of being fitted, qualified, or competent” and “[t]he state of being morally fit; worthiness”. Fitness to practise, in the context of the 1989 Act, must depend on matters such as these rather than whether the individual in question intends to practise as an optometrist. It was hard to see how the fact that an optometrist no longer intended to practise as such could have any bearing on whether his fitness to practise is impaired within the meaning of the 1989 Act: [28]. The FTP committee was entitled to make a finding of impairment at the 2016 review hearing, as its predecessor had at the original hearing. The fact that C was not intending to resume practice could be of little or no consequence: [30] – [31].

***General Medical Council v. Chandra* [2018] EWCA Civ 1898**

Dr C was erased from the GMC medical register for sexual misconduct. 11 years later he applied for restoration and a panel of the MPTS granted his application. The GMC’s appeal against this decision was dismissed by the High Court [2017] EWHC 2556 (Admin). The GMC appealed to the Court of Appeal (McCombe, King and Flaux LJ) which stated its intention to allow the appeal in due course with a view to the matter being remitted to the MPT for rehearing. The court said that the principles in *Bolton v. Law Society* [1994] 1 WLR 512 apply equally to doctors as solicitors, and the same principles and approach apply equally to both sanctions and restoration, save that restoration of solicitors to the roll is governed by section 47 of the Solicitors Act 1974 and there is no equivalent of section 41 (12) of the Medical Act 1983, requiring the SDT to consider an over-arching objective to protect the public. Also, unlike doctors who must wait at least 5 years before they can make an application to be restored to the register, there is no minimum period before a solicitor can make an application. In *Giele v. General Medical Council* [2005] EWHC 2143 (Admin); [2006] 1 WLR 942, the court held that it was wrong for a tribunal in a case of sexual misconduct to ask itself whether there were exceptional circumstances to avoid erasure. Rather, it had to look at the misconduct and decide which sanction was

appropriate. In its judgment the court said that the same approach applies equally to restoration. The court agreed with the judge that there is no test of “exceptional circumstances” which has to be satisfied before an applicant can be restored to the register although did not agree that there is a bright line as between sanction and restoration whereby a different balancing act may be appropriate. Although certain features may carry different weight at the date of erasure of a doctor from the register from that at the time of his or her application to be restored to the register, the balancing act itself is the same in respect of each application, namely, against the backdrop of the over-arching objective, is the doctor concerned fit to practise. The tribunal is required, by statute, to have regard to the over-arching objectives specified in section 1 (1B) of the Medical Act 1983. In the instant case, the tribunal did not address, or address adequately, the issue of whether public confidence and professional standards would be damaged by restoring the applicant to the register, an applicant who had fundamentally fallen short of the necessary standards of probity and good conduct by his sexual misconduct and dishonesty, albeit many years ago.

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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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