Crossing the line

Post-*Beckwith*, John Gould provides an update on the regulation of conduct outside of practice

IN BRIEF

▶ *Ryan Beckwith v Solicitors Regulation Authority*: putting the correct questions on the table for the approach to conduct which is not in the course of providing legal services.

It was a bold move to offer a two-part commentary on the regulation of conduct outside of practice just when the Divisional Court's decision in *Ryan Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) was on the horizon (see 'Misconduct outside of legal practice', 170 *NLJ* 7907, p14; Pt 2, 170 *NLJ* 7911, p15). By great good fortune, I seem to have largely escaped major error and can go forward with my nine lives intact to talk about what the law is rather than what I think it should be.

Beckwith is an important decision which is not going to be appealed. The approach to conduct which is not in the course of providing legal services, particularly where sex is involved, has not had a secure foundation for years. No judgment provides an answer for every permutation of facts which may arise in the future, but this one has at least put the correct questions on the table.

Mr Beckwith's night out

The allegations against RB arose following his female associate's (A) leaving party in 2016. The allegations (not all of which were successful before the Solicitors Disciplinary Tribunal (SDT)) were that he initiated or engaged in sexual activity with A in a way which was in breach of Principle 2 (act with integrity) and Principle 6 (behave in a way which maintains public trust in you and the provision of legal services). Essentially this was alleged to have occurred because he was A's senior who appraised and reviewed her; that he knew or ought to have known that she was so drunk that she was vulnerable or her decision-making was impaired; that she had not invited RB into her home, had not allowed him in with a view to sex and that he knew or ought to have known that his conduct amounted to an abuse of position and/or it was 'inappropriate'.

The SDT's findings were that RB was in a position of authority over A and he knew she was drunk so that her decision-making ability was impaired. RB himself was also found to have been influenced by intoxication. A was not found to be vulnerable and RB had not entered her home without being invited but did know he wasn't being invited in for sex. RB had not abused his authority but had acted 'inappropriately'. The facts found by the SDT had to be the basis of the court's legal analysis.

Was it serious?

The court decided that for conduct to be the subject of regulatory sanction (whether inside or outside practice) it must be sufficiently serious. It did not accept that in a rules-based system, such as that which applies to solicitors, there was a preliminary condition requiring the finding of something called 'professional misconduct'. As the court acknowledged, however, the words might be used descriptively in relation to the seriousness and culpability that are a required element of a breach of most regulatory rules.

Was the conduct relevant to practice?

The court accepted the need for conduct outside of practice to be considered in the context of its relevance to professional practice. The court's chosen route to relevance was through the rules for solicitors applied in the context of the statutory scheme under which they were created. To the extent that there are ethical standards applying outside of practice, they must be found in the rules.

There is no freestanding concept of 'professional misconduct' outside of the rules. Outside conduct must be a breach of a rule and that rule must be interpreted in the context of what is required of solicitors in practice. In addition, the court indicated that relevance to practice is not to be assumed but rather that it must be demonstrated for allegations to be made good.

The court's analysis of the requirements of Art 8 of the ECHR (respect for private life) provided the clearest statement of the need for relevance independent of the statutory scheme:

> '54. There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect to private life and the public interest in the regulation of the solicitor's profession.'

Relevant rules

There is no general principle that professional rules do not apply to outside conduct, but many rules are expressly limited to conduct within practice. The usual approach has been to allege that outside conduct breaches, Rule 2 (integrity) or Rule 6 (public trust). I explored the problems of applying these rules to outside conduct in my previous articles. They both tend to be used in a way which is circular—this conduct is 'inappropriate', therefore it damages public trust, therefore it breaches

Rule 6. As the court confirmed both rules are largely descriptive of conduct without in themselves providing a legitimate and transparent basis for characterising the conduct in question as being in breach of rules.

Having correctly identified the mercurial and circular nature of rules relating to integrity and public trust, the court embarked on a search for other rules which might be more readily applied and the breach of which could fairly be said to have had the effect of damaging public trust or demonstrating a lack of integrity.

This search reflected the substantial problem of establishing a basis of legitimacy and certainty for judgments about conduct outside practice. Freestanding assessments of the 'appropriateness' of conduct outside of practice by tribunals or regulators in individual cases are neither legitimate, in the sense of reflecting an accepted or recognised standard (such as dishonesty), nor sufficiently predictable or certain. It is for the tribunal to decide if the line has been crossed in an individual case but not where the line lies.

Although it is clearly correct that each rule must be considered in the context of the rules as a whole, it is difficult to see why allegations of breaches of Rules 2 and 6 should be considered on the basis of some other alleged rule breach such as that of taking advantage or abuse of position. If that were the gravamen of the complaint that is what should have been charged.

In any event, the approach only moves the question of relevance further down the line as one is then forced to ask whether the particular, say, taking advantage outside of practice, is relevant to practice. This tends to lead to an assertion that it clearly is or clearly isn't and sure enough the court's view was:

> 'Seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally.'

This approach to relevance was based on the 2011 Rules which were those which applied to the case, but now the SRA has moved strongly away from providing the detailed rules and content upon which the court's approach would have to be based.

Allegations based on integrity & trust

I personally continue to doubt that allegations based on lack of integrity or undermining trust (even in the context of the broader rule book) are sufficiently certain to be primary allegations at all in relation to conduct outside of practice, unless the basis upon which the conduct is alleged to be relevant to practice is also particularised. The judgment suggests that the basis of relevance of the outside conduct must be found qualitatively in the rules applying to practice generally. If there is a rule prohibiting abuse of position, that gives legitimacy to a finding that an abuse of position outside practice is relevant.

I would explain this a little differently. If the core of relevance is damage to reputation as a lawyer and an inference of a higher risk of a rule breach in practice, the fact that similar conduct in practice would amount to a breach of a rule could provide a basis to infer that a higher risk existed or that trust could be damaged.

The result

Mr Beckwith's appeal was successful because the tribunal's findings of fact did not, in the court's view, provide a basis in the context of the rule book generally to base a finding of a lack of integrity or damaging public trust on a free floating view that his actions were 'inappropriate'.

What does it mean?

Conduct outside of practice may amount to a breach of professional rules but to do so it must be demonstrably relevant to a person's reputation as a lawyer or to their legal practice. The conduct must have a qualitative nature which links it to conduct referred to in, or implicit from, professional rules. An example would be the abuse of a position of power (Rule 1.2 of the Solicitors Code of Conduct). This provides one legitimate basis under the statutory scheme for relevance to be assessed. It is not for a tribunal or the regulator to proceed simply on the basis of their own view of what is or is not 'appropriate' or even disgraceful. Although the court did not have to consider them, there are other legitimate foundations for the characterisation of outside conduct as breaches of Rules 2 or 6, such as the commission of criminal offences or findings of unlawful discrimination. There is, of course, no rule explicitly forbidding the commission of criminal offences.

Allegations which are in substance the statement of facts and the assertion that those facts demonstrate a lack of integrity or undermine public trust should now be insufficient. It is necessary to demonstrate relevance and provide certainty by reference to the quality of the conduct in the context of other rules or law which show why the conduct may legitimately be subject to regulatory interest.

Although one might not fully agree with the court's route from the principles of integrity and trust through other rules to relevance and legitimacy, the need for a demonstrable linkage is now firmly established. **NLJ**

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NOTES FOR ARDL SEMINAR – ANALYSING THE BECKWITH JUDGMENT

16 June 2021

Patricia Robertson QC

- *Can Beckwith be reconciled with the Divisional Court Judgment in SRA v Leigh Day or are they inconsistent?*

The Divisional Court in Beckwith v SRA [2020] EWHC 3231 (Admin) declared there to be "no universal principle" of serious professional misconduct (para 16). It's all a matter of applying the rules of the particular scheme. But is that in fact inconsistent with the earlier Divisional Court decision in SRA v Day and others [2018] EWHC 2726 (Admin)?

Let's take a few steps back from the Beckwith judgment itself to set the stage.

In the beginning, back in the mists of regulatory time, the code of conduct for solicitors was fantastically short and simple. It didn't need to be detailed because disciplinary proceedings were largely based on the concept of "conduct unbefitting" a solicitor and the idea was that a professional tribunal would be able to recognise that when they saw it. That language carried with it the notion that right-minded members of the profession, or reasonable and properly informed members of the public, would regard the conduct in question as worthy of opprobrium, in other words that it amounted to "serious professional misconduct".

The SRA's rule book got ever longer and more detailed over the years and in parts it became exceedingly technical in nature. As it did so, the potential grew for there to be inadvertent breaches of the rules which other reasonable members of the profession would see more as a case of "there but for the grace of god" than as justifying tarring a solicitor with the brush of professional misconduct. The SRA, after 2007, prosecuted breaches of specific rules and principles before the SDT, rather than framing the allegation as "conduct unbefitting".

However, I would say – and as I'll come to, the Divisional Court agreed with me about this in SRA v Day - it still remained the case that in order to engage the disciplinary function of the Tribunal any breaches needed to be, recognisably, particular manifestations of a wider overarching concept of serious professional misconduct.

The idea that such an overarching concept did exist, as something a professional tribunal could recognise when they saw it, was important in three respects.

First, it was a protection against over-prosecution by the SRA of breaches which lacked the necessary elements of seriousness and culpability.

Second, it meant that conduct which didn't breach any specific underlying rule could still be prosecuted by resorting to Principles 2 and 6. In other words, the detailed rules were not taken to be exhaustive of what could breach Principles 2 or 6 and, moreover, in interpreting and applying those two broad Principles we could be guided by what the courts had said about the overarching concept of serious professional misconduct, including in regulatory regimes other than that of the SRA.

Third, in extending regulatory reach to matters that were not the subject of a specific rule, and in particular aspects of private life, the regulator still had to show how those matters impacted the standing of the professional or the profession as a whole. In that context, again, it could be relevant

to look at how other regulatory regimes had approached the question of when, and why, private misbehaviour becomes serious professional misconduct.

Each of those words carries weight: serious – professional – misconduct. Taken together they illuminate the underlying rationale for a number of well-established legal principles. So, for example, a one-off instance of run of the mill professional negligence may well give rise to civil liability in damages but it does not follow that it will also expose a solicitor to a disciplinary sanction. Mere errors of judgment are not misconduct and negligence can't be equated to lack of integrity or be said to undermine trust in the profession, unless it is so serious as to reach the level of manifest incompetence: see the Court of Appeal in Wingate and Evans v SRA and also Connolly. Other members of the profession, and rational members of the public, recognise these to be just the ordinary hazards of professional life, which do not warrant being treated as serious professional misconduct in regulatory terms.

Now, I say that remained the case, but the SRA often tried to persuade the SDT that all it needed to prove was a rule breach and that the notion that a breach had to amount to serious professional misconduct had gone out with the Ark, when the 2007 Code came in and the language of conduct unbefitting a solicitor was abandoned. That argument was run with great determination in SRA v Day and others, both before the Tribunal and on appeal before the Divisional Court. It was rejected.

It was rejected in terms which create a clear inconsistency between the two Divisional Court judgments which may in due course need to be resolved. Mr Justice Swift (at para 23) did not want to entangle himself in what he described as the complicated facts of Day. I can see that he might not have relished having to work through the 73 pages of the Divisional Court's judgment and even more so the 214 pages of the SDT's decision. However, you do have to wrestle with what the allegations were and how they were defended to appreciate that, contrary to his conclusion at paragraph 24, Day does provide clear support for recognising a concept of serious professional misconduct in the SRA's regulatory regime.

The controversy in SRA v Day centred on the word "serious". Whereas the controversy in Beckwith centred on the word "professional". Our submission in Day was that the rules and principles should be viewed through the prism of serious professional misconduct and that meant that the element of seriousness was a necessary component before the Tribunal should find a breach, even where the given rule or principle was not worded in a way that made that inherently clear.

We supported that submission with authorities drawn from other regulatory regimes including Walker v Bar Standards Board, where it was said that consistent authorities had made clear that the stigma and sanctions that are attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious. That conclusion was based on a survey of cases which included, for example, those involving dentists and doctors. It's an example of the approach which, until now, was very familiar to us all of identifying elements of common underlying principle that link different regulatory regimes, regardless of their differences.

We also relied on Sharp v Law Society of Scotland [1984] SC 129, where the Scottish Court of Session specifically rejected the argument that "common law misconduct" differs from misconduct based on rule breach as regards the standard involved (the very argument the SRA was advancing in SRA v Day). The relevant standard is to be found in the concept of serious professional misconduct as something that members of the profession can recognise when they see it. The Court of Session said: "There are certain standards of conduct to be expected of competent and reputable solicitors.

A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of the rules […], the same question falls to be asked and answered and in every case it will be necessary to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

Mr Justice Swift referred to only one passage in Day on only one of the allegations where this issue was hotly debated and he cuts off that citation before he gets to the crucial bit, at paragraphs 157 and 158, where the Divisional Court specifically approved the decision of the Court of Session in Sharp as being an appropriate approach in this jurisdiction, despite the differences in the applicable rules. The Divisional Court said, at paragraph 158, that "though the statutory schemes are by no means the same, the like approach is generally appropriate and required for the English legislative and statutory regime in the treatment of alleged breaches of the core principles". They went on to say that, other than accounts rule breaches, which are treated as matters of strict liability, alleged breaches of core principles involve an evaluative judgment and an assessment of seriousness.

Now, it is quite right that that particular passage approving Sharp occurs in a section of the judgment dealing with an allegation that failed on other grounds in any event. The argument the Divisional Court was dealing with was whether negligence has to be serious before it will amount to a breach of principle 5 (competence). The SRA had argued that the Tribunal had erred in reading that requirement into the Principle. That particular point was academic because the Tribunal had found there wasn't any negligence at all, so questions of degree didn't come into it. However, if you read the Divisional Court's judgment as a whole the passage referring to and approving the approach in Sharp is clearly not obiter, because it explains the way they disposed of the SRA's appeals on a number of other allegations (both before and after that particular passage in the judgment).

So, for example, at para 102, the Divisional Court rejected the submission that the Tribunal had erred in asking themselves whether Mr Day's conduct in holding a press conference was "so unreasonable that it amounted to professional misconduct". The Divisional Court asked what the allegation was doing before the tribunal if it was not one of professional misconduct. Questions of seriousness and culpability were plainly relevant to the assessment of whether Mr Day had thereby breached the then 2007 code rules relating to independence and undermining trust in the profession. In other words, you had to read those elements in to the relevant rules in asking whether there was a breach, even if that's not expressed in the rule, because what the Tribunal is concerned with is professional misconduct and if those elements are missing that's not what you are looking at.

Similarly, the Divisional Court scrutinised the Tribunal's conclusions about the oversights that had occurred in failing to identify any earlier the significance of a particular document which had therefore been disclosed only late in the day to the Al Sweady enquiry. They said of this, at paragraph 136 that "any oversight by the particular partner in this respect did not, of itself, amount to misconduct" and, at paragraph 143, that although there were criticisms that could be made of what had happened that was "not to say that such lack of competence and such oversights as were involved necessarily were of a degree such as to constitute misconduct coming within the ambit of Rule 1.01 or Rule 1.06 [of the 2007 code]." And they rejected the argument the Tribunal had applied the wrong test.

Equally, in dealing with a whole tranche of allegations relating to alleged breaches of extremely technical requirements relating to referral fees, the Divisional Court specifically rejected the SRA's

contention that in order to substantiate those allegations the SRA only had to establish that breaches of the relevant rules in the referral code had occurred, without also having to show that those breaches were so serious as to amount to professional misconduct. They said at para 220: "We reject that contention, applying the same approach as set out by us above." That refers back to their approval of Sharp. They repeated that same point in rejecting the SRA's appeal on another related allegation at paragraph 236, saying that any breach of the rule in question was not so significant as to constitute professional misconduct.

So, as I say, the Divisional Court in SRA v Day accepted that Sharp, despite being a Scottish case about a different regulatory regime, nevertheless represented the approach in this jurisdiction, and as one can see from the approach they took to the SRA's appeal, they accepted that allegations of breaches of given rules and principles needed to be measured by the yardstick of whether they were such as to amount to serious professional misconduct.

In Day the debate focussed on the word "serious" and how that should guide a Tribunal when it comes to interpret and apply specific rules and principles in the SRA code. The answer was that one is looking for conduct which is serious and reprehensible in the eyes of the profession, or in the eyes of rational and properly informed members of the public, such as to amount to professional misconduct. In Beckwith the focus was on the word "professional" and what should be derived from that as to the boundaries of a regulator's intrusion into private life. Yet we're told there's no universal principle of professional misconduct which can guide us as to where that boundary lies.

It seems to me there is a clear inconsistency between the two judgments and that may open a route for re-examination of the approach adopted in Beckwith.

- *Have they unnecessarily thrown the baby out with the bath water in ditching an over-arching concept of serious professional misconduct?*

In Beckwith, as we've just seen, the Divisional Court uncoupled the analysis of whether there's a breach of the SRA rulebook from any overarching concept of professional misconduct that could be said to be held in common across other regulatory regimes.

A consequence of that is that even a regulatory regime which is very closely connected to that of solicitors, such as that of the Bar, seemingly becomes irrelevant, as one sees from the discussion of Howd at paragraph 21.

Now, the merit of some of the recent decisions of the Bar's Tribunal in sexual misconduct cases has been controversial and I'm not going to get into the specifics of that, but I do think there is a baby and bathwater aspect to this uncoupling by the Divisional Court. Once you are considering, specifically, how far professional regulators should intrude into private life and specifically sexual activity you are no longer concerned with the exercise of the professional skillset that's peculiar to this particular group of professionals, as distinct from another group of professionals. Rather, you are concerned with broader issues relating to the trust reposed in, and the special status of, professionals generally, even if there may be some nuances that relate to the particular profession.

The Divisional Court anchored its own analysis in the rule relating to taking unfair advantage of a third party. However, it is difficult to see why the outcome in such cases, which are *ex hypothesi* not about professional services as such, should depend on the quirks of the given regulatory regime and whether there happens to be a specific rule buried somewhere in the rulebook that might be said to meet the occasion, rather than finding the answer in broader principles that are common to other

professions. There is every reason why there should be a "read across" from cases which have considered allegations of sexual misconduct against doctors, dentists or barristers on similar facts as to what does or doesn't cross the boundary, so as to become the purview of the professional regulator. There is an obvious risk of divergent approaches in different regimes.

- *How else could they have tackled the public/private divide (other than by shackling principle 2 and 6 to the underlying rules)?*

The Divisional Court was concerned to rein back what it saw as excessive intrusion into private life. The findings of fact meant that the conduct in question had to be approached on the footing it was consensual and not an abuse of a position of authority, and so the question became what then justified, as a matter of principle, treating it as a regulatory matter capable of supporting a disciplinary sanction. The Tribunal's vague and unreasoned references to the conduct being inappropriate and falling below accepted standards clearly did not adequately explain on what principled basis it engaged the regulatory regime. However, the Divisional Court expressly rejected tackling the problem by reference to an overarching concept of serious professional misconduct, with the emphasis on the word "professional", as they could have done and as would have been consistent with SRA v Day.

Instead, they decided that the way to set boundaries on the application of Principles 2 and 6 in order to prevent the latter, in particular, becoming "unruly", was to insist that those Principles have to be related back to the standards defined in the rest of the handbook, in other words, somehow anchored in the underlying rules. As they put it at paragraphs 42 and 43, the ground covered by Principle 2, integrity, is to be identified by construing the contents of the Handbook, the body of rules made in exercise of the statutory power in section 31 of the Solicitors Act 1974. And the same general approach is to be taken to Principle 6, when seeking to establish the line between personal opprobrium and harm to a solicitor's professional standing or that of the profession.

That approach appears to limit the scope of these broad Principles or core duties to what can be said in some way or another to be derived from the detailed underlying rules. If that's really what it means, that approach runs directly contrary to the whole direction of travel in recent years in how the rule books of both the solicitors' profession and the Bar have been developed.

The SRA has sought to make its rules progressively less prescriptive and to rely more on high level principle. We at the Bar had the same debates when as Vice Chair of the BSB I was leading the project to revise our Handbook. There was considerable pressure from the LSB to make the Handbook a whole lot shorter. By way of example, it was suggested that we didn't need a core duty around equality and diversity because that was covered by the general law – although we stood our ground about that. The whole tenor of the debate was to reduce the rule book to only those detailed rules that were strictly necessary and to rely on the broad core duties to do the rest of the work.

It seems to me the Divisional Court may have unleashed arguments about the relationship between the SRA principles and the new standards, going far beyond the specific territory of the private/professional divide that was in play in Beckwith, which will seek to put in issue whether conduct that doesn't happen to breach any of the detailed underlying rules nevertheless engages Principle 2 or 6. Sooner or later, the SRA may find itself meeting those arguments by relying on SRA v Day for the proposition that there is an overarching concept of serious professional misconduct and we will have come full circle.

The Divisional Court did not need to go that far to crack the problem with which they were confronted. They had identified that the power under section 31 was to make rules to regulate professional conduct and fitness to practise and maintain discipline in the profession. On that basis the Principles were, consistently with the scope of that power, not to be construed as applying to purely private matters that lacked the necessary linkage to professional life or the standing of the profession. They could have concluded that the findings of fact in Beckwith made the conduct in question such a private matter and that Principles 2 and 6 were not engaged.

The Divisional Court did not need to travel beyond Wingate and Evans to crack this nut: if we can trust juries to recognise what amounts to dishonesty by the standards of reasonable people, why should we not trust professional tribunals to recognise what amounts to lack of integrity by the standards of their profession? The Court of Appeal did set boundaries, in that professional integrity needs to be linked to the manner in which the particular profession serves the public. On the Tribunal's findings of fact, Beckwith hadn't abused his position as a solicitor to take advantage of a more junior colleague and nor, absent any finding as to consent, had his conduct breached the law. The worst that could be said was that Beckwith had not been a "paragon" in his personal life and his own firm had taken a dim view of that. That being so, public outcry could not transform the matter into something that was linked to, and undermined trust in, his status as a professional or that of the profession generally. The Divisional Court could have stopped there and did not need to take the further step of shackling the interpretation of the broad Principles to the underlying rulebook.

- *How will this decision impact how regulators need to draft their rules?*

I question whether this decision may have the unintended and undesirable effect of encouraging a return to a more prescriptive approach in drafting rules. If so, that would be a retrograde step.


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OVERVIEW

- Are there logical inconsistencies within the judgment?
- Do free-standing principles create legal uncertainty?
- How have other regulators been affected by the judgment?
- A personal prediction as to how it will affect regulators in the longer term

Dishonesty v Integrity
Legal Certainty

The Court's reasoning:

1. The SRA is given the power to make rules to regulate the profession under s.31 Solicitors Act 1974 (para 31)
2. Any ethical standards must therefore be derived from those rules (para 31)
3. Legal certainty requires reasonable foreseeability (para 34)
4. The requirement to act with integrity (Principle 2) must therefore comprise "identifiable standards" (para 33)
5. This can only be done by reference to the standards in the rest of the Handbook (essentially the Code of Conduct 2011) as, if not, the notion of integrity would "run the risk of circularity" (para 32)

Dishonesty v Integrity & Legal Certainty

The Court's reasoning:

6. This is not true of dishonesty as there is "no fully-formed legal notion of lack of integrity that could be applied in the same way as the received notion of dishonesty" (para 32)
7. There is no free standing principle of dishonesty in the 2011 Principles but the Court concluded that the judgment in *SRA v Wingate [2018] 1WLR 3969* is authority for the "proposition that **properly interpreted**, the Handbook imports the **well-known legal definition** of what is dishonest" (para 33) [Emphasis added]
8. Given the established case law (and common sense) it was important that the Court found that dishonesty in any area of a solicitor's life can constitute a breach of the Code of Conduct – but the only part of the Handbook this can fit into is as a breach of Principle 2

Logical Inconsistencies in the Court's reasoning

- The reasoning thus concludes that acts of dishonesty (including in private life) can stand alone as a breach of Principle 2
- In contrast the reasoning then concludes that acts that lack integrity cannot stand alone as a breach of Principle 2 – they must be derived from the standards set out in the rest of the Handbook (essentially the Outcomes in the Code of Conduct 2011)
- This reasoning is predicated on the concept that dishonesty is a precise legal notion, and therefore affords legal certainty whereas integrity is not
- But the definition of dishonesty has changed considerably since 1968 (it is one of the least "legally certain" definitions of the criminal law, as we all know the definition in criminal law changed from a subjective test to an objective one after 30 years and only 3 years before Beckwith was decided) – in fact the Supreme Court dedicated 11 pages of its judgment in *Ivey* (more than a third) to analysing the change in the legal concept of dishonesty over time

Legal “definitions”

Dishonesty – relevant part of current “legal definition” from Ivey

- “When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.” (para 74 *Ivey*)

- In other words – what the jury think is dishonest is dishonest (irrespective of what the defendant thinks)

Integrity – definition from Wingate

- Integrity connotes adherence to the ethical standards of one’s own profession (para 100 *Wingate*)
- “A jury in a criminal trial is drawn from the wider community and is well able to identify what constitutes dishonesty. A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly, such a body is well placed to identify want of integrity” (para 103 *Wingate*)
- In other words – what the professional disciplinary tribunal think lacks integrity lacks integrity

Dishonesty v Integrity & Legal Certainty

Logical inconsistencies:

- This “legal definition of dishonesty” as para 33 of the Beckwith judgment puts it – is not a “definition” at all (as made clear by the Supreme Court) and involves the exact circularity which the Court in *Beckwith* considers creates legal uncertainty

- the Court then having equated circularity with legal uncertainty then concludes that the Principle of integrity therefore cannot stand alone but must be interpreted by reference to other standards within the Handbook, unless of course it relates to dishonesty

Dishonesty v Integrity & Legal Certainty

- The Supreme Court in *Ivey v Genting Casinos [2017] UKSC 67* (in Lord Hughes' judgment, with which all 5 members of the Court agreed) stated, at paragraph 48:

> "***Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards."***

And (again) at paragraph 53:

> "***As recorded at para 48 above, dishonesty is itself primarily a jury concept, characterised by recognition rather than by definition."***

The extension of this reasoning to Principle 6

- Is lack of integrity harder to recognise than dishonesty? What characterises lack of integrity in the profession has changed over time but this, it could be argued, is a reason not to insist on it being defined too precisely

- The same is true of what acts undermine public confidence in the profession (Principle 6) - the public of today inevitably have a different view of what behaviour undermines their trust in a solicitor than the public of 1955

- the *Beckwith* court decided Principle 2 could not stand alone and they went on to decide that the same "*general approach must also apply when determining the scope of Principle 6*" (para 43) – ie it must be derived from the standards and cannot stand alone

Problems that arise if Principles cannot stand alone

- The only part of the 2011 Handbook that relates to relations with third parties is Chapter 11, essentially it is only Outcome 11.1 that is relevant to private life (taking "unfair advantage of third parties") – NB the notes preceding the outcomes state, inter alia, "The conduct requirements in this area extend beyond professional and business matters. They apply in any circumstances in which you may **use your professional title** to advance your personal interests." [Emphasis added]

- This is even more specific in the 2019 Code of Conduct which states "you do not **abuse your position** by taking unfair advantage of…others" [Emphasis added]

Logical outcome of this line of reasoning?

- If followed it would mean that serious sexual misconduct in private life (involving no abuse of position) cannot breach Principles 2 or 6 and cannot therefore be regulated

- This would also include serious acts involving financial misconduct that don’t amount to dishonesty and don’t involve the use of your professional title

Solutions? Shouldn’t this all really be about “seriousness”?

- The judgment states there is no need to import the concept of “professional misconduct” into the Tribunal’s reasoning (paragraphs 23 & 24)

- However “inherent seriousness and culpability” is still a requirement (para 156 of the judgment in *SRA v Day [2018] EWHC 2726 (Admin)* quoted with approval in para 23 of the judgment)

- The Court didn’t then go on to consider whether or not the factual scenario in *Beckwith* passed that inherent seriousness line – instead it went on to formulate the argument that led it to the conclusion that Principles 1 and 6 cannot stand alone – ignoring the principle it had just quoted from *Day:*

Solicitor's Regulation Authority v Day [2018] EWHC 2726 (Admin) at para 156 (quoted with approval in Beckwith at para 23):

"*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 of seriousness remains a concomitant of such an allegation.***" [Emphasis added]

How *Beckwith* has been applied so far – at the SDT

- At least 5 completed cases at the SDT have already cited Beckwith with varying degrees of success:

- *SRA v Das* (Case no. 12137-2020) – another AWQC case – appeal against SRA adjudicator decision to impose a fine for a conviction of driving with excess alcohol which was found to be a breach of Principle 6 – appeal successful at the SDT on the basis of *Beckwith*

- *SRA v Baggot* (Case No 12141-2020) – SDT held that a conviction for a failure to provide a specimen of breath didn't breach Principle 2 on the basis of Beckwith - Tribunal "*not satisfied that it realistically touched on his practice or the profession*" – but the Tribunal found breaches of Principles 1 and 6 – the SRA have not appealed

How Beckwith has been applied so far – the SDT

- *SRA v Guise* (Case No. 12031-2019) – application for abuse made to the SDT citing *Beckwith* on the basis that the professional networking company of which he was a sole director did not touch on the profession – unsuccessful (Tribunal held it was intrinsically linked)

- *SRA v Kwan Yiu Ho* (Case No.12115-2020) – comments allegedly inciting violence made at a political rally in Hong Kong – not found proved on the facts – during course of hearing *Beckwith* used to argue that insufficient nexus between comments made in HK and practise of the profession in the UK – not accepted by Tribunal

How Beckwith has been applied so far – the SDT

- *SRA v Allanson* (Case No.12131-2020) – solicitor raising money for litigation funding using misleading marketing material cited Beckwith in abuse argument and at costs stage – not accepted by Tribunal – awaiting appeal

- As far as we have been able to ascertain there are no judgments yet from the higher courts that have cited *Beckwith*

How Beckwith has been applied so far – other regulators

Learning point published by the MPTS and sent to Tribunal clerks and others following the Beckwith judgment:

- *"When considering conduct within a registrant's personal/private life, tribunals should, on a case by case basis, ascertain which (if any) ethical standards are relevant to the registrant's conduct. The content of the obligation(s) to act within any applicable ethical standard (including the obligation to act with integrity) or to maintain trust in the profession, needs to be defined by reference to the rules of regulation/standards that are relevant to the alleged misconduct."*

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How Beckwith has been applied so far – Other regulators

- As far as we can tell from completed and published judgments from the other regulators (including the BSB) only the MPTS have so far considered Beckwith, and in only one case

- *GMC v Dr Kriisa* (GMC ref no 7068412)
- Dr Kriisa was found to have repeatedly touched a female paramedic on the buttocks, chest and groin, had attempted to kiss her, and had licked her neck
- All of this was when receiving treatment from her after an ambulance had been called following his collapse
- The background to those facts were that Dr Kriisa had met a man in the early hours of the morning on a dating app and had gone to that mans house by taxi and recalls drinking, watching videos and engaging in sexual activity

- It was agreed by all parties and by the paramedic that Dr Kriisa was under the influence of drugs and the Tribunal held that he was so heavily intoxicated that he was unaware of his actions and he could not form the necessary intent and thus the Tribunal found the allegation of sexual motivation not proved
- It was unclear from the evidence whether Dr Kriisa had taken the drugs voluntarily or involuntarily, the Tribunal therefore accepted that it should deal with the allegations on the basis that he had been given the drugs without his knowledge
- the first and second stages of the hearing took place in October 2020 (for those who don’t do medical regulatory work the first stage is the factual stage but the second stage, unlike the SDT process, involves the Tribunal making two decisions, namely whether the facts found proved amount to misconduct, followed by whether the doctor is currently impaired as a result of that misconduct)

- At the end of the second stage the Tribunal found that Dr Kriisa's actions were sufficiently serious to amount to misconduct – it's decision on misconduct included a reference to Dr Kriisa's conduct lacking integrity, along with a finding that he had committed a serious breach of paragraph 65 of Good Medical Practice which states that "*you must make sure that your conduct justifies…the public's trust in the profession*" and which is now (since April 2019) headed "*Honesty and Integrity*"
- There is no other reference to integrity in GMP ie the code of conduct for the medical profession
- the sanction stage (stage 3 in the MPTS's process) was then adjourned until December 2020 and during the intervening period the *Beckwith* judgment was published.

- Defence counsel cited Beckwith at the start of stage 3 and argued that the Tribunal's decision on impairment should be reconsidered in the light of the *Beckwith* judgment
- The Tribunal (chaired by Kenneth Hamer) agreed to reopen stage 2 and defence counsel submitted that the Tribunal should reverse it's decision on both integrity and misconduct given the decision in *Beckwith*
- The Tribunal held that the decision in *Beckwith* did not affect their decision on misconduct, and therefore impairment, as the facts were "far removed" from those in *Beckwith*
- The defence have appealed the findings on misconduct, impairment and sanction and we understand that the GMC are not opposing the appeal.

Personal prediction

- *Beckwith* is likely to make regulators, particularly the SRA, more cautious about charging misconduct in private life that isn't clearly "serious", which is, in my view the most important effect

- However, in my view, it will not prevent the SRA (or other regulators) from bringing inherently serious charges of misconduct relating to private life even where only principles 2 and/or 6 are breached and outcome 11 is not engaged

- Long term - no major effect, likely to be distinguished on the facts in future cases

Costs

- Likely to make the SDT take a more robust approach in insisting on justification for the costs claimed by the regulator – but this is not a new principle – simply a reminder that the costs claimed must be proportionate to the allegations (paragraphs 58 - 59 of the judgment)