ARDL

Association of Regulatory and Disciplinary Lawyers

Quarterly Bulletin Autumn 2022

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Chair's Introduction

Autumn has been busy for ARDL already. September saw the return of the ARDL Dinner, the first dinner since 2019. Over 600 people attended and were treated to the splendour of the Guildhall, some particularly delicious food and a fantastic after dinner speech from Clive Anderson. I will think of him every time I hear Stayin' Alive by the Bee Gees!

The end of the month saw the second ARDL Conference at Museum of London. ARDL is extremely grateful that such a high calibre of regulatory and disciplinary lawyers were prepared to give their time to speak at the conference, providing excellent educational content. We were delighted to have former chair of ARDL Timothy Dutton CBE KC, give a superb key note speech which was followed by the award of the 2022 Dutton Bursary to Aleja Isip and Janine Cowie. The Dutton Bursary aims to provide opportunities for educational and career development and progression for individuals who might not otherwise be in a position to take up the opportunity. Aleja Isip, received the Dutton Bursary to pay for the Solicitors Qualifying Exam 2 and preparation course. She passed with flying colours, and has now started in an NQ role at Weightmans. The second recipient, Janine Cowie, is a Case Manager at Blake Morgan and received the Dutton Bursary as a contribution towards a PGCert in Medical Law and Ethics at University of Law. Good luck to both of them. Further details about the Dutton Bursary 2023 will be published in June 2023.

We have a few important dates for key events over the next year for your diaries:

Junior ARDL Round Table Discussion and Networking

Thursday 15 November 2022 18:00 at Blake Morgan, London

Join us for an evening of round-table discussion and networking as Junior ARDL hosts this in-person event in London. The event is aimed at Junior members of the Association (0-9 years PQE) to help develop essential skills in regulatory and disciplinary law.

Confirmed speakers include Vice-chair of ARDL Sam Thomas (Barrister at 2 Bedford Row Chambers), Shannett Thompson (Partner at Kingsley Napley), Duncan Toole (Senior Lawyer at Ofsted and Legally Qualified Chair at Medical Practitioners Tribunal Service) and Richard Coleman KC (Barrister at Fountain Court Chambers), who will be speaking on a wide range of practical and skills based topics.

ARDL Scotland Winter Supper

Thursday 24 November 2022 at The Scotsman Hotel, Edinburgh

The ARDL Scotland Winter Supper will be held at The Scotsman Hotel in Edinburgh where around 100 members and guests will get together. The event is a reprise of the successful inaugural Winter Supper held in November 2019, the follow-up of which, as with much else, fell victim to the pandemic. ARDL's members in Scotland are looking forward to getting together and having the chance to meet and socialise while remaining north of the border.

ARDL Manchester Seminar and Dinner

Thursday 2 February 2023 18:00, Manchester Art Gallery

ARDL Dinner 2023

Friday 12 May 2023 at the Guildhall, London

Next year will see the ARDL Dinner return to its usual Summer slot in the calendar. Returning to the fabulous Guildhall, with food being served up once again by the amazing caterers - Party Ingredients. Keep an eye out for details of how to buy tickets. Did you know that you can buy a table for 12 or individuals tickets?

ARDL Conference 2023

Friday 10 November 2023 at the Museum of London. Mark the date in your diary now. This sell out event provides a full day of great quality education and legal updates, followed by a drinks reception.

Further details of all of these events will be posted on the ARDL website, and members will be emailed when tickets are available.

Rachel Birks
Ward Hadaway LLP

ARDL's 20th Birthday

One evening early in 2002 four disciplinary lawyers met to discuss the viability of a new professional organisation for regulatory and disciplinary lawyers. The meeting took place at the chambers of Ian Stern KC who, together with the late Rod Fletcher, had the original idea. Ian and Rod were joined by Susie Dryden and Rosemary Rollason and these four became the first committee.

At that first meeting, there were key questions. Would there be sufficient interest? Were there even enough lawyers practising in the area to warrant a dedicated organisation? However, this was the early 2000's, a period of rapid expansion and development in the professional regulatory sector, and the conclusion was that a new organisation might be timely. The Association of Regulatory & Disciplinary Lawyers, known ever since as "ARDL", was born. Shortly afterwards, Roger Henderson QC agreed to be ARDL's first

Chairperson.

It was agreed from the beginning that ARDL's primary objective would be educational and that it should provide a forum for debate and learning, open to all the legal professions, with no specific sector or "prosecution/defence" focus. An inaugural ARDL seminar was organised and was a great success. It rapidly became apparent that the answer to the questions from the initial meeting was an emphatic "yes!". Membership numbers quickly grew and since those early days back in 2002, ARDL has never looked back.

It is not possible in this short piece to name all those who have given generously of their expertise, ideas and time to steer ARDL's course over the last twenty years: they include many committee members and several Chairs; numerous speakers at seminars and conferences; administrators and organisers. Suffice to say, the number must by now be in the hundreds. Without those contributions there would simply be no ARDL.

ARDL's early activities focussed on seminars given by eminent speakers (followed by drinks and canapés of course!) but over time, many new initiatives evolved. Again, it is not possible to mention all of them here, but they include a programme of regular seminars; the invaluable Quarterly Bulletin; Junior ARDL; a mentoring programme for junior members; the newly introduced Dutton Bursary and the annual student essay competition. ARDL now has nationwide presence, with events taking place in Manchester and Edinburgh as well as London.

What ARDL has given us all as regulatory and disciplinary lawyers over its first twenty years? Perhaps members would agree on three highlights: first and most importantly, the many opportunities to enhance our knowledge of the law and practice in our specialist area. Secondly, ARDL has raised the profile of regulatory and disciplinary law so that it is now recognised as a significant, distinct and defined area of legal practice. Last but not least, ARDL continues to provide us all with opportunities to meet, debate and socialise with peers and colleagues old and new: the lively and convivial atmosphere at the recent Annual Dinner at the Guildhall, after a two-year hiatus due to the pandemic, was testament to that.

In 2022, ARDL remains a vibrant, thriving organisation and continues to develop new initiatives for the benefit of its members: at the time of writing, ARDL looks forward to its second Annual Conference. This follows the success of the inaugural conference in 2021 which for the first time provided the opportunity for a full day of education and discussion, and plenty of time to catch up with friends and colleagues.

So Happy Birthday, ARDL. Congratulations on your first 20 years and here's to the next twenty!

Rosemary Rollason
RJ Rollason Law

Why data protection fails, in Singapore and elsewhere, and what can be done to fix it – Marion Simmons QC Essay Prize Winner

I. Introduction

Almost as a requirement of our modern lives, we develop digital personas out of what we choose to share with others. However, we are only in control of what other individuals are able to learn about us. Those that control social media, business websites, the platforms that host such sites, and especially the companies that provide us with internet access to begin with, have no such limitation. Through the careful management (often automated) of the great multitude of online interactions a person can have, an internet search provider or a social media giant can assemble a very detailed picture of one's personality. To supplement the data available through direct interactions, organisations often use cookies, which can track a user's browsing behaviour

and interactions across the internet[1]. Where personal devices are concerned, telemetry data is an easy target for software companies.[2]

For illustration, Google processes an average of 8,786,448,000 searches per day at the moment of writing[3], which, distributed among the 4.9 billion people who were online in 2021[4], works out to nearly 2 searches a day. If catalogued over time, that provides hundreds of searches from any given person from which to ascertain anything from their interests to their medical conditions and their place of study or work, without speaking of any of the myriad other sources of information. To assist in this process, there exist data brokers, who, despite dating back to the early 2000s, are not well-known. These data brokers purchase and process data provided by tech giants to assemble the aforementioned representation of one's personality for access by other organisations, including law enforcement.[5] [5]

II. Singapore

Singapore is a country in which, as of 2020, 98% of the population owned a digital device[6]. Ostensibly, most, if not all, of these people use the internet. Recognising this reality, parliament passed the *Personal Data Protection Act* (PDPA) in 2012.[7]

The basic principle of this legislation, evident in Part 4, Section 13, is that consent is required in all handling of user data by organisations. This covers collection, use, and disclosure, and theoretically gives the user control over their data. Intuitively, this is a step forward. From being patients in the usage of their data, people are converted into agents for such usage.

The requirements for consent are laid out in Section 14. Firstly, a person must be cognizant of the purpose for which data is collected as defined in Section 20. Thereafter, consent must be given specifically for that purpose. Additionally, on request of the user, business contacts for the handlers of the user's data must be provided.

Immediately, this section raises two problems. Firstly, as there are no instructions for *how* consent is to be requested, this opens the door for companies to notify users of the purpose of data collection in ways that influence consumers to provide such data. For instance, a pop-up could be presented in such a way that it is more convenient for users to agree to give up their data than to disagree, and purposes can be stated in terms that do not clearly convey the usage and destination of data. Compounding this, most people are unaware of the sheer volume and specificity of personal data they bequeath to services they access when they agree to provide their data[8]. Furthermore, data requests can be misrepresented such that users are convinced that data that is not strictly necessary for the operation of a service is indeed necessary. While methods of deception and manipulation of users are disallowed under Section 14, no such transgression has ever been penalised in Singaporean courts, despite the apparent ubiquity of such tactics in internet usage today.

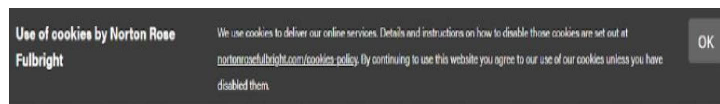


Fig 2.1: A screen capture from the website of Norton Rose Fulbright, a source used later in this very essay, depicting the inconvenience of rejecting cookies as opposed to accepting them.

Secondly, the onus then falls on users to track down the transfer of their data step by step through all companies in countries where similar

[1] Norton, 2019
[2] Office of the Privacy Commissioner of Canada, 2020
[3] Internet Live Stats, 2022
[4] International Telecommunication Union, 2022
[5] Hoofnagle, C. 2004
[6] Statista, 2022
[7] Available at https://sso.agc.gov.sg/Act/PDPA2012

[8] Morey, Forbath, and Schoop, 2015

regulations exist, and the right to erasure as well as the initial facade of data control evaporate, as no individual could possibly arrest all impropriety of data usage.

III. Private Action

On the subject of redress, Section 48 of the legislation discusses the methods by which users can seek redress in the event that the rules set down in Part 4 are transgressed. Section 48O in particular provides the right to private action, in which: "A person who suffers loss or damage directly as a result of a contravention ... has a right of action for relief in civil proceedings in a court." A look at the verdict in *Bellingham Alex v Reed Michael* [2021] SGHC 125 illuminates this discussion. While the judge ordered an injunction forcing the respondent to comply satisfactorily with PDPA, the complainant was not awarded damages where he could not "establish any form of physical or financial loss, other than general distress and loss of control over his personal data"[9]. This was because the High Court concluded that PDPA was not intended to provide an absolute right to personal data privacy but rather to provide security of personal data for the purposes of business transactions.

This approach differed from that taken in Hong Kong in *Tsang Po Mann v Tsang Ka Kit* [2021], wherein the complainant was awarded HK$70,000 in damages for the injury to feelings, in the form of distress, caused by the abuse of her personal data[10]. The core difference between these approaches lies in the perception of personal data with respect to the person. In Hong Kong, the privacy of personal data was considered a right, the violation of which is damaging to a person in and of itself. In Singapore, personal data was treated as a commodity, such that if the usage of one's personal data causes material (usually financial) harm to a person, only then it is damaging for that person's privacy to be violated.

IV. Right or Commodity?

Yet, the idea of personal control of one's data and the ability to consent to giving away personal data is present in both the PDPA and its counterpart in Hong Kong: the *Personal Data (Privacy) Ordinance* 1996[11], as well as in the EU's *General Data Privacy Regulation* 2018[12], and seems to suggest that personal data is a sort of commodity after all. When users are so easily manipulated by corporations to click accept when prompted and give consent[13][14], the question of whether one should be totally in control of one's data as if it were a commodity gains steam. Recent analyses demonstrate that governing one's personal data as if it were a thing, separate from a person's privacy as a whole, is anathema to upholding a right to the protection of personal data.[15]

V. The Way Forward

Should the privacy of one's personal data be deemed a right, regulations should be directed towards the acts through which companies violate said right. Legislation written to prevent data from being collected, stored, and used unnecessarily, regardless of the status of consent, alongside robust implementation of audits to that extent, would ensure that companies are more responsible and cannot simply obtain *carte blanche* from users. Thus, the handlers of data would need stronger justification than mere consent for their activities, in line with other rights guaranteed by law.

Regardless of and prior to whether privacy of one's personal data is considered a right, countries should seek to augment enforcement by having existing data protection commissions and authorities bring cases of manipulative

[9] Chan, E. and Louis, J., 2021

[10] Ang, Gamvros, Lua and Yau, 2022

[11] Available at https://www.elegislation.gov.hk/hk/cap486

[12] Available at https://gdpr-info.eu/

[13] Koops, B. 2014

[14] Utz et al., 2019

[15] Poulet, Y., 2009

phrasing or formatting to the courts and impose penalties on corporations as such since, as previously discussed, such nuances of digital interaction hobble the informed consent of a user.

The National Commission on Informatics and Liberty (CNIL) in France have begun work on this. Deciding that being unable to reject non-essential cookies as easily as one could accept them was manipulative of users and rendered such consent tainted, CNIL served fines of 60 million Euros each to Google Ireland Ltd. and Facebook Ireland Ltd.[16] CNIL has been prolific in prosecuting violations of GDPR and the accompanying legislation in France, making full use of provisions for privacy in the legislation that other countries, like Singapore, have left dormant. While there cannot truly be informed consent on this matter, this approach penalises attempts to take advantage of ignorance.

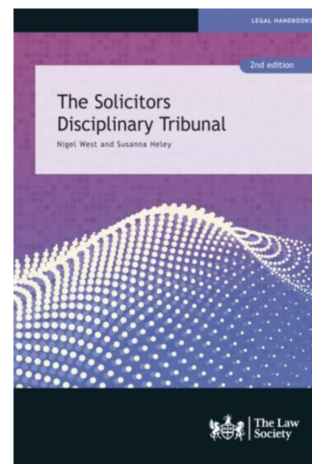
That said, insofar as legislation only prohibits misleading statements of purpose, data protection authorities are limited. Expansions of legislation would do well to ensure that statements of purpose and requests for consent to collect data in digital spaces are subject to requirements of clarity for the average person to parse and respond to appropriately. Additionally, declarations of purpose are most effective only if the general public is well-informed in matters of their data. With data protection authorities, legislation, and policy working towards these ends, the control that is granted over one's personal data would be much more substantial.
As the proportion of our lives spent online increases dramatically in the 2020s, the personal data one gives away, largely inadvertently, builds a deeper and more complete picture of the person as a whole.

[16] Schuler, M., Dumontet, J. and Heywood, D., 2022

If privacy truly is important to us, moves must be made, urgently.

Priyansh Shah

The Solicitors Disciplinary Tribunal Law & Practice (2nd edition) - Book Review by Robert Forman



The Solicitors Disciplinary Tribunal Law & Practice (2nd edition) - Nigel West and Susanna Heley – the Law Society, published May 2022.

The earliest publication on the law and practice of the SDT I recall is David Swift's thin 1996 guide, 'Proceedings Before the Solicitors' Disciplinary Tribunal'. Its slenderness perhaps reflected the informal nature of proceedings of the time. Hearings took place at the back of the RCJ, in Carey Street, and seemed to me more akin to a visit to the headmaster's study, than a civil litigation process. Back then, the late Andrew Hopper QC was prosecuting for The Law Society.
'The Guide to the Professional Conduct of Solicitors' (8th edition) published by The Law Society in 1999, included a final chapter 31 on the SDT almost as an addendum. The section on 'The hearing' consisted of five lines, helpfully informing its solicitor readership that parties may be represented and call witnesses.
2008 saw the first edition of The Solicitor's Handbook, authored by the late Andrew Hopper QC and by Gregory Treverton-Jones QC, which included a 22-page chapter on law and practice in the SDT. I have had the pleasure of joining as a co-author of The Solicitor's Handbook since 2019 alongside Nigel West and Susanna Heley. The 2022 edition of The Solicitor's Handbook includes three chapters on SDT law and practice written by Nigel West, and comprises 71 pages.
This review concerns the second edition of 'The Solicitors Disciplinary Tribunal' published in May

2022. Ignoring appendices, the second edition is 442 pages in length, an increase from the 2015 first edition's 324 pages.

The authors are known to me, both as co-authors and as experienced and highly respected practitioners in the field of solicitors professional discipline and regulation.

The first edition followed a period in the SDT's history, where proceedings had begun to closely resemble proceedings in the civil courts, and its practice directions and guidance notes had proliferated. It detailed the jurisdiction of the SDT, and took the reader on a chronological journey through proceedings, from SRA referral through to appeals. From a professional discipline practitioner's perspective, it was a welcome addition.

The second edition addresses the changes in law and practice in the intervening period, including, the change in standard of proof from criminal to civil standard, new procedural rules at the SDT (2019), the effect of the SRA Standards and Regulations 2019, the change in tests for dishonesty and integrity, Agreed Outcomes and Restriction Orders.

The book is aimed at, 'anyone who wishes to avoid the common pitfalls faced by unfamiliar users of the Tribunal.' No doubt it will be of assistance to any Respondent to the Tribunal who finds themselves unable to afford specialist representation, but it will be of equal assistance to professional discipline practitioners.

I've highlighted some chapters of particular interest.

Chapter 4 addresses the increasingly thorny issue of publicity and the 'Open Justice Principle' coined in Cape Intermediate Holdings Ltd v Dring [2019], which has increased the threshold for solicitors seeking to maintain anonymity.

Chapter 10 addresses the test for dishonesty as set out in Ivey v Genting Casinos (UK) Ltd t/a crockfords [2017], and cases since on its application such as Zivancevic v SRA [2019]. It also addresses what constitutes 'exceptional circumstances' following SRA v James & Ors [2018], required if a Respondent is to avoid being struck off following such a finding. This triple headed appeal saw mental ill health both recognised as a contributory factor to exceptional circumstances but given less prevalence than other factors such as the length of time for which the dishonesty was perpetrated, whether it was repeated and whether any harm arose. The consequence of the case is that save in 'moment of madness' cases, Respondents found to be dishonest can expect to be struck off.

Examples of cases where a dishonesty decision did not result in strike off are provided. Following the successful appeal by the Respondent in Matthew v SRA [2022], heard since the book was written, and the SRA's Workplace Culture Thematic Review, one can expect the age and experience of the Respondent will be significant in future decisions.

Chapter 11 addresses various other types of misconduct including the test for lack of integrity. The intervening years between editions has seen some topsy-turvy cases on the matter. 2017 saw the cases of SRA v Newell-Austin and SRA v Malins, decided a month apart, with diametrically opposite conclusions, the former finding that the concepts of dishonesty and integrity were not synonymous, and the later finding that they were. The matter now appears settled since Wingate and Evans v SRA [2018] such that the concepts are not treated as synonymous. In 2019, Mostyn J, who decided Malins, heard the case of Adetoye v SRA. While accepting the decision in Wingate and Evans he made clear his continued disagreement, commenting, 'I have to regard acting without integrity as involving greater moral turpitude than mere dishonesty but, paradoxically, the former will generally attract a lesser sentence than the latter.'

The SDT's view is that acting without integrity does not involve greater moral turpitude than dishonesty. Acting with integrity is a higher standard of conduct for solicitors to abide by than mere honesty, but failing to achieve it, does not mean the conduct is more serious than dishonesty. A person can act honestly and yet behave without integrity. A dishonest act will always involve a lack of integrity.

Also addressed are the highly topical matters of sexual misconduct and integrity in private life, including Beckwith v SRA [2020] in which the court

overturned a SDT decision which encroached too far on the private life of a solicitor, ruling that a finding of lack of integrity must be tethered to existing other rules.

Chapter 13 on Settlements gives examples of cases and decisions in which Agreed Outcomes were upheld for less obvious reasons, for example, 'disproportionality' of proceeding to a substantive hearing in SRA v Smith [2020] and cases in which the Agreed Outcome was rejected.

Chapter 16 on Costs, was written before the Supreme Court's decision in CMA v Flynn Pharma [2022] and therefore includes only the Court of Appeal decision of 2020. The Supreme Court maintained that if the SRA were to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful this might have a chilling effect on the exercise of its regulatory obligations. Nothing was said of the effect of one-sided costs rules causing Respondents to make admissions for financial reasons, the dangers of an unaccountable regulator, and no evidence was procured of the so called 'chilling effect' of costs orders against the SRA. Successful Respondents will continue to need to show 'good reason' why the Tribunal should depart from the standard no order as to costs, but they will also need a bold panel to act on those submissions.

Chapter 17 on appeals includes extracts from the cases of Dar v SRA [2019] Bawa-Garba v GMC [2018] and SRA v James & Ors [2018] on the test to be applied. Bawa-Garba helpfully recognised the 'evaluative' nature of Tribunal decisions. However, the 'error of law or clearly inappropriate test' leaves substantial scope for the courts to interfere when they feel sufficiently strongly that the SDT has erred, and as ever, some judges are more likely to intervene than others. In James & Ors, the evaluative judgment of the SDT was overturned as Flaux LJ considered that the SDT had given too much weight to the Respondents' mental ill health. The Ivey test has heralded a quandry for Tribunals. Only a diagnosis of psychosis will avoid a finding that the solicitor was 'not aware' of their actions, and thus defeat an allegation of dishonesty. At the same time, very serious mental ill health falling short of psychosis, which on expert evidence, has a clear effect on the decision-making capacity and renders the solicitor powerless to act otherwise is now downplayed in importance.

Chapter 20 addresses the variation and removal of Restriction Orders. Most of the cases are recent, being the natural consequence of the SDT now making Restriction Orders almost as a matter of practice.

The final chapter, 21, addresses Appeals to the Tribunal. Since publication, the SRA has been granted increased powers to fine 'traditional' law firms and its employees – a fine of up to £25,000 – the chapter however remains entirely relevant and is likely to become of increasing use as the SDT hears more such appeals. As appeals to the SDT are by way of Review rather than Rehearing, a wholly unsatisfactory state of affairs now exists whereby a solicitor may be fined £25,000 and yet never have the chance to have given evidence, even on appeal. On 23 August 2022 the SRA launched a consultation on the use of the increased powers.

This is a well-written, and reliable text on proceedings before the SDT. Despite the increase in length, it continues to be concise, and thus of great practical use. Writing this book will have been a burdensome undertaking, and practitioners will be grateful to the authors for making their lives commensurately easier.

Robert Forman, is co-author of The Solicitor's Handbook 2022, and Senior Consultant at Murdochs Professional Discipline Solicitors

Legal Update

***Competition and Markets Authority v. Flynn Pharma Limited and Pfizer Inc* [2022] UKSC 14**

Costs - regulator losing case when exercising public functions – no presumption of no order for costs – Competition Appeal Tribunal Rules 2015, r 104

By a decision of 7 December 2016, the Competition Markets Authority (CMA) found that Flynn and Pfizer had abused their dominant position in the UK market for the pricing of an epilepsy drug called

phenytoin sodium under both domestic and EU competition law by charging excessive prices. It imposed a fine of £84.2 million on Pfizer and £5.2 million on Flynn. Both Flynn and Pfizer appealed to the Competition Appeal Tribunal (CAT) which found that the CMA had made errors in deciding that Flynn and Pfizer had abused their positions and set aside the penalties. Flynn and Pfizer sought orders for costs against the CMA. The costs sought were £4.7m for Pfizer and over £3m for Flynn. The CMA's costs were £1.8m. Rule 104(2) of the Competition Appeal Tribunal Rules 2015 provides that the CAT may "at its discretion …. make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings". The CAT made an order that the CMA should pay a proportion of Flynn's and Pfizer's costs. The Court of Appeal set aside the costs order and directed that there be no order for costs: [2020] EWCA Civ 617. The main cases relied on in support of CMA's argument in the Court of Appeal that there should be no order for costs were: *Bradford MDC v. Booth* (2000) 164 JP 485; *Baxendale Walker v. Law Society* [2007] EWCA Civ 233, [2008] 1 WLR 426; *R (Perinpanathan) v. City of Westminster Magistrates' Court* [2010] EWCA Civ 40, [2010] 1 WLR 1508; and *British Telecommunications plc v. Office of Communications* [2018] EWCA Civ 2542, [2019] Bus LR 592. Reviewing the authorities, Lewison LJ (with whom Floyd and Arnold LJJ agreed) said:

> 79. The applicable legal principles to be derived from these cases are, in my judgment, as follows:
> (i) Where a power to make an order about costs does not include an express general rule or default position, an important factor in the exercise of discretion is the fact that one of the parties is a regulator exercising functions in the public interest.
> (ii) That leads to the conclusion that in such cases the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity.
>
> (iii)The default position may be departed from for good reason.
> (iv) The mere fact that the regulator has been unsuccessful is not, without more, a good reason. I do not consider that it is necessary to find "exceptional circumstances" as opposed to a good reason.
> (v) A good reason will include unreasonable conduct on the part of the regulator, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made.
> (vi) There may be additional factors, specific to a particular case, which might also permit a departure from the starting point.

The Supreme Court allowed appeals by Flynn and Pfizer. Lady Rose (with whom Lord Hodge, Lord Sales, Lord Leggatt and Lord Stephens agreed) said, at paragraph 95 in the judgment, that the main issue raised by the appeals was whether the Court of Appeal was right to hold that there was a general principle or rule that a court or tribunal exercising such a discretion should adopt as its starting point that it will not make an order for costs where the unsuccessful respondent is a public body defending a decision it has taken in the exercise of its functions in the public interest unless there is some good reason to do so; the lack of success not being of itself a good reason to depart from that starting point. In considering whether the principle asserted by the CMA was supported by the *Booth* line of cases, Lady Rose said:

> 97. In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the *Booth* line of cases is, rather, that where a public body is unsuccessful in proceeding, an important factor that a court or tribunal exercising an

apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in kinds of proceedings of proceedings dealt with directly in *Booth, Baxendale-Walker* and *Perinpanathan,* there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.

98. Where I depart from the CMA's argument and from the decision of the Court of Appeal in this case is in making the jump from a conclusion that in some circumstances the potential chilling effect on the public body indicates that a no order as to costs starting point is appropriate, to a principle that in every situation and for every public body it must be assumed that there might be such a chilling effect and hence that the body should be shielded from the costs consequences of the decisions it takes. An appeal is not sufficiently analogous to the *Booth* line of cases merely because the respondent is a public body and the power to award costs is expressed in unfettered terms. Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending – it cannot be assumed to exist. Further in my judgment, the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.

The Supreme Court noted at paragraph 59 that the Scottish Solicitors' Discipline Tribunal does make awards against the Law Society of Scotland; see *Ahmed-Sheikh v. Scottish Solicitors' Discipline Tribunal* [2019] CSOH 104 at [50]. In the instant case, the Supreme Court concluded that the CAT's costs ruling adopting a 'costs follow the event' starting point was a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors. The Court therefore allowed both appeals and reinstated the CAT's costs ruling.

AIC Ltd v. Federal Airports Authority of Nigeria [2022] UKSC 16

Court's discretion to reconsider judgment and order – formal order not sealed by court – importance of finality

AIC Ltd were the successful claimant in a Nigeria-based arbitration with the Federal Airport Authority of Nigeria (FAAN). FAAN were ordered to pay US$48.13 million to AIC, plus interest. AIC were initially granted permission by the High Court to enforce the award in England and Wales. This was set aside pending FAAN's challenge to the award in the Nigerian courts, on condition that FAAN provided security of US$24 million by way of a bank guarantee. The guarantee was not provided and at about 14:20 hours on 6 December 2019 the High Court judge gave an oral judgment and made an order permitting AIC to enforce the award (the enforcement order). The enforcement order was not sealed at this stage. FAAN obtained the guarantee later the same day and provided a copy of it to AIC at 17:17 hours, stating that it intended to apply to the judge to re-open her judgment and the enforcement order given earlier that afternoon. An application was made on 8 December, and the application was heard by the judge on 13 December, after she had ordered that the enforcement order should not be sealed in the meantime. At the hearing on 13 December, the judge set aside the

enforcement order and retrospectively extended time for the provision of the guarantee. The Court of Appeal allowed AIC's appeal against the judge's revised judgment and reinstated the enforcement order. AIC called on the guarantee which was paid in full by FAAN's bank. The Supreme Court unanimously allowed FAAN's appeal to the extent of setting aside the enforcement order pending the outcome of the Nigerian proceedings, but, reflecting FAAN's failure to comply with deadlines imposed by the court, confirmed the judge's order for the provision of the guarantee which had already been called upon.

Lord Briggs and Lord Sales (with whom Lord Hodge, Lord Hamblen and Lord Leggatt agreed) said:

1. A judge delivers judgment in open court and makes an appropriate order. A few hours, or days, later, but before the formal written minute of the order has been sealed by the court, the judge receives a request from one of the parties to re-consider both the judgment and the order. What should the judge do? The problem may arise at all levels in civil litigation, from interim and case management hearings, to final orders made at the end of a trial and even to orders made, but not yet sealed, on appeal. There is no doubt that the judge has power to re-open the judgment and order at any time until the order has been sealed, but the question raised by this appeal is by what process, and in accordance with what principles, should the judge decide whether or not to exercise that power?

Lord Briggs went on to say that in In re L (Children) (Preliminary Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634, at para 27, Baroness Hale of Richmond said that the judge should seek to resolve the problem by doing justice in accordance with the overriding objective. Re L was a case which had come up from the Family Court, and the overriding objective gave emphasis to securing the welfare of children. The present case was governed by the Civil Procedure Rules. CPR Part 1.1.(1) states that the overriding objective is to deal with cases justly and at proportionate cost. These include "enforcing compliance with rules, practice directions and orders": CPR Part 1.1(2)(f). Lord Briggs said he was in full agreement with Coulson LJ, who in the Court of Appeal at para 50, said: "The principle of finality is of fundamental importance". This means that, on receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from anything like neutrality or evenly-balanced scales. There may be cases where the judge cannot reliably gauge the weight of the factors put forward for the exercise of the discretion to depart from adherence to the finality principle without hearing submissions from both sides. There may be cases where (since the order already made is already enforceable) urgency requires an immediate inter parties hearing with notice to both sides. More fundamentally it may be impossible to disentangle the factors for and against departing from finality from those for and against the re-making of the order on the merits. The judge will in the end be faced with a single decision: do I set aside the order which I have already made and replace it with a different order? The finality principle is better reflected by recognition that it will always be a weighty matter in the balance against making a different order.

35. [F]inality is likely to be at its highest importance in relation to orders made at the end of a full trial. But other kinds of final order, which end the proceedings at first instance, will attract the finality principle to almost as great a degree. Case management and interim orders lie towards the other end of the scale, and indeed many reserve liberty to the parties to apply to vary or discharge the order, even after it has been sealed. But the finality principle cuts in, as Coulson LJ said, when the order is made, not merely when it is sealed. After the order is sealed, the finality principle applies in a more absolute way, to put it beyond challenge which made it, subject to any liberty to apply in the order, the application of the power in CPR Part 3.1(7) to vary or revoke it and the slip rule.

***Henning v. General Dental Council* [2022] EWHC 175 (Admin)**

Retirement of practitioner – effect on sanction

The appellant orthodontist retired in 2018 but continued to be registered with the GDC. The appellant provided treatment to Patient A between January 2015 and July 2017 to straighten her bottom teeth and for the widening and straightening of the definition on her top arch. The treatment that was provided included the placing of brackets on Patient A's teeth using the 'Damon' technique. The appellant had been in practice as a dentist for over 30 years, and no allegations of poor performance had been made against him before the complaints concerning Patient A. The appellant admitted a number of heads of charge but denied that they reflected a poor standard of orthodontic treatment. Hill J dismissed the appellant's appeal against the determination of facts and impairment made by the committee. Following the case of *General Optical Council v. Clarke* [2018] EWCA Civ 1463, the committee was required to assess the appellant's current fitness to practise, irrespective of his retirement. The appellant remained on the Dentists' Register and, as such, could return to practise. The committee decided that a six-month suspension, followed by a review, was the appropriate sanction. The judge dealt with sanction at paragraphs 121 – 130 of her judgment. As with the finding on impairment, the fact of the appellant's retirement made the committee's decision on sanction difficult: [121]. The committee correctly directed itself to the relevant guidance on sanctions, and properly considered them in increasing order of gravity: [122]. There was no argument that the committee was entitled to reject the sanction of a reprimand, given the gravity of its findings and the ongoing risk to members of the public: [123]. The committee was entitled to conclude, based on the lack of evidence of the appellant having the necessary structure and support network, that conditions were not practical and workable in this case: [124]-[125]. The judge said that the committee was therefore, entitled to consider that a suspension of six months with a review was the appropriate sanction. In her view, the sanction was appropriate and necessary in the public interest. Accordingly, the appeal on sanction would also be dismissed: [126]-[130].

***Hawker v. Health and Care Professions Council* [2022] EWHC 1228 (Admin)**

Paramedic – failure to treat patient – denial of allegation- flagrant disregard of needs of member of public in acute need – lack of insight and risk of repetition – striking off upheld

This was an appeal against the decision of the HCPC to strike off the registrant. Dismissing the appellant's appeal, Eyre J said, at [50], that the striking off was undoubtedly a severe penalty in the light of the appellant's otherwise blameless record; his return to work after his initial suspension by his employer and his continuation in work without further incident; and his remorse. However, the gravity of the appellant's actions on 24 October 2019 must be borne in mind. The effect of the panel's findings of fact was that the appellant chose to walk away without assessing or assisting a person who was seriously unwell and about whom a member of the public was expressing concern rightly saying that she was suffering a stroke. The appellant did so moreover on the basis that his shift had come to an end. In addition, regard must be had to the panel's findings in respect of a lack of insight and a risk of repetition. It would have been open to the panel to impose the lesser sanction of suspension. However, the conclusion that striking off was appropriate and necessary cannot be said to have been in any way unreasonable or outside the range of sanctions which could properly be imposed in these circumstances.

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ARDL is delighted to announce that the annual Marion Simmons QC prize is now open to entrants:
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- **those who are taking a period of up to sixteen months as a sabbatical or "gap year" within their undergraduate or postgraduate study or after such study and before starting a confirmed place as a pupil barrister in the UK, trainee solicitor in the UK or Cilex training in the UK.**

Entries must be no longer than **1,500 words** (word count includes footnotes but excludes bibliography) and should be type-written in the English language. The judges' decision will be final. Entries must be submitted so as to be received by **5pm on Friday 28 April 2023** by email to:
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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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Request for speakers

ARDL is looking for speakers for our webinar/seminar programme for the remainder of 2022 and 2023. If you have been involved in an interesting piece of work/have a particular interest/specialism that could form the basis of a webinar then let us know. Email **ardl@blakemorgan.co.uk.**