ARDL

Association of Regulatory and Disciplinary Lawyers

Quarterly Bulletin Spring 2023

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Chair's Introduction

Welcome to this latest Spring 2023 edition of the ARDL Bulletin. We have been fortunate enough to have been able to hold three in-person events during the winter. Laura Hoiles and the Junior ARDL team organised a fantastic round-table discussion and networking event at Blake Morgan's offices in London in mid-November. Many thanks to speakers Shannett Thompson, Duncan Toole, Sam Thomas and Richard Coleman KC who gave us their time to lead the discussions. Thanks to Catriona Watt and the ARDL team in Scotland for then organising the fabulous ARDL Scotland Winter Supper which was held at the Scotsman Hotel in Edinburgh at the end of November. And finally, just a couple of weeks ago, a seminar on allegation drafting and responding to allegations took place at the Art Gallery in Manchester, followed by a drinks reception and meal. Thanks to Peter Mant and Vivienne Tanchel for speaking and to Clare Chapman for organising and chairing the event. Peter and Vivienne have kindly volunteered to repeat their talks in London later in Spring/Summer. Further details will follow.

Around now reminders should be landing in your inboxes inviting you to renew your ARDL Membership for the year ahead. We are pleased to confirm that there will be no increase in the cost of membership this year. The price of the ARDL Dinner and Conference tickets will also remain the same. 2023 is shaping up to be a busy year for ARDL. I thought I would outline for you the events

currently fixed in the calendar, with plenty more in the planning, so that you can see what your ARDL Membership can offer you this year:

Spring Bitesize Webinars during March and April 2023
"Recusal and Bias" with Chris Hamlet, 23ES Chambers
"Privacy, Anonymisation and Non-Disclosure Orders in Regulatory Proceedings" with David Mitchell, 39 Essex Chambers
"Abuse of Process" with Marios Lambis KC, 2 Hare Court Chambers

Tuesday 7 March 2023, Webinar
"Health matters in healthcare regulation"
Chair: Kate Steele, Capsticks
Speakers: Katie Costello, Clyde & Co LLP and Tamarind Ashcroft, MPTS

Tuesday 21 March 2023, Ward Hadaway LLP Manchester
Junior ARDL Round-table Discussion and Networking Event
Chair: Clare Chapman
Speakers: Jim Percival, GMC; Rachel Birks, Ward Hadaway LLP; Michelle Brown, Deans Court Chambers and Fameeda Shafiq, Ward Hadaway LLP

Monday 24 April 2023, Via Zoom
ARDL AGM

Friday 12 May 2023, Guildhall, London
ARDL Dinner
Tickets on sale: Wednesday 15 February 2023

Friday 10 November 2023, Museum of London
ARDL Conference
Tickets on sale: July 2023
You can find details of all of ARDL's scheduled events on the website: Events - Association of Regulatory & Disciplinary Lawyers (ardl.org.uk)

ARDL prides itself on its increased offering to Junior Lawyers working, or aspiring to work in regulatory and disciplinary law. Details of the annual Marion Simmons QC Essay Prize, which is now open to entrants, can be found towards the end of the Bulletin. Junior ARDL Members should also keep an eye out for details of The Dutton Bursary 2023 which will open for applications in May 2023. Updates will be posted here: Bursaries - Association of Regulatory & Disciplinary Lawyers (ardl.org.uk). As ever, we are always keen to hear of people who can offer their services as an ARDL Mentor or from people seeking a Mentee. We hope to update the website shortly with some personal experiences of those who have already been involved in ARDL's mentoring scheme. Updates will be provided here: Building Careers - Association of Regulatory & Disciplinary Lawyers (ardl.org.uk).

Finally, ARDL's AGM takes place at the end of April 2023. Each year we hold elections for positions on the ARDL Committee. Any ARDL Member is welcome to stand for election, and details of how you can do so will be emailed out to members in the next few weeks.

Rachel Birks
Ward Hadaway LLP

Mandie Lavin - Obituary

Many of us who work in professional regulation were deeply saddened to learn of the death of Mandie

Lavin in December 2022. Mandie had an unrivalled breadth of expertise at a senior executive level across the professional regulation sector. At the start of her regulatory career she worked at the fore-runner to the Nursing and Midwifery Council (the UKCC), then subsequently held senior executive posts at (amongst others): the Charted Institute for Management Accountants; the Royal Pharmaceutical Society of Great Britain (which was at the time, the regulator as well as the professional body for the pharmacy professions), the General Optical Council, the Bar Standards Board and the Chartered Institute of Legal Executives. In addition, Mandie was at various times a decision-maker for the GMC (chairing its Investigation Committee), a member of the Appointments Committee at the Institute of Osteopathy, and an independent panel member on misconduct panels for the Metropolitan Police. Her last role was as a barrister working on the Home Office Undercover Policing Inquiry.

Mandie started her professional career as a nurse, qualifying at Guys Hospital and going on to run night services at Brook Hospital (a large district general hospital in London). While working there full-time, she also studied law at London South Bank University, and then went on to train as a barrister, and was called to the Bar in 1993. Mandie's professional identity as a nurse, as well as a lawyer, was of central importance to her throughout her career. This was reflected in the nature of the regulatory roles she took on, the majority of which were targeted at improving either patient safety or the justice system.

Mandie was someone with a brilliant and inquiring mind and always kept herself abreast of the latest developments across the regulatory field. As a result, she was often far ahead of others in terms of identifying emerging risks and opportunities, and was adept at reading across from the experiences and lessons learned by other organisations. Her focus was always on the big picture and what was coming over the horizon. She ensured that she had high-functioning team(s) working with her to deliver on operational goals, allowing her to focus her considerable energy on longer-term strategy.
Mandie was a charismatic and enthusiastic leader, who was in her element when engaging with and motivating others. She used humour to help build and strengthen team relationships, and was often to be found making a joke at her own expense, thereby putting people at ease. She believed in giving talented individuals opportunities to achieve their ambitions and concentrated on developing peoples' transferable skills, aptitudes and potential, supporting them to progress their careers. Mandie was by no means a micro-manager – she set the direction and then empowered individuals whom she trusted to make day to day decisions with minimal input from her, and by doing so, ensured that they developed self-confidence in their own abilities and judgment. Many of us who have worked in the regulatory field for the majority of our careers credit Mandie with giving us either our first regulatory role, or significantly boosting our regulatory experience.

I have never met a manager as focused as Mandie on enabling individuals within her teams to develop themselves and fulfil their potential – whether through encouraging engagement in further study, arranging useful secondments, or supporting their research interests. I can say from personal experience that she was that rarity amongst bosses – one who also acted as a mentor without any self-interest. Mandie strongly encouraged work-life balance long before most organisations placed any focus on wellbeing issues, she was genuinely pleased if one of her team succeeded in obtaining an opportunity elsewhere that would help progress the development of their skills or expertise, and she always maintained her interest in the careers of all those whom she had championed, mentored or supported. It is surely just one aspect of Mandie's significant legacy to professional regulation that several individuals who benefited from her guidance and support at a formative time in their careers have gone on to achieve senior executive positions within the sector.

Twenty years ago professional regulators, particularly those dealing with healthcare professionals, were entering a period of significant change as a result of various public inquiries and the introduction of oversight from an external sector-wide body. The RPSGB, where Mandie and I worked together, was undergoing modernisation of its fitness to practise function, and ultimately embarked on a transfer of all its regulatory function to a new regulator (GPHC). In an interview she gave in 2015 Mandie described this period as representing the time of greatest challenge in her regulatory career – and specifically highlighted the contribution that she made to the work of the Shipman Inquiry (Mandie was a member of the working group focusing on the safer management of controlled drugs) which she described as assisting in devising creative and innovative solutions to complex problems, working in partnership with others and acting in the public interest. It was evident to everyone who worked with her that Mandie thrived on driving and delivering change programmes, whether inside a particular organisation or in a wider context, and she demonstrated time and time again that she had the leadership ability, the personal charm and the persuasive skills required to carry even reactionary forces with her. Mandie built positive working relationships with everyone she met, from the most junior staff members to Council members and independent decision-makers, and was able to motivate them to engage with and support the innovations she introduced. As a result, Mandie was often able to achieve dramatic progress on delivering change within short timescales. She was an unstoppable force that only very rarely met an object that she really could not persuade to move.

Not everyone reading this will be aware that during the Covid pandemic Mandie voluntarily returned to frontline nursing, first at the NHS Nightingale Hospital London set up in the ExCel London convention centre (which would have been the largest intensive care unit in the country) and later taking responsibility for setting up the hugely successful vaccination programme at Harlequins Rugby Club's stadium (which vaccinated more than 75,000 individuals). In doing so, like many other healthcare professionals, she put her own safety at risk in order to deliver a vital service to patients and the public at a time of national crisis, and it was a decision that absolutely typified Mandie's commitment to the public interest.

Mandie was known and held in great affection by many across the regulatory sector, and her dynamism, joie de vivre and generosity of spirit will be hugely missed. One of Mandie's attributes which I personally admired the most was that, while she was attuned to internal politics, she was never one to stand on ceremony or to be intimidated, and she was fearless in speaking truth to power. Comments from others who worked with Mandie whom I have spoken to since her death have focused on her personal warmth and how much fun she was to work with and for. There is no doubt that the field of professional regulation is a far less colourful place as a result of her loss. Those of us who worked directly with Mandie will always be grateful for the contribution she made to our lives, and we will continue to reflect on lessons we learned from her.

If you would like to make a donation in Mandie's memory, her husband Mark and daughter Flora have set up a JustGiving page in aid of Shelter.

Rosalyn Hayles

R. (on the application of Salam) v Solicitors Disciplinary Tribunal [2022] EWHC 1793 (Admin)

Summary

The High Court has again highlighted that for those looking to challenge the interlocutory decisions of the SDT, the bar is exceptionally high. The Court restated its reluctance to interfere as adequate protections are provided by the Tribunal. It also added that such cases are met with considerable reservation as they risk undermining the regulatory system and causing unnecessary work for both the Tribunal and the Court.

Background

Mr Salam ('the Applicant') was an immigration solicitor. In December 2016 he was visited by an undercover BBC journalist posing as a potential client seeking assistance with a spousal settlement visa application. During this visit the Applicant told the Reporter he could help her exaggerate her income in order to satisfy the £18,600 threshold requirement of the application. In January 2017 audio recordings of the discussions were broadcast on Radio 4.

In 2018, the SRA issued disciplinary proceedings against the Applicant, and in July 2020 the SDT found a case to answer. A number of disclosure requests were made to Capsticks solicitors (the firm representing the SRA in the proceedings before the SDT) requesting various documents. In the name of transparency Capsticks voluntarily disclosed some documents, even though they did not meet the statutory test. Other documents were not disclosed to the Applicant as Capsticks/SRA were not in possession of them.

The Applicant applied to the SDT for a disclosure order and a stay of proceedings for abuse of process. At a case management hearing in January 2021, the SDT rejected the Applicant's application for specific disclosure accepting the SRA's submission that it could not disclose information it did not possess and that it did not have the power to compel a third party to disclose material to the SRA.

The Applicant applied for judicial review of the SDT's case management decision. Permission was granted and limited to two issues: the lawfulness of the SDT's refusal to grant the claimant's application for the SRA to disclose material to the claimant, and whether the SDT had erred in law by failing to consider that an indirect power to facilitate the disclosure by requiring the SRA to obtain the information by application to the High Court (under 44BB of the Solicitors Act 1974).

Decision and commentary

The application was refused. In doing so the Judge reaffirmed the points of principle to consider in such cases (para 75). It is clear that, save for truly exceptional circumstances, the Tribunal is the proper venue for these types of determination.

A solicitor facing SDT proceedings will benefit from the protection deriving from the fact that the tribunal meets all the requirements of fairness and Article 6 ECHR requirements. Moreover, they will benefit from the protection of a right of appeal to the High Court in the event of an adverse finding against them under section 49 of the 1974 Act.

The SDT is the proper forum for issues such as disclosure, abuse of process and admissibility of evidence to be assessed and the proper forum in which relevant and admissible evidence may be heard, tested and weighed. Where there has been an alleged procedural failure in the SDT and the matter is before the tribunal, the proper conclusion is that the tribunal will have ample opportunity to cure any of the failures which are said to have occurred.
This case reaffirms the general principle that the High Court will not entertain challenges to interlocutory decisions save in exceptional circumstances. 'Exceptional circumstances', as per Mr Justice Newman in *R (Aurangzeb) v Law Society of England and Wales [2003] EWHC 1286 (Admin)*, are instances were 'irreparable harm or unfairness is likely to occur or justice could only be met by intervention'.

The Court will 'have considerable reservations' about interference with interlocutory decisions of the Tribunal. As observed by Newman J in *Aurangzeb*, such interventions run the risk of the regulatory process 'being undermined' and the Court and tribunals becoming 'bogged down' by repeated applications for judicial review.

This case not only confirms that the Court is unwilling to intervene in interlocutory decisions of the tribunal, but also serves as a warning for those looking to obtain third party material. Whilst

regulatory authorities must conform to their disclosure obligations, those obligations have limits. Respondents in regulatory proceedings should not rely on their regulator in order to obtain third party material, instead taking proper legal advice on how to obtain the material they seek.

Sam Smart
Red Lion Chambers

Non-Parties, Copy documents and Open Justice in the Solicitors Disciplinary Tribunal

A short case note looking at the SDT's approach to disclosing documents to non-parties, as shown by its recent memorandum in *SRA v Rehman*.

In 2017 the SDT introduced a "Policy on the Supply of Documents to a Non-Party from Tribunal Records". Following the decision of the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, the SDT sought views on proposed revisions and the revised policy was introduced in May 2020.

The May 2020 policy, however, seemingly fails to mention the SDT's own Rule 35(10) in the Solicitors (Disciplinary Proceedings) Rules 2019: "The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if it is satisfied that (a) the disclosure would be likely to cause any person serious harm and (b) it is in the interests of justice to make such a direction". On its face, that Rule (which is part of a statutory instrument) is broad enough to govern the way in which the SDT deals with non-party requests for copy documents.

By a recent "memorandum"[1], a panel of the SDT decided a request of this kind. The request was made by a firm of solicitors, acting for clients who claim to have suffered loss through the actions of a solicitor, Mr Rehman. Mr Rehman had been struck off by the SDT following a hearing in April 2022. The non-party's clients wanted to pursue claims against him. The non-party applied for copies of three reports which had featured at the SDT's case against Mr Rehman: one from a tracing agent and two produced by the SRA. The SRA adopted a neutral position in relation to the report of the tracing agent, but objected to the release of the two reports which it had prepared itself.

By a majority, the SDT directed disclosure of all the requested documents, but with some redactions. Those redactions covered "all client names and identifying or financial information" and the bank account details of Mr Rehman's now defunct practice.

While the decision in *Rehman* is to be welcomed, it is notable that the panel which decided that request was not unanimous. One member of the panel (the Chairman, a solicitor) would have disclosed the requested documents without redactions, but the other two members (a solicitor and a layperson) considered that redactions were necessary. All members gave short shrift to the generic objections which the SRA made to release of its own reports. The threshold question - whether the non-party had made out a case for the release of the requested documents - was addressed without any significant focus on why the non-party wanted the documents.[2] The aim of the principle of open justice is to ensure that the processes of the relevant court/tribunal are open to scrutiny. Here, the non-party made no secret of the fact that it was asking for the documents in the hope that they would assist in finding Mr Rehman and making claims against him. All the requested documents were plainly in the possession of the SRA, but the SDT did not ask

[1] SDT case number 12288-2021; memorandum dated 21 July 2022.

[2] This approach is consistent with *R (British American Tobacco (UK) Ltd) v Secretary of State for Health* EWHC 3586 (Admin), at [41], and *UXA v Merseycare NHS Foundation Trust* [2021] EWHC 3455 (QB), at [33]; but contrast the comments of Picken J when applying the Supreme Court's guidance in *Dring*: [2020] EWHC 1873 (QB), at [78], [81] and [99].

why the SRA had not already disclosed them to the non-party (or the non-party's clients).[3] The non-party's application was presumably a way of trying to get over the SRA's reluctance to disclose them.

The minority judgment, which appears to show a more wholehearted acceptance of the principle of open justice (by rejecting the idea of redacting the documents), fell into error in one aspect. The fact that Mr Rehman's "firm" (which was a sole practice, not a firm) was defunct was regarded as meaning that questions of privilege were irrelevant. That is surely wrong: the fact that a firm/practice has shut down (or been shut down by the SRA) does not mean that clients lose any privilege which might have attached to their files.[4] Whether any relevant privilege (or confidentiality) had been lost as a result of Mr Rehman's hearing in the SDT was not considered, whether by the majority or the minority.

Taken as a whole, the SDT's decision to direct disclosure of the (redacted) documents to the non-party looks like a step in the right direction. However, the reasoning of both the majority and the minority is sketchy. The decision in *Rehman* has not been followed in a subsequent refusal by the SDT to disclose documents in *Davies v Greene*[5]. There, the SDT declined to disclose documents relating to a high-profile trial of a former President of the Law Society, apparently on the ground that locating documents in its own electronic trial bundle would involve disproportionate effort on its part.

It is to be hoped that the SDT will refrain from four practices which it has adopted in relation to non-party applications for copy documents. The first of these practices is refusing to allow the non-party to see and reply to any representations which the parties make in response to the non-party's request. While it is not clear from the relevant memorandum, that practice seems to have been adopted in *Rehman.* It may make life easier for the SDT, but it ignores the most basic principles of procedural fairness.

The second practice is deciding non-party requests for documents on paper (that is, without a hearing), even where the parties oppose the request. The High Court has made clear (in *Goodley v The Hut Group Ltd* [2021] EWHC 1193 (Comm)[6]) that contested applications for the release of documents from the files of a court/tribunal should be listed for a hearing.

The third objectionable practice - which was on display in the final paragraph of the decision in *Rehman* - is telling the non-party that the only way of challenging the SDT's decision is through applying for judicial review. That may be the SDT's view, but there is no authority to support it. Dicta in *Lu v. SRA* [2022] EWHC 1729 (Admin) at [60] to [69] suggests that any decision which the SDT makes in relation to open justice can be challenged through an appeal (because it involves a substantive matter of law, not just an interlocutory procedural matter).

The final objectionable practice is telling non-parties that the SDT may order them to pay costs to the parties, if their request for copy documents is unsuccessful. The SDT has yet to explain from where it would derive the jurisdiction to make a costs order against a non-party. Its own website records that, during one of its in-house training days

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[3] The SRA is required to exercise its regulatory functions with transparency and accountability (section 28 of the Legal Services Act 2007), but it is not a public authority for the purposes of the Freedom of Information Act 2000.

[4] Privilege "remains absolute unless it is waived [by the client]": *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600, per Lewison LJ at [26].

[5] SDT case number 11934-2019; memoranda dated 27 September 2022. The non-parties requesting the copy documents were a Guardian journalist and the author of this case note.

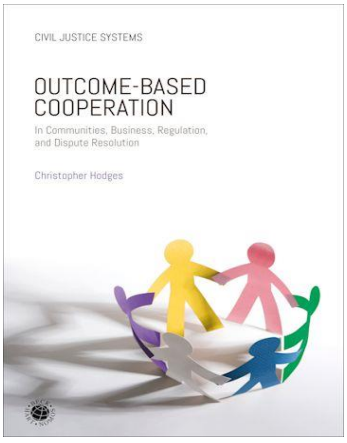
[6] Applied in the Employment Appeal Tribunal in *Guardian News & Media Ltd v Rozanov* [2022] EAT 12; and see *Cider of Sweden Ltd v HMRC* [2022] UKFTT 76 (TC).

in November 2017, it was told that it has no power to make costs orders against non-parties.[7] A non-party's request for copy documents is a matter between the non-party and the SDT, not an application against the parties. On any view, there should be no question of ordering a non-party to pay costs to the parties without first joining the non-party as a party and giving him/her/it the chance to make oral representations on costs.[8]

The non-party's request for documents in *Rehman* suggests that dissatisfied clients (and those acting for them) are becoming more alive to the possibility of extracting from the SDT documents which the SRA refuses to disclose. It seems likely that, sooner or later, one of these requests is going to come before the High Court, which could give useful guidance on how such requests should be dealt with.

Tim Bullimore, Solicitor,
Consultant at Bloomsbury Law

Outcome-based Cooperation: In Communities, Business, Regulation and Dispute Resolution, By Christopher Hodges – Book Review by Sam Thomas



While The Outcome-Based Cooperation ("OBC") Model is thought provoking this is a high level exploration of socio-economic behaviour that will be relevant and useful for the design and creation of regulatory systems rather than a manual for a regulatory lawyer. Reading through I found myself reminiscing back to my first degrees in economics and politics – reading Thomas Hobbes Leviathan, and studying John Nash's equilibrium and game theory – rather than drawing upon analysis from precedent and authorities. Christopher Hodges is the Emeritus Professor of Justice Systems at the Centre for Sociology-Legal Studies, Oxford, and the book reads as an academic thesis which may have practical application rather than a practitioner's text book. This is not to suggest that there is no pragmatic value for the reader. Leviathan was published in 1651, when the concept of the *"social contract"* was conceived as a secular explanation of the interaction between a single nation state with its people. The concept of globalisation was at least 100 years into the future. OBC provides a process for encouraging cooperative behaviour and engagement, based upon *"theories and science"* like human motivation, trust, and purpose and outcome, and then applies it to an international, modern world, perspective. In designing a system of regulation this book is incredibly useful because it allows for analysis of the purpose and function of regulation, and how it might apply to the society it is regulating, in advance of drawing-up the code of practice or rules and guidance.

In this context, Christopher Hodges does provide practical guidance, which has particular significance in the financial sector. The chapter on Cooperation in Regulation begins with an exploration of the driving forces for the market: Are market forces prescient or is the market a reflection of the human interaction which it serves. This question is asked rhetorically before Hodges applies the OBC Model in a similar way for Cooperation in Regulation as he does in earlier chapters for Cooperation in Society and Cooperation in Business Organisation. Purposes, strategic objectives and prioritisations are deemed as fundamental, with the outcomes of prosperity, protection and good behaviour decided as the appropriate impacts or outcomes. The reader is encouraged to think of developing a system through co-creation fully involving all stakeholders within the regulatory regime. Hodges criticises more traditional regulatory systems in which stakeholders achieve success but on an individual basis: *'Whilst*

[7] An Introduction To Costs In The SDT.pdf (solicitorstribunal.org.uk)

[8] Cf *Cider of Sweden Ltd v HMRC* [2022] UKFTT 126 (TC), at [36].

some actors have achieved success, it has sometimes been on their own terms and at the expense of others, without delivering collective outcomes and goals. The typical mode of formal regulation is for the state to intervene on business activities based on a linear model involving the following stages: setting rules to be complied with, identifying breaches of those rules, taking enforcement action against perpetrators of breaches, and assuming that enforcement rules will lead to compliance with rules in future.' Instead Hodges encourages debate between stakeholders as the basis for the implementation of rules and policy. This is designed to generate trust and trustworthiness in regulation. In the OBC Model the objective is for actors, individuals and organisations, to take responsibility for producing evidence that they can be trusted which, in response, allows the regulator to be confident that the regulated parties are acting towards the identified objectives. Rather than internal policies being a regulatory requirement, the onus and responsibly is flipped so that the regulated party is asking: What evidence should I produce if I wish to be trusted/trustworthy?

A continuous model of problem-solving and improving performance is suggested at the operational level to evaluate progress against objectives which acts in contrast to the traditional linear model. Improvement is not driven by enforcement rather through reflection which becomes the basis for trust and trustworthiness. Hodges' hypothesis are not entirely speculative. The book examines existing regulatory systems as case studies and draws elements from these existing models back into the OBC Model. It is truly interesting to see a comparison of statutory purposes and mission statements of selected UK Regulatory Authorities side-by-side, and following an analysis of their application integrating these common elements into a potentially overarching regulatory system that could be applied throughout different areas.

Christopher Hodges writes in a clear and accessible style, on a topic which is not straightforward. The OBC Model can be applied to a variety of sectors and circumstances; however, from a regulatory law perspective his insights and practical examples make the book an engaging read; and the reader is encouraged to consider regulatory governance as more than simply a set of rules to be followed. This is not a reference text. This is a philosophical guide to achieve trusted regulation in a modern global society.

Sam Thomas
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Vice Chair of ARDL

Legal Update

***Leave.EU Group Ltd v. Information Commissioner* [2022] EWCA Civ 109**

Non-attendance of appellant – inherent jurisdiction of court to hear appeal in absence or to dismiss appeal – need for finality

At the hearing of the appellant's appeal in the Court of Appeal on 1 February 2022, following no attendance by counsel, solicitors or representative on behalf of the company, the court (Sir Geoffrey Vos MR, Lewison, Asplin LJJ) indicated that it had decided: (a) that it did not consider that it would be just or appropriate to hear the substantive appeal in the absence of the appellant, and (b) that, in the circumstances, since the court was satisfied that the appellant had been aware of the appeal hearing and had not attended, the appeal would be dismissed. Handing down judgment giving reasons on 8 February 2022, Sir Geoffrey Vos MR said that Lewis J had held in *GMC v. Theodoropoulos* [2017] EWHC 1984 (Admin) that there was an inherent jurisdiction to proceed with an appeal in the absence of the parties. The Court of Appeal had an inherent jurisdiction either to hear an appeal in the absence of one party or to dismiss an appeal where the appellant fails to appear for a substantive hearing. It would make the operation of the court impossible if no such jurisdiction existed, and the court must be in control of its own procedures in order to give effect to the overriding objective of enabling the court to

deal with cases justly and at proportionate cost contained in CPR 1.1. It was not desirable or appropriate to comment on the substantive matters that would have been before the court. Despite the benefit of high quality skeleton arguments, it was undesirable in the circumstances of the instant case to try to decide such important questions without full oral argument. An adjournment would not be appropriate and the appellant had made no such application. Parties cannot simply fail to show up for a hearing and then submit, after the event, that they should have been allowed an adjournment. There must be finality in litigation. It was only reasonable for the court to take non-attendance as an indication that the appellant did not wish to proceed or intend to proceed with its appeal. The court would dismiss the appeal.

Webberley v. General Medical Council **[2022] EWHC 3520 (Admin)**

Adjournment for medical reasons – need for registrant to prove ill health

In dismissing W's appeal against the tribunal's direction that his name be erased from the medical register, Foster J said that there was nothing wrong with the tribunal's approach in refusing W's request for an adjournment of the fitness to practise hearing. It was for W to prove his ill health and the tribunal was not obliged to accept his claims. W did not make clear whether his problems were mental or physical or how his symptoms would affect his participation in the proceedings and whether any, and if so what, measures could be taken. The tribunal was entitled to conclude that he had been frustrating the examination process and failing to cooperate with the GMC. The tribunal was entitled to conclude that W had not discharged the burden of showing that he was unable to participate in the proceedings.

Disclosure and Barring Service v. AB **[2021] EWCA Civ 1575**

Disclosure and Barring Service – statutory scheme to determine appropriateness to include person's name on barred list – powers of Upper Tribunal on appeal – Safeguarding and Vulnerable Groups Act 2006, s 4

In allowing the appeal of the Disclosure and Barring Service (DBS) from the decision of the Upper Tribunal, Lewis LJ (with whom Macur and Moylan LJJ agreed) said that the appeal concerned the powers of the Upper Tribunal hearing appeals against a decision of the DBS that it was not satisfied it was no longer appropriate to include a person's name on the children's barred list, that is, a list of persons barred from engaging in certain activities relating to children. In brief, the respondent, AB, was an organist and choirmaster at a church. In 2004, his name was placed on the predecessor to the children's barred list and, in due course his name was transferred to the children's barred list under the Safeguarding and Vulnerable Groups Act 2006. In 2014, he applied for a review but the DBS decided that his name should remain on the list. AB appealed to the Upper Tribunal under section 4 of the 2006 Act. Section 4(5) provides that unless the Upper Tribunal finds the DBS has made a mistake of law or fact, it must confirm the decision of the DBS. Section 4(6) provides that if the Upper Tribunal finds the DBS has made such a mistake it must (a) direct the DBS to remove the person from the list, or (b) remit the matter to the DBS for a new decision. In the instant case, the Upper Tribunal allowed AB's appeal and directed the DBS to remove his name from the list, holding that it was not 'appropriate' to retain AB on the list. Allowing the DBS's appeal and remitting the matter to a differently constituted Upper Tribunal, Lewis LJ said that the Upper Tribunal did not confine itself to deciding whether the DBS had erred in law or fact and whether the DBS had failed to provide adequate reasons for its conclusions. It simply disagreed with the reasons given because it considered that the circumstances did not, in its view, justify the decision that it was appropriate to maintain the respondent's name in the children's barred list. The judge said, at [66], that the proper interpretation of section 4 of the Act depends on a consideration of the words used, having regard to the context as a whole, and the underlying purpose of the statutory scheme.

67. The context, and the nature of the

> statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adult's barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error or law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act)

Summarizing the position at [68]-[77], the judge said that the scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions of the appropriateness of inclusion of a person within a barred list. The Upper Tribunal is not intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. Section 4(6) sets out the powers of the Upper Tribunal when it has found an error of law or fact. The Upper Tribunal then has a power to direct removal or remission of the matter back to the DBS. Unless it is clear that the only decision that the DBS could lawfully come to is removal, the matter should be remitted to the DBS to consider. If there is any question of whether it is appropriate to include a person's name on a barred list, the appropriate action under section 4(6) of the Act would be to remit the matter to the DBS so that it can decide the issue of appropriateness. This was consistent with the decision of Maurice Kay LJ, with whom the other members of the Court of Appeal agreed, in *Independent Safeguarding Authority v. SB (Royal College of Nursing Intervening)* [2012] EWCA Civ 977, [2013] 1 WLR 308, who observed that the ISA, the predecessor of the DBS, was particularly equipped to make safeguarding decisions whereas the Upper Tribunal is designed not to consider the appropriateness of listing, but more to adjudicate upon mistakes on points of law or findings of fact; see also the decision of the Upper Tribunal in *MR v. Disclosure and Barring Service* [2015] UKUT 5 (AAC) UT.

Stuewe v. Health and Care Professions Council [2022] EWCA Civ 1605)

Late appeals – appellant resident outside of jurisdiction – extension of time refused

The Court of Appeal (Moylan, Baker and Carr LJJ) dismissed the appellant's appeal against the refusal of the deputy judge to extend time for the appellant's statutory right of appeal. The appellant was at all material times a paramedic registered with the respondent. On 7 January 2021 the CCC of the respondent made a finding against him of impairment on the basis of misconduct, and imposed conditions on his registration. The appellant's 28 day time limit for appeal under article 29(10) of the Health Professions Order 2001 expired on 5 February 2021. The appellant was based in Gibraltar and did not have a residential or business address in the UK. CPR 6.23 provides that a party to proceedings must give an address for service. The appellant filed an appeal notice on 7 April 2021 accompanied by an application for leave to provide an address for service that was outside the jurisdiction. The respondent applied to strike out the appeal notice and on 17 November 2021 the deputy judge declined to grant an extension of time. Dismissing the appeal, Carr LJ said that CPR PD6B at paragraph 5.2 identifies Gibraltar as a British Overseas Territory and out of the jurisdiction for service under CPR Part 6, Section IV. Thus the appellant failed to file a valid appeal notice within the statutory 28 day period under article 29(10) of the 2001 Order. There were no exceptional circumstances to extend time. First, it was open to the appellant to file an appeal notice whilst awaiting the outcome of his insurers' decision on funding.

Instead he waited almost two weeks – half of the full period of time for appeal – before attempting to do so. Second, on 26 January 2021 he was informed by the Administrative Court Office in writing that his options were to provide a consent order or to apply 'to be allowed to apply out of the jurisdiction'. Between 26 January 2021 and expiry of the time for filing, the appellant was aware of the reason why his notice of appeal had been rejected and was aware of what he needed to do: either to provide a UK address, a consent order agreeing that he could use an address in Gibraltar, or make an application to the court to use an address in Gibraltar. Thus the appellant had a meaningful opportunity to file an appeal notice within time. None of the matters relied on by the appellant, such as difficulties in finding legal representation, funding, or postal delays, alters this fact. This was not a case of 'blameless ignorance', as contemplated in *R (Adesina and Baines) v. NMC* [2013] EWCA Civ 818, [2013] 1 WLR 3156 at [14]. While the HCPC said in an email dated 5 March 2021 that they would not seek to make a point about being out of time, the email, as the judge below correctly analysed, could not create a jurisdiction that did not otherwise exist (and in any event it post-dated the expiry of the relevant time limit).

Ibrahim v. General Medical Council [2022] EWHC 2936 (Admin)

Domestic violence – conviction and misconduct in private life – overarching objective of upholding public confidence and maintaining proper standards of conduct – erasure upheld

The appellant doctor appealed against the sanction of erasure and invited the court to substitute an order for a six month (or up to twelve month) suspension with a review. The context for the issues before the tribunal concerned a domestic setting involving the appellant and his ex-wife Ms A. On 19 September 2019 at South East Northumberland Magistrates' Court the appellant was convicted of assaulting Ms A by beating on 17 April 2019 at Newcastle Upon Tyne, contrary to section 39 of the Criminal Justice Act 1988. The assault involved the appellant pouring a jug of hot water over Ms A, before pulling her by the hair towards and down the stairs, and kicking her legs and back. All this took place in the presence of their four-year-old son. The appellant was sentenced to (a) a twelve month community order with a programme requirement and a rehabilitation activity requirement, (b) a restraining order and (c) a fine and order for costs. The appellant completed most of the requirements of the community order, being excused from the rest after the intervention of the Covid-19 pandemic. The GMC then took up the case, pursuant to its regulatory procedures, the appellant having made a self-referral to the GMC. Ms A provided evidence to the GMC, to a large extent covering the same ground as her victim impact assessment evidence which had been provided before the magistrates' court. The allegations and evidence before the tribunal explored, and the tribunal found, a far more extensive picture of violence than the conviction. In addition to the conviction the allegations which the appellant faced included allegations of misconduct between 2013 and 16 April 2019 of physically and verbally assaulting Ms A on one or more occasion. Ms A gave oral evidence at the hearing before the tribunal, as did the appellant. The tribunal found that the appellant had engaged in a course of abusive behaviour towards Ms A, including violence, verbal threats and coercive behaviour that spanned several years. The tribunal found that the appellant had hit Ms A, both on the face and on the body frequently and throughout the six year period between 2013 and April 2019. The tribunal said that in relation to his wider misconduct, the appellant's insight was limited and that his attempts at remediation were at an early stage.

Dismissing the appellant's appeal against the sanction of erasure, Fordham J said, at [22]-[27], that the tribunal's findings and evaluative description – on the central feature of seriousness as the key question in the case – were unimpeachable. The judge agreed with the tribunal's finding that there was impairment of fitness to practise in terms of the limbs of the overarching objective concerned with upholding trust and confidence in the medical profession and upholding proper standards of behaviour. Sanctions are not concerned with

punishment but with protection. But the protective limbs of the overarching objective can be engaged by what a doctor does in their private life, and erasure may be appropriate even where the doctor does not present a risk to patient safety; see GMC's Sanctions Guidance (November 2020 edition). The case of *Khan v. General Pharmaceutical Council* [2016] UKSC 64, [2017] 1 WLR 169 was a case where erasure was unjustified and disproportionate. It arose in a domestic setting. But the Supreme Court did not say that erasure was, in principle and for that reason, always inappropriate in such a setting. In conclusion, the judge, at [37], said that erasure was necessary in the instant case to promote and maintain proper conduct standards, and to promote and maintain public confidence in the medical profession, and to achieve both of those aspects of the statutory overarching objective.

Kenneth Hamer
Henderson Chambers

Marion Simmons QC Prize 2023

ARDL is delighted to announce that the annual Marion Simmons QC prize is now open to entrants:
You are invited to submit an essay or article on a regulatory law or disciplinary law topic of your choice.
The first prize is £2,000, the second £1,000 and the third £500.

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

Competition Terms and Conditions:

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

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

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 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.**