ARDL

Association of Regulatory and Disciplinary Lawyers

Quarterly Bulletin Winter 2024

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Chair's Introduction

As the autumn leaves have turned from red to brown and fallen to the winter frost, I wish everyone welcome to read the Winter Bulletin 2024, unfortunately with yet more sad news. Immediately after my introduction you will see a memorial to the passing of Faris Amin, a colleague and friend of many at ARDL from his time in the Capsticks Regulatory Division. Our thoughts and good wishes go out to Faris' family.
This is followed within the bulletin by a remembrance of Mary O'Rouke by Karen Rea, at Queen Square Chambers.

While there is sadness in loss there is also a great deal to celebrate over the last few months. The ARDL Conference 2024 was a huge success, and I would like to thank all of the speakers, including Alexis Hearnden and Vikram Sachdeva KC, both of 39 Essex Chambers; Anne Whyte KC, QEB Hollis Whiteman; Nisha Dutt, UKAD; Jodie Blackstock, Garden Court Chambers; Katie Maras, Centre for Applied Autism Research; Andrew Kennedy KC, 1 Crown Office Row; Jessica Clay and James Alleyne, both of Kingsley Napley LLP, Kenneth Hamer, Henderson Chambers; Emma Waldron, 3 Paper Buildings, and special thanks to our Keynote Speaker, Her Honour Deborah Taylor. It was a pleasure to introduce Deborah, as it was to celebrate those who placed within the Marion Simmons QC Essay Prize competition, the winning entry of which is contained within this bulletin.

I would also like to thank those that chaired and introduced speakers at the ARDL conference. Thanks goes out to Shannett Thompson, Kingsley Napley LLP; Deborah Nicholson, Markel Law; Rachel Birks, Ward Hadaway LLP; Catriona Watt,

Anderson Strathern LLP; Rosemary Rollason, RJ Rollason Law; Joanne Harrison, Carson McDowell LLP and Kate Steele, Capsticks LLP.
Finally on the conference please can I thank, Laura Short, Capsticks LLP, and Megan Baldwin, Ward Hadaway, for all their help behind the scenes.

The ARDL Conference may have been the biggest event on the calendar but it certainly was not the only one. Continuing ARDL's commitment to equality diversity and inclusion initiatives we hosted 'ARDL and FreeBar: Acceptance without Exception'. This discussion with Brei Stevens-Hoare KC, Gatehouse Chambers/FreeBar; Melinka Berridge, Kingsley Napley LLP; Poornima Karunacadacharan, BSB, and Sian Hughes, SRA, chaired by Paul Ozin KC, 23ES, touched upon the different perspectives of LGBT+ professionals and introduced the possibility of ARDL adopting the FreeBar Charter. I would encourage anyone with some time to read the FreeBar Charter and consider whether this is something that ARDL would like to adopt?

The ARDL Scotland Winter Social was a great success, as was the Bitesize Webinar, with Ben Tankel, 39 Essex Chambers, on Immediate Orders.
Coming up before the New Year, ARDL has another Bitesize webinar on Pleading Patient Vulnerability, on 3 December 2024, with speaker Jade Bucklow, New Park Court.

As we then enter the New Year, ARDL will seek to continue with a number of projects initiated in 2024. We are working closely with legal educational institutions to try and introduce new members to ARDL; we will continue with expanding the mentoring scheme to provide greater support to our junior members; and we will seek to encourage equality, diversity and inclusion initiatives so that everyone feels part of ARDL. In 2025, ARDL is hoping to progress into the future while honouring the strong foundation of our past.

Sam Thomas
2 Bedford Row

Remembering Faris Amin

Faris Amin battled with cancer during his late teenage years. Despite long breaks from his studies and receiving intensive treatment, he secured a first in his law degree. He went on to study the LPC part-time alongside chemotherapy treatment and achieved a Distinction. My legal life: Faris Amin, Capsticks | Profile | Law Gazette

Faris joined the Capsticks Regulatory Division as a paralegal in October 2019, he went on to secure a training contract in September 2021 and qualified into the Social Work England team in May 2023. Faris also made significant contributions to the development of Capsticks' EDI network groups. Despite continuing to have treatment during his time at Capsticks, Faris never lost his distinctive enthusiasm and passion. Faris moved from Capsticks to Weightmans in the Summer of 2024 to continue his legal career.

As well as being a brilliant lawyer respected by colleagues and clients alike, Faris was an amazingly kind and warm person, and he will be much missed by all those who had the pleasure of knowing him. All our thoughts are also with his family and friends at this difficult time.

Capsticks has donated to the Teenage Cancer Trust, a reflection of the support that organisation gave to Faris during the early stages of his legal career. If you would like to donate in Faris' memory please see the link here: Donate today so no young person faces cancer alone | Teenage Cancer Trust.

Capsticks LLP

Mary O'Rourke KC Remembered

I first met Mary in the early 1990s at a Clinical Negligence conference and we 'gelled' over a few 'bevvies'! I had never met a person like her...a rapier intellect and a devastatingly wicked humour delivered in that wonderful Northern Irish brogue, which she never lost.

I next encountered her...at length...and in great detail...in an historical (nursing home) case at the NMC...*Johnson v Maggs*, where she defended two wonderful nurses who had taken the short straw in a plethora of attempts at prosecuting a doctor and about 12 other nurses in relation to nursing home neglect. I was the Legal Assessor. It lasted 89 working days, spread over 4 years. It deserves a mini-book unto itself that case, but, by Jove, was Mary a formidable force.

She worked so incredibly hard for those two nurses, eventually pro bono, and was a scathing, devastating, highly intellectual and most effective advocate. It was a force to behold and one which, I believe, finally, after many years, contributed to her appointment as a silk, which took place in the middle of the case.

She invited me to her silk party and I will regret to the end of my days that my panel advised me not to go as that would appear too partisan; so I didn't go and I am ashamed that I didn't defend the Bar principle of independent practice to that panel, who had no concept of the camaraderie of the Bar and our ability, clear of any bias, to mix and be friends, even if in court/a hearing against each other.

One final word or several....on one of the many occasions that Mary stunned and starred in equal measure in that case, she bluntly asked a panel member (by name, with emphasis!), whom she had noticed (with that sharp eye of hers) had not been taking notes of Mary's cross examination of an NMC witness, if that panel member had already decided against her clients. "*Why do you ask?*", asked the panel member. "*You are not taking notes of my cross examination. Therefore, you have already decided my clients are guilty*", came the O'Rourke direct and curt response in full volume. The member stuttered a bit, speechless (Mary, in fact, had been correct about that panel members' approach). After a hard stare and a long silence, Mary continued with her devastating questions and that panel member was seen thereafter to be furiously taking notes! '*Effective*' is an understatement!

Mary O'Rourke, KC, you will be missed more than we can put into words and the regulatory world is a poorer place without you.

Karen Rea
Queen Square Chambers, Bristol

Marion Simmons QC Essay Prize 2024 Winner - The Crypto Winter: A Watershed Moment for Regulating Crypto? by Catherine Bar

I. Introduction

Prolonged depreciation in the crypto markets (dubbed the "crypto winter"), coinciding with an avalanche of crypto-related insolvencies in 2022 and 2023 (e.g., Three Arrows Capital, Voyager, Celsius, FTX and Alameda, BlockFi, Genesis, Bittrex Inc.), highlighted the regulatory inadequacy of the crypto industry. Although the fallout was somewhat self-

contained,[1] this crypto winter has not spelt a death knell for the digital asset space. The ECB, UK and China are consulting on or trialling central bank digital currencies; in March 2024, a single Bitcoin hit the record high price of $69,000 following the SEC's approval of 11 bitcoin ETFs, "enabl[ing] retail and institutional investors direct … exposure to the world's first blockchain-based cryptocurrency".[2]

Despite naysayers arguing that we should just "let crypto burn",[3] more than one crypto winter will be required for the industry to become obsolete. Whilst it may sit uncomfortably with crypto's decentralisation ideal, a comprehensive regulatory framework is therefore imperative as cryptoassets become increasingly intertwined with traditional financial markets (thereby posing greater systemic risk) and UK insolvencies are likely to rise.[4]

By exploring crypto-specific regulatory issues that become particularly acute on insolvency, this article considers whether the crypto winter has proved a catalyst for regulatory correction. It argues that although some advances have occurred following the crisis, regulatory gaps still exist in the distressed space that speak to broader, unresolved issues for crypto.

II. The status quo

Cryptoasset providers were subject to limited regulation in the UK before the crypto winter. These businesses were not (by default) regulated by the FCA, beyond oversight relating to promotions, anti-money laundering and terrorist financing.[5] Following the crypto bear market, the UK government assured investors of its intention to be a leader in regulating crypto technologies.[6] To implement this pledge, HM Treasury has conducted several consultations as part of its "phased approach"[7] e.g., *Managing the Failure of Systemic Digital Settlement Asset (including Stablecoin) Firms* and *Future Financial Services Regulatory Regime for Cryptoassets*, incorporating new regulation on stablecoins and cryptoassets into existing legislation and signalling that the Bank of England and FCA will be progressively responsible for regulating the crypto market (in the insolvency sphere and beyond).

By comparison, in June 2023 the EU deployed arguably the world's first comprehensive package of cryptoasset regulation via a new regime, *Regulation on Markets in Cryptoassets* (MiCAR). Although the UK and EU proposals largely overlap, they diverge in key areas e.g., legislative approach, cryptoasset definition, scope of regulated activities (operating crypto lending platforms is not included under MiCAR).[8]

Other regulatory bodies (in Japan, Switzerland, US and UAE) have not been idle, introducing or drafting their own crypto legislation.[9] However, these

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1 Global value of the crypto industry slumped to $0.8tn by March 2023, a 75% reduction from its peak $3tn value in November 2021. See UK Parliament, House of Lords Library, *Cryptoassets: What does the future hold?*, 9 March 2023.

2 Bryan Quinn and Charles Pellegrin, 'Bitcoin comes out of crypto winter and scales to new heights' (*French 24*, 6 March 2024) <https://www.france24.com/en/tv-shows/business/20240306-bitcoin-comes-out-of-crypto-winter-and-scales-to-new-heights> accessed 24 April 2024.

3 Stephen Cecchetti and Kim Schoenholtz, 'Let crypto burn' (*FT*, 17 November 2022) <https://www.ft.com/content/ac058ede-80cb-4aa6-8394-941443eec7e3> accessed 21 April 2024.

4 UK insolvencies hit a 30-year high in 2023 and are expected to rise to 7,000 per quarter in 2024, inevitably involving crypto at the enterprise and/or asset level (see UK Insolvency Service).

5 House of Lords Library (n1).

6 HM Treasury, Keynote Speech by John Glen MP (Economic Secretary to the Treasury), Innovate Finance Global Summit during Fintech Week 2022 <https://www.gov.uk/government/speeches/keynote-speech-by-john-glen-economic-secretary-to-the-treasury-at-the-innovate-finance-global-summit> accessed 20 April 2024.

7 Linklaters, *UK Crypto Proposals: how do they compare to the EU's?*, 16 February 2023 <https://www.linklaters.com/en/insights/blogs/fintechlinks/2023/february/uk-crypto-proposals-how-do-they-compare-to-the-EU's> accessed 24 April 2024.

8 ibid.

9 Aditya Narain and Marina Moretti, 'Regulating Crypto' (*IMF*, September 2022) <https://www.imf.org/en/Publications/fandd/issues/2022/

regulatory policies differ widely, with some countries prohibiting cryptoasset issuance or transaction and others acting as a safe haven for market development.[10] This fragmented response – albeit progress – does not encourage regulatory rigour or cohesion, and questions relating to jurisdiction, collateral, recovery and valuation remain unanswered.

III. Jurisdictional issue(s)

Designed as a repudiation of the global financial system, cryptoassets run on decentralised blockchains i.e., not governed by any central authority. The digital architecture behind blockchain, distributed ledger technology (DLT), is not based in any one jurisdiction. Cryptoassets are inherently borderless; the application of insolvency law, however, is jurisdiction specific.

In the absence of cross-border regulation, legal uncertainty and inconsistencies with respect to creditor treatment are inevitable.[11] In *Ion Science* and *Fetch.ai Ltd*,[12] the English courts held that the *lex situs* for a cryptoasset is the place where the person or entity that owns the asset is domiciled.[13] Although recent English case law on this point is aligned, even the UKJT has stated there is "*little reason to try to allocate jurisdiction to an asset which is specifically designed to have none*".[14]

Other jurisdictions may conceptualise *lex situs* differently; stakeholders could also be incentivised to commence proceedings elsewhere because foreign precedents are more beneficial, for example, regarding ownership rights, validity of security, or ease in obtaining freezing injunctions and enforcement orders. Crypto ownership itself becomes complicated when held by an intermediary (exchange or platform). Ownership is dictated by (i) the intermediary's T&Cs and (ii) the jurisdiction's insolvency framework, often boiling down to: "*will customers be treated as mere unsecured creditors?*" This issue was hotly contested in the US bankruptcy cases of *Celsius* and *Voyager*. Both cases found that cryptocurrency deposits were held under a debtor/creditor rather than custodial relationship (in which the customer retains ownership), such that most customers were classed as unsecured creditors.

Consistent, cross-border regulation on these issues would be welcomed to mitigate contradictory judgments between jurisdictions and forum shopping by customers and officeholders.

IV. Crypto products = financial collateral?

This question will be of escalating importance, insofar as crypto use continues against a backdrop of greater regulatory oversight. A developing body of English jurisprudence (UKJT Statement, mostly adopted in case law)[15] concludes that cryptoassets constitute property and can be the subject of security.

In crypto lending, one cryptocurrency is often used as collateral for a loan denominated in another cryptocurrency. Crypto as collateral remains untested in English law and is rife with practical issues (for example, de-anonymising the parties to a transaction upon registration). Should crypto as collateral be determined as falling within the scope of the FCARs,[16] certain statutory and insolvency provisions would be disapplied or amended (e.g., enforcement carve-outs, foreclosure, void dispositions), alleviating some investor concerns over conducting crypto transactions.

09/Regulating-crypto-Narain-Moretti> accessed 22 April 2024.

10 ibid.

11 Although judgment recognition and cross-border assistance is, of course, of aid.

12 *Ion Science Ltd v Persons Unknown* [2020] (Commercial Court); *Fetch.ai Ltd v Persons Unknown and others* [2021] EWHC 2254 (Comm).

13 i.e., the asset's location, determinative of the law governing proprietary rights associated with said asset.

14 UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts*, The Law Tech Delivery Panel, November 2019.

15 ibid; see also *AA v Persons Unknown* [2019] EWHC 3556 (Comm); *Fetch.ai Ltd v Persons Unknown* [2021].

16 Financial Collateral Arrangements (No 2) Regulations 2003.

Whilst financial collateral is governed by the FCARs under English law, equivalent regimes in other major financial centres allow some global legislative coordination. Such cooperation is arguably even more vital for regulating abstruse assets like crypto products.

V. Difficulty in tracing; improbability of recovery?

Anonymity is a fundamental characteristic of cryptoasset transactions; asset dissipation is, as a result, a constant threat for insolvency practitioners (IPs). It is generally understood in the UK and US that cryptoasset ownership derives from knowledge (and control) of the relevant private key. Cryptoassets are usually accessed through wallets, but these can be hosted on private addresses (cold wallets) or exchanges (hot wallets). In the liquidation of Canadian cryptocurrency exchange Quadriga, c.$190m of its inventory "turned into digital dust" when transferred to cold wallets and could not be subsequently accessed.[17] Furthermore, money laundering programs (e.g., Tornado Cash) exist to pool crypto funds so that assets cannot be traced accurately. These precedents expose (i) the lack of governance solutions for "eleventh hour" cryptoasset access and (ii) the inefficacies of anti-money laundering regulations when confronted by novel crypto protocols.

VI. Volatility in valuation

Price volatility is another cryptoasset hallmark. Determining appropriate price levels is a key consideration for IPs. Volatility issues are aggrandised in insolvency by uncertainties over timing and type of distribution i.e., should distribution be delayed maximising value? Should claims be paid by in-specie or fiat distribution? These questions are not yet answered under English law because cryptocurrencies do not constitute legal tender. Liquidators of Three Arrows Capital in the Cayman Islands were able to convert cryptoassets into USD, USD Coin or Tether; claims in *Voyager* and *Celsius* were intended to be distributed (at least in part) in-kind, avoiding problems relating to pricing deviations or undue market influence.[18]

Additionally, since the English courts have recognised cryptocurrencies as property, cryptoasset transfers may constitute transactions for the purposes of clawback.[19] Further regulatory guidance on these valuation issues could allay – if not prevent – the (un)avoidable progression to litigation.

VII. Conclusion

No comprehensive or globally coordinated regulatory framework exists for the crypto industry. Whilst UK regulation and English jurisprudence (amongst others) has since developed, combined domestic and international reform is required to ensure that a repeat of the crypto winter is not systemically more disastrous.[20] The crypto winter offered a "circuit breaker" for governments and regulatory bodies alike,[21] a litmus test as to the (in)efficacy of crypto

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17 Norton Rose Fulbright, *Quadriga bankruptcy: c$190 million may have turned into digital dust*, July 2019 <https://www.nortonrosefulbright.com/en/knowledge/publications/168bc350/quadriga-bankruptcy> accessed 25 April 2024.

18 Sara Coelho and Alexander Wood, 'Chimeras: what happens when novel intangible assets meet ancient, abstract legal frameworks in insolvency' (*Shearman & Sterling LLP*, 16 November 2022) <https://www.shearman.com/en/perspectives/2022/11/sara-coelho-and-alexander-wood-on-what-happens-when-crypto-meets-legal-frameworks> accessed 19 April 2024.

19 Jonathan Sears and Julian Ng, 'Bit by bit – the future direction of English insolvency law and cryptocurrency' (April 2022) 15(2) Corporate Rescue and Insolvency 53, 54 e.g., ss238 (transactions at an undervalue) and s423 (transactions defrauding creditors) of Insolvency Act 1986.

20 Lewis McLellan, 'Robust regulation key to limiting fallout from repeat of crypto winter' (*OMFIF*, 26 October 2022) <https://www.omfif.org/2022/10/robust-regulation-key-to-limiting-fallout-from-repeat-of-crypto-winter/> accessed 21 April 2024.

21 Michael J. Casey, 'Bankruptcy Was Crypto Winter's Circuit Breaker' (*Coindesk*, 8 March 2024) <https://www.coindesk.com/consensus-magazine/2024/02/06/bankruptcy-was-crypto-winters-circuit-breaker/> accessed 20 April 2024.

regulation when its financial consequences were still largely constrained to the industry itself. Whether the regulatory lessons taught by this crisis will be applied sufficiently, remains to be seen.

Catherine Bar

At Last - Amie Tsang and The Correct Interpretation of *Baxendale-Walker*

I am old enough remember life before Baxendale-Walker v Law Society [2006] 3 All E.R. 675 was decided by the Divisional Court in March 2006. In those far-off days, the Solicitors Disciplinary Tribunal (SDT) operated a conventional approach to costs, i.e. that costs would follow the event. Therefore, "acquitted" Respondents could expect an order that the regulator would pay their costs unless, for example, they had brought the prosecution upon themselves or otherwise behaved in such a way as to make it unfair that they should receive a costs award. This general approach worked perfectly well across the regulatory spectrum, and at the time I was not aware of any concern on the part of regulators that the costs regime was operating unfairly or against the public interest.

All of this changed with the Divisional Court decision in Baxendale-Walker v Law Society, upheld by the Court of Appeal in 2007 ([2008] 1 WLR 426). Many of your readers will recall the ringing tones of Sir Igor Judge P in the Court of Appeal:

"Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov, as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The `event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow.

…

For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

That last sentence reads well on the page, but in the real world it created significant unfairness. I have no doubt that the "chilling effect" supposedly identified by Sir Igor Judge P was dramatically overstated. "Conviction" rates in the SDT have traditionally exceeded 90%, and the SDT, which at the time was dealing with more than 200 cases a year, was well able to distinguish between the deserving and undeserving among the small number of "acquitted" Respondents.

Aftermath of the decision

Unfortunately, the decision created an immediate and opposite "chilling effect" to that feared by the Court of Appeal. Henceforth, solicitor Respondents had to be advised that whatever their belief in their innocence, and whatever the strength of their case, if they were not going to be suspended or struck off, there was little point in contesting the case against them – they would be much better off financially by agreeing to pay a modest fine and costs, than by fighting the case, with all of the stress and expense involved: any reputational damage would probably be temporary only. I know this, because I gave that advice to numerous solicitors facing disciplinary proceedings, and it always stuck in my craw to have to do so.

Other events were also conspiring to create an extremely uneven playing field. The minimum terms and conditions were amended to eliminate the provision that professional indemnity insurers had to cover the legal costs of disciplinary proceedings against solicitors – the Law Society waved this through. The SRA obtained statutory powers to fine

solicitors without having to refer the case to the SDT. The standard of proof in disciplinary proceedings was lowered from the criminal to the civil standard.

After Baxendale-Walker was decided, prosecutors recited the "shambles from start to finish" mantra in resisting applications for costs by "acquitted" Respondents, stating that these were the only circumstances in which a costs order was appropriate. In the early years, this worked even though it was incorrect, and in the ten years after the decision only a handful of acquitted Respondents received a costs order in their favour. But steadily the SDT started to adopt a more pro-Respondent interpretation of the decision, and in Ring (11922-2019) the SDT made a substantial costs order against the SRA even though the Respondent, my client, had been found "guilty" and fined a small sum. The SRA did not appeal.

A missed opportunity

For years I despaired of being able to chip away at Baxendale-Walker to remedy the unfairness which it had produced. And then a golden opportunity presented itself. A competition case, Competition and Markets Authority v Flynn Pharma Ltd [2020] EWCA Civ 339 was decided by the Court of Appeal in March 2020, and was destined for the Supreme Court. At last, I believed, Baxendale-Walker could be properly examined by an appellate court – and not just any appellate court. A group of us got together and thought of making an attempt to get our voices heard in the Supreme Court. Then we thought that the ideal body to mount an intervention before the court would be the Law Society as it was obvious that the SRA would intervene in order to seek to uphold Baxendale-Walker. So I wrote a Note, pointing out the unfairness which had resulted from Baxendale-Walker and urging the Law Society to intervene in the appeal. The Note disappeared into the bureaucratic morass of the Law Society committee structure. Weeks or months later we were told that the Law Society would not intervene in the appeal.

So, the result was predictable. The Law Society left the field clear for the SRA which did intervene in the appeal (reported at [2022] 1 WLR 2972). Baxendale-Walker was approved even though the Supreme Court said that in other regulatory fields there was no presumption that there should be no order for costs where the regulator fails. So that seemed to be that: the chance to have Baxendale-Walker examined had gone, and I was destined to ride off into the sunset of retirement having failed to disturb it.

Then along came a charming and unassuming lady called Amie Tsang. She owned a small firm and acted as a conveyancing solicitor for around 450 clients who purchased flats off-plan in the north-west. These were investment properties, rather than being purchased for residential occupation by the owner. The investments were risky – if the properties were not built, investors would lose their money. Ms Tsang contended that she gave adequate warnings to her clients about this. Unfortunately, the developments failed, and the investors lost most or all of the sums invested.

Prosecution in the SDT

The failure of these "fractional developments" caused great regulatory interest. In the early days, the SRA believed that the schemes were fraudulent, or borderline fraudulent ("dubious"), although after a decision of the SDT in the case of Roberts (11970-2019), the regulator rowed back from this and concentrated upon whether the various conveyancing solicitors involved in the various developments had given adequate advice of the risks involved.

The SRA first contacted Ms Tsang in April 2017, asking a number questions. A formal investigation was opened more than two years later, in October 2019. It proceeded at a snail-like pace: disciplinary proceedings were commenced against her in December 2022, more than five and a half years after the first contact from the regulator. Ms Tsang

had co-operated throughout and none of the delay was attributable to her. In the meantime, on 10th January 2022, HH Judge Hodge KC had given judgment in the High Court in Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd [2022] EWHC 4 (Ch) in which the judge said "I found Ms Tsang to be a competent, thoughtful, open, careful and honest solicitor."

In June 2022, after the SRA had threatened to send Ms Tsang to the SDT, I was instructed and produced a detailed written submission as to why any disciplinary proceedings brought against her would be unfair, disproportionate and misconceived in law. This document was provided to the SRA in order to seek to dissuade it from commencing disciplinary proceedings. It fell on deaf ears.

Eventually the case was listed for hearing in July 2023. Although I could not see what possible regulatory/disciplinary offence she could have committed, I gave Ms Tsang the usual advice. She was facing only a modest fine, and it would cost a lot for her to contest the case, with a very uncertain outcome. It would have been easy to negotiate an agreed outcome with the SRA, but Ms Tsang was deeply upset at her treatment at the hands of the regulator, and opted to contest the case on its merits.

She faced one Allegation only, that she had failed to advise her clients of the high risks involved when investing in the off-plan properties. Such an allegation raised two simple legal questions: (a) What was the source of the duty to advise contended for by the SRA?; and (b) what advice should have been given but was not?

At the hearing, the SRA was unable to provide coherent answers to either question. It became increasingly apparent that the prosecution case had no sound basis in law, as the SRA was not relying upon the terms of the solicitor-client retainer to found the duty to advise. Instead, it contended unconvincingly that there was a "professional" duty, independent of the retainer, resting upon her to give the advice.

It was not necessary for me to call Ms Tsang to give evidence, as the only issues in the case were legal rather than factual. After a 2-day hearing, the SDT dismissed claim against Ms Tsang and ordered the SRA to pay £74,950 to her in costs, just about the entirety of her costs. Its reasons for doing so were essentially that the case had been misconceived in law, and that the delay in bringing the case was unacceptable.

The SRA's appeal

To my surprise, the SRA appealed the costs order only. This involved accepting that the case had been properly dismissed by the SDT, but asserting that no order, or a lower order for costs ought to have been made. At the hearing of the appeal before Eyre J, the SRA contended that for a costs order to be made against the SRA it was necessary for there to be a finding that the proceedings had been improperly brought (absent a finding that the proceedings had been so mishandled as to be a "shambles from start to finish"). According to this submission, where proceedings had been properly brought in the sense of the SRA having made a reasonable decision to proceed in good faith there was no scope for a costs order.

The appeal ([2024] EWHC 1150 (KB) (Admin)) was heard by Eyre J. He rejected the SRA's interpretation of Baxendale-Walker and held at [56] that

"The effect of those authorities is not that the circumstances in which a costs order can be made against the SRA are limited to those in which the proceedings have been improperly brought. The improper bringing of proceedings is not the only thing which can be capable of being a good reason for the award of costs. Such a limitation was not set out in Baxendale-Walker either in the Divisional Court or in the Court of Appeal and would be inconsistent with the fact that Sir Igor Judge P expressly contemplated that there would be other

circumstances which could lead to the making of a costs order."

The Judge went on to find at [75]:

"I am, therefore, satisfied that both the fact that misconduct proceedings have been brought on a fundamentally flawed basis and the fact that there have been failings in
the conduct of the proceedings, including inordinate delay, are capable in an appropriate case of being good reasons for the making of a costs order against the SRA."

And so, at last, Baxendale-Walker has been properly explained and the favourable treatment of regulators in disciplinary proceedings which it spawned, has been reduced. The test for an award of costs against regulators in such proceedings is not that the proceedings were improperly brought, or that the proceedings have been a shambles from start to finish. Rather, there must simply be a good reason, over and above the result of the case in the Respondent's favour, for an award of costs to be made against a regulator. This opens the way to a far greater readiness by disciplinary tribunals to award costs against regulators, which will in turn lead to better decision-making by regulators. Amie Tsang should never have been prosecuted, and hopefully the decision in her case will mean fewer similarly unmeritorious cases will be brought before disciplinary tribunals in the future. It is salutary to reflect that the investigation, prosecution, and then the appeal together represented a dark cloud over her for more than seven years of her life.

Gregory Treverton-Jones KC
39 Essex Chambers

Book Review: Making Lawful Decisions by Victoria Butler-Cole KC and Steve Broach KC.

Administrative decision-making affecting the legal rights of those affected by the decision, should not be intimidating. The decision-maker needs to have a keen sense of justice to ensure that the process is fair to all concerned, an open mind, and sufficient analytical skills to ensure that the decision actually made, whether right or wrong, is one that can reasonably be made. Yet time and again in the real world, one sees fairly basic errors being made. In the field in which I practise, regulatory law and practice concerning legal professionals, the quality of decision-making by regulators can be very patchy – some of it is good, and some dreadful.

Now help is at hand with the publication by the Legal Action Group of an invaluable short book, "Making Lawful Decisions", written by two well-known public law silks, Victoria Butler-Cole KC and Steve Broach KC. It describes itself as a guide for decision-makers on acting within the law. After an interesting Foreword by Lord Justice Singh, the book starts with a 3-page checklist, setting out all of the relevant questions which decision-makers should ask themselves when embarking upon their task. It then proceeds in a logical order from preparation, to hearings, and then to the making of the decision itself, with further checklists included along the way. Later chapters cover compliance with two important statutes, the Equality Act 2010 and the Human Rights Act 1999.

The law is explained clearly and accessibly. Public law concepts are explained in simple language, and non-lawyers will find the text easily comprehensible. The chapter explaining the principles underpinning the Human Rights Act is particularly impressive.

I can recommend this book without qualification. Every administrative decision-maker should be provided with a copy, and should take the time to read it. The time will be well spent, as it will lead to better decision-making and fewer legal challenges.

Gregory Treverton-Jones KC
39 Essex Chambers

Legal Update

***Masood v. General Medical Council* [2024] CSIH 27**

Appeals – approach by court to appeals generally

The tribunal found that the appellant had emotionally, physically and sexually abused his former wife, attempted to interfere with the fitness to practise process and was convicted of a domestically aggravated offence; that his conduct amounted to serious misconduct and that his fitness to practise was impaired as a result; and ordered that his name be erased from the medical register. Dismissing the doctor's appeal, the Inner House (Lady Dorrian, Lord Justice Clerk, Lord Malcolm and Lord Tyre) said:

> 38. In assessing whether there is any compelling reason to disagree with the findings and determination of a specialist Tribunal, the court must look at the whole circumstances of the case, bearing in mind that the primary purposes of the Tribunal lie in the protection of the public, the maintenance of proper professional standards of conduct, and the preservation and maintenance of public confidence in the profession. Where the determination follows the leading of evidence, the court must also recognise that it does not have the same advantages as the Tribunal which saw and heard the witnesses. This is a relevant consideration in the present case where so much hinges on the Tribunal's assessment of evidence led before it.
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> ….
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> 59. In essence the appellant's submission invited this court to re-open the findings made by the Tribunal in respect of those instances where it accepted the evidence of Ms A; and to re-assess the conclusions on misconduct, impairment and sanction. As we have already noted, in appeals of this kind the court may only interfere with the decision of the specialist Tribunal if it is seriously flawed or manifestly wrong. The court may correct egregious errors of fact, or errors of law; it may interfere if important evidence has been left out of account; or misinterpreted in a significant way; or where the reasoning cannot be defended according to the principles applicable. What is cannot do is simply remake the decision according to its own views of the case.

***McAteer v. Solicitors' Disciplinary Tribunal, Fox, Diver and Magee* [2024] NIKB 8**

Delay in lodging appeal by complainant – whether grant of extension of time for appealing – fairness and public interest

On 16 August 2021 the Solicitors' Disciplinary Tribunal of Northern Ireland issued its decision dismissing misconduct proceedings brought by the appellant, a chartered accountant and businessman, against the three respondent solicitors. Article 53 of the Solicitors' (Northern Ireland) Order 1976 provides that an appeal shall be brought within 21 days from the date of the making of the order or refusal appealed against. The application seeking leave to appeal and an extension of time was not lodged until 26 October 2022. In refusing to extend time to lodge the appeal and striking out the application, McBride J considered the line of authority commencing with *Tolsky Miloslavsky v. UK* [1995] 20 EHRR 442 which recognised that any limitation on a person's access to a court must not breach article 6(1) of the European Convention on Human Rights; *Pomiechowski v. Poland* [2012] UKSC 20, and *Adesina v. Nursing and Midwifery Council* [2013] 1 WLR 3156 CA.

McBride J said:

> [57] *Stuewe v. Health and Care Professions Council* [2022] EWCA Civ 1605 accepted that the law was now settled, and Carr LJ suggested that the *Adesina* principle was a duty, not a power or discretion to extend time to the minimum extent necessary, where to deny a power to extend time would impair the very essence of the right of appeal – paras [48], [49] and [54].
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> [58] In determining whether the operation of the statutory time limit would have this effect in any given case the court must look at all the circumstances. This will include

> consideration of the steps taken by the appellant and whether he has done everything he can to bring the appeal timeously or whether there are circumstances beyond his control which prevented him bringing the appeal. *Adesina* sets out some examples where the court would extend time – namely where the person is unaware of the decision, or where he is so seriously ill, he is unable to issue proceedings. Each case will ultimately turn on its own facts, but the existing case law demonstrates that difficulties in securing legal representation, or funding are rarely sufficient. The test is one of exceptionality and as a general rule therefore the test is only met in a small number of cases.
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> [59] I am satisfied that this is a case in which the statute has set an absolute time limit without a dispensing power. In those circumstances, in accordance with section 3 of the Human Rights Act, I must read down the statutory provisions as conferring a power to extend time in circumstances in which an absolute time limit would impair the "very essence" of the right to appeal conferred by statute and I must extend time by the minimum extent necessary to ensure compliance with the Convention.

In considering whether to extend time, the judge said that none of the complaints made in respect of the SDT process impaired the appellant's ability to appeal; the appellant had failed to give any explanation why he did not issue an appeal on time; the appellant's pursuit of judicial review proceedings did not impair his ability to appeal; the lack of reasons with the order was not an impediment; the appellant could have issued an appeal and applied to have a statement of reasons from the tribunal; the fact that the solicitors knew he was going to appeal did not amount to exceptional circumstances preventing him appealing in time; and he had not provided any particulars about resources he lacked or why a lack of resources affected his ability to bring the appeal. The principle of fairness involves fairness to all parties. The existence of a time limit for appeal is necessary in the interests of fairness. Solicitors must be able to adequately defend allegations against them and complaints need to be made in a timely manner. Further they are entitled to finality. The appellant had not shown how the time limit had caused any unfairness to him and had not therefore established exceptionality on this basis.

MacCallum v. Secretary of State for Education [2024] EWHC 87 (Admin)

Late filing of appeal notice – fault entirely of solicitor – appellant blameless – exceptional circumstances – effect on appellant if leave refused

On 11 November 2022, following a finding of unacceptable professional conduct, a panel of the Teaching Regulation Agency recommended that the appellant should be issued with a prohibition order subject to review in 2 years. The appellant was found to have had a sexual relationship with a vulnerable former pupil and to have then lied about it to the school Principal. The Secretary of State for Education considered that a prohibition order was appropriate and should not be subject to review before 5 years. The Secretary of State's decision was communicated to the appellant by letter dated 15 November 2022, stating that any appeal must be submitted by 15 December 2022. The appellant retained solicitors on 17 November 2022, and regularly checked on the progress of his appeal and its preparation. Negligently, the solicitors failed to lodge a valid notice of appeal until 12 January 2023. Granting an extension, Lang J said that the cause of the delay was that of the appellant's former solicitors who were not familiar with the procedure to be adopted. The length of the delay was more than minimal. There were avoidable errors in the preparation of the appeal documentation. The court does not ordinarily distinguish between a litigant and his legal advisers. However, the principle is not universally applied in cases where it would be unjust to do so. In the instant case, the appellant was not personally at fault and 'personally has done all he can to bring [the appeal] timeously' (per Maurice Kay LJ in *R (Adesina) v. NMC* [2013] EWCA Civ 818 at [15], citing Lord Mance in *Pomiechowski v.*

District Court of Legnica, Poland [2012] 1 WLR 1604 SC at [39]). The appellant was aware of the strict deadline and regularly checked on the progress of the appeal and its preparation. His former solicitors misled him by informing him that the appeal had been lodged in time when in fact no valid appeal had been lodged. They did not inform him that an extension was needed until 15 August 2023. The appellant had a potential claim against his former solicitors for damages for professional negligence. His employers were willing to continue to employ him for the duration of a 2 year prohibition order, but could not do so for as long as 5 years. Therefore, he stood to lose his employment if he could not successfully appeal. An award of damages, which would have to be evaluated on a 'loss of a chance' basis, would not adequately compensate the appellant for the inability to pursue his profession.

[Note: the substantive appeal was later dismissed ([2024] EWHC 2454 (Admin)]

Ilenotuma v. (1) Teaching Regulation Agency, (2) Secretary of State for Education **[2024] EWHC 1158 (Admin)**

Late appeal – no fee or fee remission application filed in time – extension refused

The appellant's time for serving notice of appeal against a prohibition made by the Secretary of State following proceedings before the Teaching Regulation Agency was 27 March 2023. On 23 March the appellant filed notice of appeal with the civil appeals office, the wrong office, and on 31 March he filed it with the correct court, the administrative office. However, neither filing was accompanied by a fee or a fee remission application or certificate as required by CPR Practice Direction 52B, para 4.1. On Saturday 15 April, the appellant completed an online application for fee remission and on 17 April filed perfected documents with the court. In refusing an extension of time, Griffiths J said that in giving judgment in *Jinks v. Teaching Regulation Agency* [2023] EWHC 1059 (KB), Linden J said at [8] that the requirements to file the documents specified in the Practice Direction and to pay a fee or have applied for fee remission were "important and proportionate requirements which seek to ensure that the appeal is conducted efficiently and fairly to both parties".

Sutcliffe v. Secretary of State for Education **[2024] EWHC 1878 (Admin)**

Appeal filed in wrong division of High Court – appeal otherwise validly issued – extension of time granted

The appellant, a teacher, sought to appeal the decision of the Secretary of State, confirmed by letter dated 11 May 2023 from the Teaching Regulation Agency, prohibiting him from teaching. It was common ground between the parties that 8 June 2023 was the last day for filing the appellant's appeal. The appellant's solicitor filed the appeal at 3:03 pm on that day in the King's Bench Division of the High Court using the court's e-filing service. The following morning, the appellant's solicitor received a notification that the appeal had been rejected because, it was asserted, statutory appeals are required to be made to the Administrative Court. On 9 June 2023, the solicitor re-filed the appeal in the Administrative Court and applied for an extension of time.

On the application for an extension of time, Pepperall J questioned at [12] the correctness that the appeal was rightly rejected by the King's Bench Division, and concluded that the appeal was wrongly rejected.

1. Paragraph 2.1 of CPR Practice Direction 52D provides that the court to which a statutory appeal lies is prescribed by statute. Beyond that, Part 52 provides no specific guidance as to the destination of statutory appeals by teachers.
2. Here, the relevant statute was the Education Act 2002. Paragraph 5 of Schedule 11A to the Act, and reg 17 of the Teachers' Disciplinary (England) Regulations 2012, provide for a right of appeal "to the High Court". Neither the Act nor the Regulations requires the appeal to be made to any particular division, to any particular specialist court, or in any particular specialist list of the High Court.
3. There appeared to be no statutory provision,

rule or practice direction requiring the appeal to be filed in the Administrative Court.

4. The highest it could be put is that there is a longstanding custom and practice of appeals being issued in the Administrative Court. Absent some provision mandating issue in the Administrative Court, such custom and practice does not mean that the appeal was wrongly filed in the King's Bench Division. Further, even where there has been an error of procedure, such error does not invalidate the step taken unless the court so orders: CPR r.3.10. In future, appeals lodged in the King's Bench Division should be properly accepted and then transferred to the Administrative Court for case management and hearing.

Strict application of the 28-day limit would impair the very essence of the statutory right of appeal such that the court must extend time in this case. The court extended time but dismissed the appeal on its merits.

R (Dalton) v. Chair of Police Appeals Tribunal and Chief Constable of Hertfordshire Constabulary [2024] EWHC 1116 (Admin)

Bias - independent panel member questions – degree of latitude

During the hearing before the police misconduct panel the claimant, a police officer facing disciplinary charges, applied for the independent panel member to recuse herself on the ground that her questioning of him indicated a concluded view of the evidence and the allegations, which led to a perception of bias. The legally qualified chair refused the application. The chair of the Police Appeals Tribunal dismissed an appeal on paper under rule 11(2) of the Police Appeals Rules 2012 on the grounds that it had no real prospect of success. Refusing permission to apply for judicial review following an oral hearing Lang J said, at [61], that on reading the transcript, it was plain that the independent panel member was asking the claimant a series of questions, at the appropriate time in his evidence, which she was entitled to do. The claimant responded to them as if they were questions. The independent panel member was not a trained lawyer or judge, and so formulated her questions as a lay person would do. She was entitled to some latitude in this regard. Exactly the same points could have been put to the claimant by a judge or a barrister, with rather more finesse, which would not have given rise to any challenge on the grounds of a settled view of bias.

Gleeson v. Social Work England [2024] EWHC 3 (Admin)

Bias – cross-examination of complainant

The grounds of appeal included that the chair's interventions, restricting questions which the appellant's representative was permitted to ask Person A about their relationship, were wrong/irregular. His Honour Judge Stephen Davis (sitting as a High Court judge) said:

67. In my judgment this complaint is not made out. The complaint is that during cross-examination of Person A the chair intervened several times suggesting that Mr Walker should stop exploring the nature and detail of the relationship and suggested that he move on to explore the specifics of the allegation. The submission is that given the general nature of the allegations it was wrong to seek to prevent Mr Walker from cross-examining on the general nature of the relationship. However, as [counsel for Social Work England] submitted:

> (i) Under rule 32(a) of the Fitness to Practise Rules 2019 the panel was entitled to regulate their own procedures and conduct the hearing in a manner they consider fair.
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> (ii) Any court or tribunal is entitled to set timetables for cross-examination and ensure reasonable compliance with those timetables and to exclude irrelevancies and discourage repetition.
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> (iii) An appeal should only be allowed on grounds of inappropriate intervention in cross-examination where it resulted in actual unfairness.
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> (iv) Here Mr Walker was never prevented from putting questions to Person A about the nature of the relationship, only exhorted to

remain within the agreed timetable for cross-examination and to focus on the allegations.
(v) It is not suggested that it was ever said to him that he could not cross-examine, for example, about the allegation that Ms Gleeson was regularly drunk and aggressive at weekends, or about the specific instances where the police attended or the thinking of ways to kill allegation.

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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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