

## PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2017

### Judicial Review of the Regulators

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The following definitions are used throughout:

|         |   |
|---------|---|
| "A1P1"  | ECHR Article 1 Protocol 1               |
| "C/Cs"  | Claimant/s                              |
| "CAT"   | Competition Appeal Tribunal             |
| "CJEU"  | Court of Justice of the European Union  |
| "CMA"   | Competition and Markets Authority       |
| "D"     | Defendant/s                             |
| "ECHR"  | European Convention of Human Rights     |
| "FCA"   | Financial Conduct Authority             |
| "FSMA"  | Financial Services and Markets Act 2000 |
| "FTT"   | First Tier Tribunal                     |
| "HMRC"  | Her Majesty's Revenue & Customs         |
| "OFCOM" | Office of Communications                |
| "SoS"   | Secretary of State                      |
| "UT"    | Upper Tribunal                          |

#### **PRIVATE/PUBLIC**

1. **Benjamin Dean (Claimant) v Secretary of State for Business, Energy and Industrial Strategy (Defendant) & Dart Energy (West England) Plc (Interested Party) [2017] EWHC 1998 (Admin)**

C applied for judicial review of a deed of variation which amended a petroleum exploration and development licence to increase its initial term to 10 years and decrease its second term to one year. C contended that the deed was ultra vires since the Petroleum Act 1998 did not give power to the SoS to amend a deed once it had been granted. Holgate J concluded that the Act did not suggest that a section 3 licence could not be amended by agreement. Although model clauses for licences contained in regulations issued under the Act did not expressly provide for the initial or second terms to be varied, they did not expressly prohibit such variation either. The licence was more than just a contractual agreement; it was also the grant of an interest in land. The power to vary by agreement existed as part of the normal relationship created by a contractual licence, notwithstanding that one party had exercised a statutory power. Furthermore, the ability to amend a licence after grant was not incompatible with the Directive that dealt with the grant of authorisation for the production of hydrocarbons and the Regulations which transposed the Directive. If the Court was wrong and the licences were governed entirely by the legislation rather than being contractual in nature, section 3 still provided an implicit or incidental power to amend that licence by agreement. The Court rejected C's contention that the deed of variation was ultra vires and the application for judicial review was dismissed.

2. **R (Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy and another [2017] EWHC 771 (Admin)**

C applied for judicial review of the SoS decision to appoint the interested parties as the preferred bidder in the proposed sale of a publicly owned bank.

C, without any adequate explanation, took four and half weeks after D's reply to the pre-action letter to file the claim. Lewis J therefore found that C did not bring the claim promptly and permission to apply for judicial review was refused.

In relation to justiciability, the Court considered whether the decision under challenge had a sufficient public element to it to render the decision amenable to judicial review. The judge noted that although D was exercising the common law powers of a shareholder to sell shares, the decision involved the sale of a publicly-owned asset, sold as a matter of government policy, and the sale would be reported to Parliament. However, while the decision was subject to judicial review, the judge concluded that there were no public law errors. While C had argued that procedural fairness and rationality required the SoS to agree to sell to the only bidder whose bid complied with the requirements of the sale, the Court found that this was incorrect. There was no statutory framework governing the sale process, and according to its terms, D was entitled to amend the bid process and not therefore obliged to accept any bid. In any case, D did not think C's bid satisfied the requirement and he was entitled to take that view.

Even if the claim was successful the Court would have refused to grant a remedy on the basis that granting a remedy would be detrimental to good administration and would prejudice the rights or interests of third parties.

### **3. R (on the application of Underwritten Warranty Co Ltd (t/a Insurance Backed Guarantee Co)) v FENSA Ltd [2017] EWHC 2308 (Admin)**

C was an insurance broker specialising in the provision of 'insurance backed guarantees' (IBGs), which form a key part of a self-certification regulatory system under the Building Regulations 2010. Under the Regulations, there are two ways of certifying that certain types of building work comply with building regulation standards; the first is through local authority control, and the second is through self-certification schemes known as CPSs. The Regulations state that a number of named entities (including D) are entitled to run self-certification schemes. C was recognised by D as a provider of IBGs under D's self-certification scheme. After C changed its underwriter to an entity regulated by the Channel Islands Financial Ombudsman (rather than the Financial Ombudsman Service) and structured as a cell company, D concluded that C no longer met the requirements of its scheme and that D could no longer recognise C as an approved provider. C applied for judicial review of that decision.

D argued that it was not amenable to judicial review, and after considering the relevant authorities, Dove J agreed. In his view, while self-certification schemes were "*part and parcel of the statutory scheme for building control*", this was not sufficient for the decision to be susceptible to judicial review, particularly given that self-certification had been designed as an alternative system to regulation by local authorities or other independent building inspectors. Should no party choose to operate a CPS, Dove J thought that Parliament would not intervene, but that the alternative system of local authority control would continue. He also noted the considerable latitude afforded to operators of CPSs on how they chose to construct their CPS, and that in practice operators of CPSs competed in a market for the business of installers' self-certification, both of which pointed against judicial review being available.

#### **ALTERNATIVE REMEDY**

### **4. Glencore Energy UK Ltd v Revenue & Customs Commissioners [2017] EWHC 1476 (Admin) – *permission to appeal granted***

The Court held that a taxpayer's application for permission to apply for judicial review of a charging notice issued by HMRC should be refused because of the availability of alternative review mechanisms which were in substance adequate and appropriate. The taxpayer, C, applied for permission for judicial review of a charging notice issued by HMRC. The statutory regime established a six-stage procedure governing imposition of the notice. C applied for judicial review at stage three of that procedure (HMRC issuing a charging notice), rather than waiting until stage six, which would have involved HMRC conducting a mandatory review within 12 months of the end of the payment period, and then subsequently a route of appeal to the FTT.

Green J refused permission. In doing so, the Court reiterated the basic principle that judicial review is a remedy of last resort such that, where an alternative remedy exists, it should be exhausted before any application for judicial review is made. The Court found that, looking at the substance of the grounds raised, the statutory six-stage procedure was an effective and appropriate alternative remedy. It was by no means clear that judicial review would save time and/or expense, as if C won the judicial review it would likely still need to go through the statutory procedure. Under section 31(3C) Senior Courts Act 1981, the Court considered that the outcome for C would not be substantially different if the conduct of which it complained had not occurred.

**5. R (Sarah Zahid) v University of Manchester; R (Maaz Rafique-Aldawery) v St George's, University of London; R (Mithilan Siva Subramaniam) v University of Leicester [2017] EWHC 188 (Admin)**

The C in each of the three separate proceedings was a medical student whose participation in a medical course had been terminated by their university. Each challenged that decision by way of judicial review. Each C also made a reference to the Office of the Independent Adjudicator for Higher Education (OIA), which has the power to review a complaint against a university and make recommendations to the relevant university if it determines that a complaint is wholly or partly justified. However, the OIA does not have jurisdiction to consider complaints where the subject matter is the subject of ongoing court proceedings which have not been stayed. The Cs therefore applied for a stay of each of their judicial review proceedings pending completion of the OIA procedure. Two of the universities refused to consent to a stay on the basis that the OIA reference procedure provided a suitable alternative remedy which excluded any scope for judicial review.

Hickinbottom J found that the OIA's scheme was "*inherently different*" from that of the Court and each performed different functions; the OIA offered an "*attractive*" form of ADR but only the Court could determine legal rights and obligations following a full investigation into the underlying facts, and award formal legal remedies. Hence, the OIA reference did not provide a "*coextensive remedy*" to judicial review. In addition, the intention behind the statutory OIA scheme was not to exclude the availability of judicial review. The Court observed that a refusal of a stay in these circumstances is likely to be rare so as to avoid discouraging ADR. Where a university contests a stay, without good grounds for doing so, it is likely to face an adverse costs order. The Court ordered that all three judicial proceedings be stayed pending the conclusion of the OIA reference.

Separately, the Court offered general guidance in relation to the utility of issuing protective judicial review proceedings alongside an OIA reference and then seeking a stay. It concluded that if the parties agreed, in most cases a court would grant an extension of time to file a claim after the OIA's determination, rendering issuing a protective claim unnecessary.

**6. R (Grace Bay II Holdings Sarl) v Pensions Regulator [2017] EWHC 7 (Admin)**

The Court dismissed an application for permission by HIG, the American private equity fund that purchased the Silentnight business in a pre-pack administration during 2011, for judicial review of the manner in which D had gone about exercising its regulatory powers. The effect of the purchase had been to divorce the company's operations from its heavily-underfunded pension scheme. D issued warning notices against the Cs in December 2014. Eighteen months later, having received expert evidence, D issued a second round of warning notices to the Cs. Cs argued that D's actions in issuing the second warning notices were ultra vires. Whipple J refused permission for judicial review, holding that the Cs had an alternative remedy; namely the existing statutory scheme under the Pensions Act 2004 comprising the Determinations Panel and UT. Despite the anticipated cost of the scheme (running into the millions), it still constituted an adequate means of allowing those affected by warning notices to have their case heard. Further, while the Determinations Panel lacked the Administrative Court's powers to make a declaration or quash a warning notice, the practical effect of the Determinations Panel's powers (e.g. not to issue a Contribution Notice or Financial Support Direction) would be similar.

## STATUTORY INTERPRETATION

### 7. **R (UK Power Networks (Operations) Ltd) v Gas and Electricity Markets Authority [2017] EWHC 1175 (Admin)**

The interested party applied to C, a licensed electricity distribution network operator, for electricity connection works. The interested party made three advance payments for those works, as requested by C. Following completion, the interested party complained that C ought to have paid interest on its advance payments pursuant to section 20(3) of the Electricity Act 1989. C disagreed and the issue was referred to D. In light of sections 19 and 20 of the Act, D found that advance payments could only be taken by way of security, upon which interest was required to be paid, and therefore interest was payable on the interested party's advance payments. C challenged that decision by way of judicial review, alleging it was based on an error of statutory construction. Ouseley J noted that the question was whether D's determination of the issue of statutory construction was right or wrong; not whether it was reasonable. Thus, in this context, D's *"expertise and experience is of lesser value, though it can illuminate the purpose of a provision or the practical effect of or problems associated with any particular interpretation"*. Ouseley J highlighted the importance of considering sections 19 and 20 of the Act in their wider context as well as the statutory objective of protecting the consumer. Ouseley J held that the Act's structure and the language of the relevant sections did not support D's decision. Although D had expertise on certain aspects of its reasoning, Ouseley J was not persuaded that D had properly thought through its position. The decision was quashed accordingly.

### 8. **R (Newby Foods Ltd) v Food Standards Agency [2017] EWCA Civ 400**

D appealed against the Administrative Court's decision allowing in part a claim for judicial review by C. Edwards-Stuart J had held that certain meat products manufactured by C should not be classified as mechanically separated meat (MSM) for the purposes of para 1.14 of Annex I to EU Regulation No. 853/2004. Whilst D had concluded that Newby's product was MSM, Edwards-Stuart J (after a preliminary reference to the CJEU) found that the product fell within the exception set out by the CJEU to the definition of MSM. D appealed, submitting that Edwards-Stuart J had erred (i) in his interpretation of the CJEU's ruling and by finding that the products did not constitute MSM; and (ii) in his analysis as to when a domestic court was free to depart from the CJEU's conclusions. The Court of Appeal (Lloyd-Jones, Beatson and Moylan LJJ) held that Edwards-Stuart J's broad interpretation of the exception had been incorrect. The Court acknowledged that Edwards-Stuart J's conclusion was influenced by Art 11 of the Treaty on the Functioning of the European Union, the objective of which was to promote sustainable development. He had considered treating *"desinewed meat"* as MSM was wasteful and contrary to that objective. However, the CJEU had been aware of that consideration and had attached no weight to it. The Court of Appeal found that the CJEU's intention was clear and that Edwards-Stuart J's reading would undermine the principal objective of the Regulation: to secure a high level of consumer protection with regard to food safety. The Court of Appeal acknowledged that any stated conclusions of the CJEU as to the application of the law to the facts were not binding on the national court. However, in this case, the Court considered that the CJEU's judgment left no scope for argument as to the application of the law to the facts. D's appeal was allowed accordingly.

### 9. **R (National Aids Trust) (First Respondent) v National Health Service Commissioning Board (NHS England) (Appellant) Local Government Association (Second Respondent) & Secretary of State for Health (Interested Party) [2016] EWCA Civ 1100**

NHS England appealed against a decision that it had the power to commission an anti-retroviral drug (PrEP) as a preventative measure for people at high risk of contracting HIV. NHS England maintained that under the exception in section 1H(2) of the National Health Service Act 2006, it was not responsible for parts of the health service provided by the SoS or local authorities pursuant to their public health functions. PrEP, being essentially preventative, fell into this category. At first instance Green J attempted to limit the scope of the exception, by finding that it operated only to

define the entity with which NHS England's duty was concurrent, rather than to exclude particular functions. On appeal (in which King, Underhill and Longmore LJ all gave judgments), Green J's construction of section 1H(2) was not sustained; each Lord Justice considered that the first instance judge had erred and his interpretation would undermine Parliament's clear intention. The three Lord Justices did however each agree that NHS England does have the power to commission PrEP. Whilst the judges gave slightly different reasons for their decision (which highlights the difficulty in the construction of the particular statutory regime), they all used the 2012 Regulations made under the Act as an aid to the Act's construction, with Longmore LJ stating that those Regulations are the "*best guide to the ambit of NHS England's responsibilities*".

**10. R (Palestine Solidarity Campaign Ltd (2) Jacqueline Lewis v Secretary of State for Communities & Local Government [2017] EWHC 1502 – appeal outstanding**

Cs applied for judicial review of statutory guidance issued by the SoS in regard to the investment strategy for the local government pension scheme pursuant to the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016. The guidance stated that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries was inappropriate unless the government had made formal legal sanctions. Cs' argument was based on two main grounds; that the guidance (1) lacked clarity and certainty; and (2) fell outside the proper scope of the SoS's statutory powers because it was issued for non-pension purposes. The first ground was rejected by the Court but the claim succeeded on the second ground.

On the first ground, Sir Ross Cranston held that there is no binding principle that ministerial guidance would be unlawful because it is materially unclear; in order to be unlawful it needed to be positively misleading or erroneous in law. That was not the case here.

On the second ground the Court found that the SoS's submissions failed to distinguish between his general power to give guidance and whether in doing so he exercised the power for a purpose for which it was conferred. The preamble to the Public Service Pensions Act 2013 made clear that it is to make provision for public service pension schemes; i.e. for "pensions purposes". The regulation-making powers conferred by the legislation can therefore only be exercised for those purposes. The power to make guidance under the Regulations can be no wider than those behind the making of the Regulations themselves. The Court found that the parts of the guidance in dispute were not issued for pension purposes but were a reflection of broader political considerations, including a desire to advance UK foreign and defence policy, to protect UK defence industries and to ensure community cohesion. Accordingly the SoS had acted for an unauthorised purpose and the challenged part of the guidance was unlawful.

**11. Mazarona Properties Ltd v Financial Ombudsman Service [2017] EWHC 1135 (Admin)**

Pursuant to an agreement with the then Financial Services Authority, Allied Irish Bank Great Britain (AIB) conducted a review of its sales of interest rate hedging products to certain customers. Where AIB reviewed a sale and found a breach of regulatory requirements it would make an offer of redress to the customer. C asked AIB to review the sale of an interest rate swap and AIB made an offer of redress which C rejected. AIB reviewed its redress decision but decided to withdraw the original offer on the basis that C would have entered into the swap even if there had been no regulatory breach. C complained to D. D (reversing the initial adjudication) concluded that consideration of AIB's review process fell outside the scope of its compulsory jurisdiction as it was neither a regulated activity nor an ancillary activity connected with a regulatory activity, so it could not consider the complaint. C challenged this decision by way of judicial review. Mitting J considered the scope of D's compulsory jurisdiction as set out in section 226 FSMA, and the rules set out in the "Dispute Resolution: Complaints" section of the FCA's Handbook. The Judge noted that D could only consider complaints about "*the provision of or failure to provide a financial service or a redress determination*". C's complaint about AIB's withdrawal of its redress offer was not a "*redress determination*" as it was not conducted under section 404 of the Act; nor was it a complaint about "*the provision of, or failure to provide, a financial service*". Mitting J rejected C's

submission that a payment of redress was a financial service and therefore a regulated activity – it would be a *"misuse of language to say that the provision of recompense for a wrong itself is a financial service"*. The complaint was therefore outside D's remit and Mitting J dismissed the claim.

## **12. Macris v FCA [2017] UKSC 19**

The FCA appealed against a Court of Appeal decision that notices which it had served on a bank had *"identified"* the bank's International Chief Investment Officer (the respondent), as provided for by section 393 (1)(a) FSMA. The respondent had been involved in the management of a trading portfolio which suffered substantial losses. Following an investigation, the FCA issued a warning notice, a decision notice and a final notice which referred to the failings of "CIO London management". The respondent argued that the notices clearly identified him as a third party within the meaning of section 393(1)(a) and accordingly, he should have been given a copy of the notices to enable him to make representations. The Court of Appeal had concluded that, although "CIO London management" could have referred to a number of people, on an objective basis, persons acquainted with the respondent or who worked in his area of the industry would reasonably have been able to identify him from the statements made in the notice. The Supreme Court had to consider the extent to which background facts could be considered when determining whether a person had been identified in notice. The majority judgment given by Lord Sumption SCJ (with whom Neuberger and Hodge SCJJ agreed) considered that a person was "identified" for the purposes of section 393(1)(a) if he is identified by name or by a synonym for him, such as his office or job title. In the latter cases, it should be apparent from the notice that it only applied to one person, and that person should be identifiable from information either in the notice or publicly available elsewhere. Resort to publicly available information was permissible to "interpret" (as opposed to "supplement") the language of the notice. The relevant audience was the public at large, rather than the specific industry sector. Accordingly, the respondent was not "identified" in the enforcement notices and was not entitled to third party rights under section 393 (1) (a) FSMA. In dissent, both Wilson and Mance SCJJ considered the relevant audience was instead market operators. Lord Wilson justified this on the grounds that the relevant harm to individuals which the regime was intended to prevent was damage to an individual's reputation within his industry, which could affect his employment prospects.

## **RATIONALITY**

### **13. Heathrow Airport Limited (Claimant) v Office of Rail and Road (Defendant), Transport for London and Secretary of State for Transport (Interested Parties) and Civil Aviation Authority (Intervener) [2017] EWHC 1290 (Admin)**

C applied for judicial review of the Office of Rail and Road's (ORR) decision to restrict the amount C could charge Crossrail and other transport companies for the use of a stretch of railway track and infrastructure connecting Heathrow Airport with central London, known as the spur. C considered that an exception within the relevant regulations applied, which would permit an infrastructure manager such as C to impose a higher charge than the direct cost of operating the train service if a project *"increase(d) efficiency and/or cost-effectiveness and could not otherwise be or have been undertaken"*. ORR did not believe that the exception applied, as C had not shown that there had been no realistic prospect of the spur being built without some of the long-term costs being recovered from charges levied on rail users. As a result, C was only entitled to recover from Crossrail and other users the direct costs it incurred from the operation of their services. C challenged that decision on the grounds that the decision was irrational on the facts, and that there was no evidence to support the ORR's conclusion. In considering whether that conclusion was rational and evidence based, C submitted that the "hands-off" or deferential approach afforded to expert regulator's judgments in previous cases was not warranted in this case as it concerned the ORR's evaluation of evidence as opposed to policy judgement. Ouseley J saw some force in that point, but stated that the decision still involved appraisals made in light of the ORR's specialist expertise in this area. Further, as the challenge was based on irrationality, there was necessarily a high hurdle for C to cross. That hurdle was not met in this case. Even if the Court had concluded that the ORR's decision was irrational, Ouseley J stated that he would have exercised his

discretion against quashing the ORR's decision so as to prevent C from benefiting from unjust enrichment. The application for judicial review was dismissed.

**14. R (Global Gaming Ventures (Southampton) Limited) (Claimant) v Southampton City Council (Defendant) and Aspers Universal Limited (Interested Party) [2017] EWHC 165 (Admin)**

C, a gambling company, challenged D's decision to grant a gambling licence to the interested party under the Gambling Act 2005 following a competitive bid process. The judicial review proceedings were not commenced until nearly three months after the decision. Baker J did not consider the explanation for the delay to be satisfactory but nonetheless went on to consider the merits of the claim. C alleged that the council had failed to take relevant considerations into account and failed to properly apply the relevant criteria during the competition. The Court concluded that D's advisory panel and licensing committee had approached their tasks in a conscientious manner and were entitled to reach the decision they did. When giving reasons for their decision the committee did not have to specify every last detail of the evidence they had considered as opposed to providing a clear indication of its nature and content. Despite D initially stating that it would evaluate applications using a particular methodology, it was entitled to conclude after the applications had been made that a broader evaluation would be appropriate.

**15. R (Soma Oil & Gas Ltd) v Director of the Serious Fraud Office [2016] EWHC 2471 (Admin)**

C applied for judicial review of an investigation by D into whether it had committed bribery and corruption offences. D had informed C that there was insufficient evidence of criminal behaviour in relation to one strand of its investigation, but that it could not close the investigation as it was still pursuing other strands. C was concerned at both the length of the ongoing investigation, which was causing it commercial difficulties, and D's failure to inform C of the nature of the "*other strands*" of its investigation. C argued that the Court should grant a mandatory order that the SFO end its investigation or compel it to make a final decision. Gross J concluded that the company faced a "*very high hurdle*" in seeking a judicial review of a decision of D in this context. D had a broad discretion in regard to investigations into suspected offences and in the instant case there was nothing exceptional or irrational about its conduct of the investigation to justify court involvement. Even if C's Article 8 rights were interfered with, as Gross J assumed without deciding, the interference in this case was proportionate.

**16. R (The Assisted Reproduction & Gynaecology Centre) v The Human Fertilisation & Embryology Authority [2017] EWHC 659 (Admin) – *awaiting decision on application for permission to appeal***

C, a fertility clinic licensed by D, applied for judicial review of D's decision to change the presentation of information and statistical data relating to licensed clinics which it published on its website pursuant to its statutory requirements. Given the specific circumstances of C, the decision would have an adverse impact on the success rates shown on its clinic profile page. The Court was required to consider whether the decisions promoted the policy and objects of the relevant legislation; whether D carried out sufficient inquiry in reaching its decisions and had regard to all legally relevant considerations; whether the respondent carried out adequate consultation and adequately considered responses; and whether the decision was rational and within the range of reasonable decisions. O'Farrell J found that the D had considered all relevant factors, that it carried out adequate consultation and that the decision fell within the range of reasonable decisions. The Court noted, among other matters, that board minutes identified consideration given and the reasons for the decisions, and where reasons were not set out, the board had the consultation results and the various arguments before it. There was no obligation on the part of D to adopt the majority view based on consultation feedback, but merely to give conscientious consideration to the views expressed. The claim for judicial review and relief was dismissed.

**17. Full Circle Asset Management Ltd (Claimant) v Financial Ombudsman Service Ltd (Defendant) and Joanna King & the Financial Conduct Authority (Interested Parties) [2017] EWHC 323 (Admin)**

C, an investment management company, applied for judicial review of D's decision to uphold an investor's complaint against it. C had provided a "medium risk" model portfolio investment service to the investor who was subsequently dissatisfied with the service and complained to D. Following a skilled person review into its business as required by the FCA, the review stated that the average risk level in the medium risk model portfolio provided to the investor was consistent with medium risk as per industry standards. The FCA accepted this finding. However, D found that the portfolio was not suitable to the investor's circumstances and had the inherent risks been made clear to her she would not have proceeded with the investment. C argued, amongst other things, that if D was going to depart from the views of the skilled person review (which had been accepted by the FCA) then it had to explain why and that D's alleged departure from the regulator's standard without justification was an error of law. Nicol J noted that D had found that the term "medium risk investor" was too vague a description for the investor and that C should have investigated more closely what the investor's requirements were. D had not disagreed with the skilled person review's conclusion that overall the portfolio recommended to the investor was "medium risk" – D had concluded that the "medium risk" portfolio was just not suitable for this investor. There was therefore no departure from the "regulator's standard" as it had been termed and so there was no obligation on D to explain why he differed from such a standard. The Court also noted that D was not confined to investigating what had been identified as the nature of the complaint on the complaint form. The Court dismissed the judicial review.

**18. R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 (Admin)**

C, a secure tenant of a housing estate, applied for judicial review of D's decision to authorise the rebuilding of properties on the estate, which meant displacing all tenants and owners and demolishing the existing properties, instead of refurbishing those properties. C raised seven grounds, including that D had failed to meet its own mandatory criterion that the scheme should have a positive net present value (NPV) and as such D had acted unlawfully; the consultation process was unlawful and unfair; and the interference with C's ability to rely upon a statutory right to buy constituted a breach of his A1P1 rights. Holgate J's starting point was the very broad margin of discretion that D enjoyed to manage its houses, which the Court considered extended to D's decision-making on how much to investigate particular issues, D's carrying out of the consultation exercise, and D's evaluation and weighing of the pros and cons of the options. Ultimately it was decided that pursuant to section 31 of the Senior Courts Act 1981, it was highly probable that the outcome would have been the same or not substantially different whether or not the particular option had been adopted. It was not irrational or unlawful for D to rely upon the advice of its experts which showed a positive NPV for the particular option, where that advice was not based on any error of law and was not so obviously erroneous that D knew, or ought to have known, that it was acting irrationally. The consultation process was not unlawful, although D had failed to state in its consultation document that the real constraint on refurbishment was a lack of funding, this did not validate the quashing of the decision unless there had been unfairness or a failure to ensure involvement in the decision-making process. With regard to C's A1P1 rights, an absolute right to buy did not exist as the potential exercise of that right was conditional upon the tenant continuing to hold a secure tenancy. Under the Housing Act 1985, this could be brought to an end by redevelopment. Regardless, C's right to buy was not an "obviously material" consideration and D was not obliged to take it into account when making its decision.

**19. R (London School of Science & Technology) v Secretary of State for the Home Department [2017] EWHC 423 (Admin) – awaiting decision on application for permission to appeal**

C sought judicial review of a SoS's decision to revoke its tier-4 and tier-2 visa sponsorship licences following her decision that the college had not complied with its duties as a sponsor because of a failure properly to assess the academic progression of the students when accepting them. Sara Cockerill QC had to consider whether the SoS had the scope to review C's assessment as to

academic progression (or rather whether it was an evaluative academic judgment to be made by the sponsor, ie in this case C); whether her decision to revoke the licences was unreasonable; and whether she had fettered her discretion in holding that the revocation of the tier-4 licence would entail simultaneous revocation of the tier-2 licence. It was concluded that, under relevant guidance, the SoS was entitled to exercise her judgment on the question of compliance (including academic progression) and that her decision was not limited to a public law review but would also have substantive content. The structure for decision-making was founded in detailed and clear guidance, and provided checks and balances to ensure that the SoS could not take an unreasonable decision without risking it being challenged and if wrong in terms of public law, quashed. The Court found that the SoS's concern over C's lack of assessment was justified and her reasons were rational, took careful consideration of the facts and reflected the guidance. Finally, it could not be said that the SoS's policy offended against the legal principles on fettering discretion and although C had requested that only its tier-4 licence be revoked, it had never provided reasons why, which suggested an implied acceptance that the case was not exceptional. The application for judicial review was refused accordingly.

**20. R (Justice for Health Ltd) (Claimant) v Secretary of State for Health (Defendant) & (1) NHS Confederation (2) British Medical Association (Interested Parties) [2016] EWHC 2338 (Admin)**

C applied for judicial review of D's decision to introduce new terms and conditions of employment for junior doctors in order to deliver a "seven-day NHS." C argued that D did not have power or jurisdiction to impose such a contract; that even if he had the power, he had violated the public law principle of transparency and good administration; and the decision to introduce the contract on the basis that it could reduce the higher mortality rate occurring across the NHS at weekends was not based on any credible evidence and was therefore illogical, irrational and unlawful. Green J concluded that D had broad statutory powers including participating in negotiations surrounding the contract, facilitating agreement between employers and employees and concluding the terms of a national NHS staffing contract. The decision did not violate the principles of transparency or good administration, when all the relevant material is read objectively and in its proper context. The evidence on weekend mortality rates met proper research standards and the fact that there was a conflict of view between reputable professionals on the matter was not sufficient to make the decision irrational.

## **LEGITIMATE EXPECTATIONS**

**21. Infinis Energy Holdings Ltd v HM Treasury and another [2016] EWCA Civ 1030**

C, a UK generator of renewable energy, appealed against the High Court's ruling upholding Parliament's decision to remove the exemption for renewable source electricity from the climate change levy with immediate effect. The appellant contended that the decision breached the EU law principles of foreseeability, legal certainty, the protection of legitimate expectations and proportionality. Dismissing the appeal on all grounds, in a judgment to which all the members of the court (Sir Terence Etherton MR and Lloyd Jones and Sales LJ) contributed, the Court considered the line of authority concerning the requirements for a protected legitimate expectation to arise and held that the same standards apply to the related principles of legal certainty and foreseeability. In the instant case, no legitimate expectation arose - HM Treasury and HMRC had not indicated that the exemption would apply indefinitely or that there would be a notice period prior to it being changed. Finally, the principle of proportionality had not been breached. The Court held that, in the absence of a legitimate expectation, a reduced income for individuals or companies had little or no weight as compared to the public interest judged by Parliament, which should be afforded a wide margin of discretion when balancing factors to decide whether to make tax changes.

**22. R (The Prudential Assurance Company) v HMRC [2017] EWHC 1484 (Admin)**

C renewed its application for permission for judicial review of D's decision not to treat it as having made a valid claim for double tax relief on overseas dividend income in respect of its accounting period ending 31 December 2009. C contended that it had a legitimate expectation that it would be

entitled to tax relief, arising from D's practice of meeting C's claims by amending C's tax returns to reflect the correct accounting treatment.

Sir Ross Cranston held that no legitimate expectation arose because there was "*no clear, unambiguous and unqualified representation*" by D that C did not have to make a valid claim for double taxation relief in 2009. That was because D had made clear, in without prejudice correspondence in 2012, that relief would only be available where a proper claim had been made in accordance with the relevant statutory conditions. C had, in subsequent correspondence, implicitly accepted that it would have to make a valid claim by revising its double tax relief claim by 31 December 2015 for the year 2009. It could therefore not be said that D had agreed to treat C's 2009 open return as including a valid claim for the double taxation relief.

## HUMAN RIGHTS

### 23. **R (British American Tobacco UK Ltd and others) v Secretary of State for Health [2016] EWCA Civ 1182**

The Cs, tobacco product manufacturers, appealed against the High Court's refusal of their application for judicial review of the Standardised Packaging of Tobacco Products Regulations 2015. The High Court had dismissed the appellant's arguments that Directive 2014/40/EU (which underpinned the Regulations) was illegal; that the SoS had erred in according only limited weight to the expert evidence produced by the tobacco product manufacturers during the consultation process; and that the Regulations restricted the appellant's intellectual property rights without compensation. In a judgment to which each of its members (Lewison and Beaston LJJ and Sir Stephen Richards) contributed, the Court dismissed the appeal on the intellectual property aspects of the case, concluding in particular that the appellants had not been deprived of their Community trademarks. It found that the Regulations amounted to "*control of use*" rather than a "*deprivation of use*" under A1P1. Additionally, the judge had not erred in his conclusions on proportionality. The UK was fully entitled to regulate the packaging of cigarettes pursuant to Article 24 (1) and Article 24 (2) of the Directive.

Notably, the Court did not endorse Green J's recommended process for dealing with complex technical evidence in judicial review proceedings; the Court should not normally need to be drawn into the resolution of technical disputes between experts.

## PROCEDURAL FAIRNESS

### 24. **Zai Corporate Finance Ltd (Appellant) v AIM Disciplinary Committee of the London Stock Exchange Plc (Respondent) & London Stock Exchange Plc (Interested Party) [2017] EWCA Civ 1294**

C, a nominated advisor in relation to the Alternative Investment Market (AIM), or NOMAD, was subject to disciplinary proceedings brought by the London Stock Exchange following an alleged breach of the AIM rules. The dispute in this case concerned whether the hearing before D should be held in public, as contended by C, or in private, as D directed. The issue turned on the wording of rule C22.1 of the AIM Disciplinary Procedures and Appeals Handbook – May 2014 which provided that D would "*usually*" conduct hearings in private, although a NOMAD "*has the right to ask for such hearing to be conducted in public*". It further provided that a NOMAD "*requiring such hearing to be conducted in public shall notify the Chairman*" at least five days in advance of the hearing.

C had written to D to request that the hearing should be held in public, but gave no explanation for this request, with the result that D's Chairman did not consider a departure from Rule 22.1 to be justified. C argued that Rule 22.1 should be construed as meaning that it had a right to a public hearing, that D's exercise of its discretion was flawed, and that D had breached C's Article 6 ECHR rights. Sir James Munby held that the more natural meaning of the Rules was that a NOMAD was entitled to request a public hearing, but that D had a discretion as to whether to grant that request. Giving a NOMAD an absolute right to demand a public hearing would make no sense in the context

of the regulation of a commercial market, as a public hearing could have reputational and other adverse consequences where third parties are concerned. In this case, D's exercise of its discretion had been entirely sensible.

On the Article 6 point, the Court found that even if C's Article 6 rights had been engaged, they had not been breached, as a hearing may be held in private where publicity would prejudice the interests of justice.

**25. R (Association of British Insurers) v Lord Chancellor & Association of Personal Injury Lawyers (Interested Party) [2017] EWHC 106 (Admin)**

C, the Association for British Insurers (ABI), sought permission to apply for judicial review of the Lord Chancellor's (LC) decision on 7 December 2017 to announce the result of her review of the discount rate for awards of personal injury damages by 31 January 2017. C argued firstly that the decision was inconsistent with a legitimate expectation engendered by the LC's promises to publish a response to consultation exercises from 2012 and 2013. Secondly, C argued that it would be an unlawful retrospective use of the relevant power to exercise it without putting transitional provisions in place regarding pending claims and claims that had arisen but had not yet become the subject of litigation. The ABI sought an injunction to restrain the LC from exercising her statutory power, and a declaration that without transitional provisions, her exercise of the power would be unlawful in regard to some cases. Baker J held that while C could have a legitimate expectation of a response to the previous consultation exercises, the essence of C's case was that it should have had an opportunity to make representations. However, the Court held that it was not arguable that publication of a consultation response must mean a further opportunity for consultees to provide input, meaning C's first ground failed. Baker J emphasised the principle that the duty to re-consult arises only where there is a change in fundamental circumstances, which the ABI had not argued. On the second ground, Baker J considered that the LC had no power to make transitional provisions; it would be for the Courts, not the LC, to decide on the applicability of any new rate to existing claims. Despite having refused permission, the Court went on to consider whether it would have granted applying the American Cyanamid principles as adapted to public law situations (see *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin)). It noted that there was a strong public interest in allowing a public authority to continue to apply a policy in a particular sphere, and concluded it would not have granted the relief sought.

**26. R (Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin)**

C applied for judicial review of D's decision to uphold a complaint made by a husband and wife in relation to two life insurance policies with C. After cancelling the first policy, following his separation from his wife, the husband subsequently applied for a single life insurance policy, but he did not disclose that he had been referred for psychiatric assessment and was awaiting a CT scan. An adjudicator upheld the single life policy claim on the basis that the husband's misrepresentations were innocently made. The matter was referred to D who upheld the adjudicator's decision contradicting the usual legal position. C brought judicial review proceedings to quash D's decision and D consented to the quashing order to the extent of inadequacies in the D's reasons. Jay J allowed the judicial review on this basis. The Court found that D, while not bound by relevant law and practice, failed to explain why she was departing from the rules and principles set out in the governing law and practice in this case. D's determination was therefore flawed for inadequacy of reasons as had been conceded by C.

**27. R (Durand Academy Trust) (Claimant) v Office for Standards in Education, Children's Services & Skills (Defendant) & Secretary of State for Education (Interested Party) [2017] EWHC 2097 (Admin) – *awaiting decision on application for permission to appeal***

C, a school, applied for judicial review of a report by the Office for Standards in Education, Children's Services and Skills (OFSTED) which concluded that the school was "*inadequate*" and recommended that the school be placed into "special measures". The school had previously been

judged "outstanding" in 2008 and it subsequently received a "good" rating in 2013. The school argued (1) that OFSTED's assessment of it as inadequate was so "*vitiated by unfair and arbitrary evaluations, factual errors and...a relentless accentuation of the negative and elimination of the positive as to be Wednesday unreasonable*"; and (2) the internal complaints procedures were unfair given that they prohibited substantive challenges to reports where a school was determined to have a "serious weakness" or to require "special measures". OFSTED justified this position on the basis that such reports were subject to additional quality assurance processes. McKenna J concluded that the internal complaints procedure which failed to allow the school to pursue any substantive challenge to a report it considered to be defective, on the basis that the decision maker's processes were so effective as to be unimpeachable, was neither rational nor fair and vitiated the report. The Court ordered that the report be quashed accordingly. In light of this conclusion, the Court did not express a concluded view on the reasonableness or rationality of the report.

## TAX

### **28. J P Whitter (Waterwell Engineers) Ltd v Revenue & Customs Commissioners [2016] EWCA Civ 1160 – appeal outstanding**

C appealed against HMRC's cancellation of its registration under the Construction Industry Scheme (CIS) which had allowed it to receive payments from contractors without deduction for tax. The impact on C of losing its registration would be severe; it would lose a major customer and over 60% of its turnover, and would have to make the majority of its employees redundant. Although its appeal to the FTT was successful, the decision was overturned by the UT who re-instated the cancellation of registration to the CIS. On appeal, C argued that the statutory scheme should be read as requiring HMRC to consider the impact of cancellation when making its decision and that both common law and human rights (in particular A1P1) required that its discretion should be exercised proportionately. Henderson J concluded that Parliament had not intended for HMRC to take into account the impact of cancellation on a business. If that had been the intention, this would have been expressly stated in the "*prescriptive and closely textured*" statutory regime. He considered that the CIS legislation as a whole was proportionate given the procedural safeguards contained within it and was compliant with A1P1. Neither was the common law principle of proportionality of any assistance to C. The Court found that while an individual outcome may be harsh, a degree of harshness in a regime designed to counter tax evasion could not be considered disproportionate.

### **29. R (Ingenious Media Holdings plc and another) v Commissioners for her Majesty's Revenue and Customs [2016] UKSC 54**

The appeal concerned D's decision to disclose information on film tax relief schemes which C had promoted to financial journalists. The information was subsequently published in The Times. At first instance and in the Court of Appeal, it was held that D's disclosure was not irrational and had been made for a legitimate purpose. The Supreme Court considered the scope of the duty of confidentiality in section 18 of the Commissioners for Revenue and Customs Act 2005 and concluded that the correct interpretation was that disclosure was only permitted to the extent reasonably necessary for D to fulfil its primary function. A broader interpretation, as argued for by D, would mean that the protection afforded to the taxpayer by D's duty of confidentiality would be "*very significantly eroded by words of the utmost vagueness*". While the lower courts had approached the case as a review on public law principles of an administrative act, Lord Toulson considered the case to be in substance a straightforward claim for breach of a duty of confidentiality. It was therefore for the Court to decide for itself whether the facts amounted to a breach of confidentiality, even where a public body was involved. The fact that D's disclosure of the confidential information had been "off the record" and not in anticipation of the comments being reported was not a sufficient justification for disclosure. Accordingly, D's decision to disclose information about the group's tax avoidance scheme constituted a violation of the duty of confidentiality pursuant to section 18 of the Act.

### **30. PML Accounting Ltd v Revenue & Customs Commissioners [2017] EWHC 733 (Admin)**

C, a company, challenged HMRC's refusal to delete work product derived from information and documentation provided in response to an information notice and to undertake not to make use of the work product for any future purpose. HMRC had considered information provided by C in response to a notice to be incomplete and had issued a penalty notice. C appealed against the penalty to the FTT, which concluded that the notice was invalid. As a result no penalties should be imposed for non-compliance and HMRC was ordered to return the documents and not to rely on them further. HMRC complied with the order but retained work product from the documentation provided which it sought to use in a separate criminal investigation.

C advanced two broad arguments of challenge: illegality and breach of Article 8 ECHR. Sir Ross Cranston granted permission in relation to the illegality ground only. In relation to illegality, C submitted that D had unlawfully retained substantial information and work product derived from the material provided by C, and had refused to confirm that it would not use this material in future. C argued that even if the FTT had lacked jurisdiction to consider the validity of the notice, absent any appeal by HMRC to the UT, the decision was final and HMRC was barred from raising this issue by virtue of the doctrine of issue estoppel or *res judicata*. C also submitted that since HMRC did not challenge the FTT's decision it had a legitimate expectation that HMRC would comply with the decision. The Court concluded that the FTT had lacked jurisdiction to consider the validity of the notice. However, regardless of the FTT's jurisdiction, the Court found there was no public law illegality and no basis for a legitimate expectation, as the FTT had said nothing about work product and C had identified no other basis on which HMRC was obliged to destroy the work product. Further, the doctrine of issue estoppel and *res judicata* did not apply in the ordinary way in tax cases because of public interest factors.

In relation to Article 8, the company argued that HMRC was unlawfully in possession of its commercial information and this constituted an unlawful, unjustified and disproportionate infringement of its right to private life. The Court did not accept this argument as the information had been returned to the company and HMRC had said it would not rely on it. In any case, interference with its Article 8 rights would have been justified in the context of HMRC's ongoing investigations into the alleged fraud.

### **31. R (Archer) v HMRC [2017] EWHC 296 (Admin) – appeal outstanding**

C, a taxpayer, applied for judicial review of D's decision letter which threatened to bankrupt him on the basis of a number of alleged debts stemming from two (ineffective) tax avoidance schemes. C argued that D's threats were unlawful in circumstances where the closure notices relied on by D for the debts did not state the amounts of tax that were payable. C did not contest that the closure notices were valid and effective; his central argument was that they had failed to amend his tax returns as envisaged by the relevant legislation (the Taxes Management Act 1970 (TMA), section 28A). Jay J found that section 28A TMA requires that a closure notice itself amend the taxpayer's return by stating the amount of tax due (ie assess the taxpayer's tax liability). Thus, the two closure notices in issue were defective in that they did not contain amendments to the returns. The Court then considered whether section 114(1) TMA could "*save the error*" as that section, essentially, provides that any "*purported assessment*" or "*other proceeding*" shall not be "*deemed to be void or voidable*" if certain conditions are met. As there had been no relevant assessment, the Court considered whether there had been a "purported assessment". This raised the public law issue as to whether a statutory term of art such as "assessment" or "other proceeding" could include a purported determination vitiated by public law error. The Court interpreted section 114(1) TMA as specifying that purported assessments shall not be quashed, or declared void or voidable, in certain specified circumstances and where this applies, an assessment should be treated as legally valid notwithstanding that it may be possessed of *Anisminic*-type error. In the instant case, the Court found that there had not been a purported assessment. Finally, the Court found that C should have appealed the closure notices and the defects in the closure notices would have been cured on appeal. As C had an effective right of appeal which he should have exercised, the judicial review was dismissed as being an abuse of process.

As part of its task the Court was also required to consider whether it could properly resolve the factual disputes between the parties around whether C's online tax returns and self-assessments had been amended. Reiterating the general proposition that the resolution of factual disputes is not ordinarily carried out in judicial review proceedings, particularly where cross-examination has not

been ordered, the Court nevertheless recognised that there was no jurisdictional bar to it doing so if it thought it should, commenting that the days have long since passed when the Administrative Court accepted D's version of events unless it was implausible.

## COMPETITION

### **32. Intercontinental Exchange, Inc. v Competition and Markets Authority [2017] CAT 6**

C applied for review of certain decisions by the CMA under s120 of the Enterprise Act 2002. The decisions included (i) a CMA Report (the Report) which found that C's purchase of the entire issued share capital of two companies and their subsidiaries (the Transaction) was likely to result in a substantial lessening of competition (SLC) under section 35 of the Act; and (ii) a decision issued by the CMA directing the companies which were merging to cease implementation of an agreement (the New Agreement). The CMA imposed a final order requiring the sale of one of the merging companies through a divestiture process and the unwinding of the New Agreement. C challenged the lawfulness of the Report and the CMA's final order on a number of grounds. While dismissing C's other grounds, the CAT concluded that the Report contained a serious failure as it provided no reason as to why the requirement to unwind the New Agreement would help ensure the effectiveness of the divestiture remedy. The CAT quashed the part of the Report which required the unwinding of the New Agreement and submitted it to the CMA to reconsider. The CAT upheld the decision directing the parties to cease implementation of the New Agreement pending the CMA's reconsideration of the issues as to the CAT's findings on the unwinding of the New Agreement. In its judgment, the CAT considered the appropriate intensity of review required in the proceedings, in particular where the CMA has ordered divestiture of property or in the context of a vertical merger.

### **33. British Telecommunications Plc (Appellant) v Office of Communications (Respondent) & (1) Virgin Media Ltd (2) CP Group ((1) TalkTalk Telecom Group Plc (2) Vodafone Ltd (3) Colt Technology Services (4) Hutchison 3G UK Ltd) (3) Gamma Telecom Holdings Ltd (Interveners) [2017] CAT 17 [no reasoned judgment available]**

BT appealed against certain determinations made by OFCOM in a document entitled "*Business Connectivity Market Review - Review of competition in the provision of leased lines*". The document defined a single product market for certain services of all bandwidths (CISBO services) and defined four relevant geographic markets (the Central London Area; the London Periphery; Hull and the Rest of the UK). The document also made determinations in regard to the extent of BT's core network and proposed certain remedies including a remedy known as Dark Fibre Access (DFA). BT argued that there were errors concerning the market definition and errors in regard to the remedies imposed. The CAT concluded that OFCOM had erred in (1) determining that it was appropriate to define a single product market for CISBO services of all bandwidths; (2) determining that the Rest of the UK comprised a single geographic market; and (3) its conclusion relating to the boundary between the competitive core areas and the terminating areas of BT's network. The CAT quashed all three decisions and remitted the matters to OFCOM for reconsideration.

### **34. British Telecommunications Plc v (1) Office of Communications (2) Sky UK Ltd (3) TalkTalk Telecom Group Plc (4) The Altnets: Cable & Wireless Worldwide Ltd, Virgin Media UK Ltd, Verizon UK Ltd; TalkTalk Telecom Group Plc v (1) Office of Communications (2) British Telecommunications Plc and Gamma Telecom Holdings Ltd (Intervener) [2017] EWCA Civ 330**

Two telecommunications providers (BT and TalkTalk), appealed against different parts of orders made by the CAT. The appeals to the CAT concerned a determination by OFCOM of disputes referred to it under the telecommunications competition regime. OFCOM had determined that BT's charges for Ethernet services to communication providers such as TalkTalk were excessive and breached a regulatory control known as a cost orientation condition (HH3.1) which OFCOM had

imposed on BT. Pursuant to section 190(2) of the Communications Act 2003, OFCOM imposed a new cost methodology for calculating its charges (DSAC) on BT and directed it to make repayments to the providers. OFCOM did not however direct BT to pay interest on those repayments, finding that this was excluded by clause 12.3 of the contracts between BT and the providers. TalkTalk appealed against OFCOM's failure to direct BT to pay interest and argued that a fully allocated cost (FAC) methodology should have been employed instead. The CAT largely upheld OFCOM's determination, except in respect of the interest issue where the CAT held that clause 12.3's purported exclusion of interest payments was inconsistent with regulatory objectives. The CAT therefore concluded that OFCOM's section 190(2) direction should have included an interest award. BT appealed to the Court of Appeal on the interest issue, arguing that (i) OFCOM's power to order repayment of the sums overcharged was restricted to the period after the dispute was notified to it; (ii) OFCOM should not have ordered repayment since it had not previously indicated that its cost orientation methodology was wrong; and (iii) there was no jurisdiction under section 190(2) to order the interest payment and the CAT had not had proper regard to clause 12.3. TalkTalk appealed to the Court of Appeal on the grounds that FAC methodology should have been used. The Court (composed of Arden, Lloyd Jones and Sales LJ) dismissed both appeals. In relation to BT's appeal, the Court held that national regulatory authorities were authorised to take effective action in response to past breaches of significant market power conditions. OFCOM's power to order the repayments before the dispute was notified to BT was derived from section 190(2)(d) and relevant provisions under Directive 2002/19 and Directive 2002/21. On the question of interest payments, the Court found that clause 12.3 did not preclude BT from making interest payments and the CAT was correct to hold that interest should be paid. In relation to TalkTalk's appeal, the Court held that OFCOM was entitled to make an evaluative judgment about the appropriate cost orientation methodology to impose on BT and it had done so within the proper ambit of HH3.1.

## PROFESSIONAL DISCIPLINE

### 35. **Baker Tilly UK Audit LLP and others v Financial Reporting Council and others [2017] EWCA Civ 406**

Baker Tilly UK Audit LLP and two of its partners appealed against the dismissal of their claim for judicial review of a decision to deliver a formal complaint under the Financial Reporting Council's (FRC) disciplinary scheme for accountants and auditors.

C had audited a company and delivered an unqualified report on its group accounts. Following an investigation into the accuracy of the company's financial statements and the underlying audit work, the FRC's Executive Counsel delivered a formal complaint in respect of C's work to the FRC's conduct committee. Executive Counsel had found that a hearing was desirable in the public interest because there had been "*a non-trivial failure to act with professional competence or due care*" within para.12 (1) (f) of the relevant FRC guidance.

C unsuccessfully sought judicial review of the decision to bring a complaint against them. On appeal to the Court of Appeal, C contended that the relevant wording of the FRC's guidance should be quashed, on the basis that it was incompatible with the definition of "misconduct". Arden, King and Sales LJ dismissed the appeal, holding that the reference in para.12(1)(f) of the guidance to a "*non-trivial failure to act with professional competence*" did not refer to the same basic definition of "*misconduct*" in the disciplinary scheme. The sub-paragraphs of para.12(1) of the guidance were concerned with matters indicating that the misconduct alleged was more grave or serious than a case of basic misconduct. On that interpretation, not every allegation of misconduct meeting the evidential test would be one of special weight meeting the public interest test.

### 36. **Peter Rhys Williams v Solicitors Regulation Authority [2017] EWHC 1478 (Admin)**

C, a solicitor who had been struck off, appealed against a finding of misconduct against him by the Solicitors Disciplinary Tribunal (SDT). C's former firm reported to the SRA that C had devised and sought to implement a scheme to defraud the client's creditors and had misled/caused his client to mislead various third parties. The SDT found that C had made five false representations to third

parties, and (variously) that he had acted dishonestly, without integrity, and not in a way that maintained public trust. However, it dismissed the case that C had devised the fraudulent scheme in its entirety. C argued before the Court that none of the matters which were the subject of adverse findings had been pleaded, key allegations had not been put to him in cross-examination before the SDT or mentioned in closing, and each finding was in any event irrational. Carr J held that in respect of solicitors' regulation, the concepts of dishonesty and want of integrity are "*separate and distinct*", in that want of integrity "*does not require the subjective element of conscious wrongdoing*". Applying the principle that interference with a specialist tribunal's findings will not be made lightly by the Court unless those findings are plainly wrong or there has been some serious procedural irregularity, it was concluded that there was no basis for interference with the SDT's decision in regard to C's lack of integrity in light of his false representations. However, one particular finding of dishonesty was held to be unfair; C was not cross-examined or questioned on this issue, and it was not mentioned in the closing argument. The Court stressed that it was necessary in the circumstances for C to be challenged directly on the point so that his evidence could be tested properly before a finding of dishonesty could be made. Accordingly the appeal was allowed in part. (In a subsequent judgment in this matter, [2017] EWHC 2005 (Admin), the Court addressed the test for when the issue of sanction should be remitted to the Tribunal or determined by the Court, finding that in this case there were compelling reasons for the Court to determine sanction.)

### **37. R (Pitt and Tyas) v General Pharmaceutical Council [2017] EWHC 809 (Admin)**

C, two pharmacist members and officials of the Pharmacists' Defence Association, applied for permission to challenge by way of judicial review the "Standards for Pharmacy Professionals" which had been adopted by D and were due to come into effect on 1 May 2017. C argued that the decision to agree the Standards was unlawful because the Standards (1) needed to be met at all times and not only during working hours; (2) were contrary to ECHR Articles 8 and 10; and (3) were uncertain. Recognising D's broad discretionary power, Singh J found that the Standards were not ultra vires and in particular, Cs interpretation of them was wrong. Cs were not entitled to rely on the ECHR as they could not be regarded as victims of the alleged violations of Articles 8 and 10. It was impossible to say that the new standards were inherently and necessarily incompatible with those articles. Whether the application of the Standards to any particular case would breach an individual's rights would depend on the facts of the case. Although there are recognised exceptions where "a potential victim" may successfully rely on the rights in the ECHR, none of those situations are analogous to the present case. Furthermore it was not arguable that the Standards were void for uncertainty. The concept of legal certainty does not require absolute precision, but rather requires that laws (and by analogy other instruments that set out standards to regulate human behaviour) should be sufficiently certain that a person can reasonably know, if necessary after taking advice, what they must do in regulating their affairs so as to comply with them. The application for permission for judicial review was refused.

### **38. Bar Standards Board v Stephen Howd [2017] EWHC 210 (Admin)**

C, a barrister, appealed against a decision of the Disciplinary Tribunal of the Council of the Inns of Court that he was guilty of professional misconduct following his behaviour towards four female colleagues at a chambers party. The Tribunal rejected the argument that C's medical condition had contributed to his conduct and imposed on him an £1,800 fine. Lang J found that the Tribunal had misunderstood and misapplied the evidence regarding C's medical condition when determining that his condition had not contributed to his behaviour at the party. Whilst the Tribunal was correct to find that Core Duty 3 under the relevant Code of Conduct ("*act with honesty and integrity*") applied to C at the chambers event as it was a marketing event directed at clients, it had erred in its application of the relevant Guidance on Core Duty 3. Whilst C's behaviour had been inappropriate, it did not constitute a lack of honesty or integrity and breach of Core Duty 3. The Court held that the charges should therefore have been dismissed. On the breach of Core Duty 5 (behaving in a way "*likely to diminish the trust and confidence which the public places in you or in the profession*"), the Court found that if the public were aware that C's conduct was a result of his medical condition, it was unlikely to diminish their trust and confidence in the profession, provided he was fit to practice. On the facts and on consideration of the Bar Standards Handbook (which includes the Code) and

the case law on the requirement that misconduct must be serious, it could not be said that C's behaviour reached the threshold for serious professional misconduct and the appeal was allowed accordingly.

**39. R (Chinwe Cecilia Oriaku) v Nursing & Midwifery Council [2017] EWHC 235 (Admin)**

C, a nurse, applied for judicial review of D's failure to refer to its Investigating Committee (IC) her allegation that the entry of certain nurses on D's register had been fraudulently procured or incorrectly made, and/or alternatively for the IC's failure to consider her allegation and give her a reasoned decision. Permission was "rolled-up" with the substantive hearing. Lang J refused permission on the basis of delay as C had issued the proceedings four months after D's decision to dismiss the nurse's complaint and had not provided any valid explanation for the delay. Furthermore, the decisions which she was really seeking to challenge had been made as long ago as 2010. Additionally, there was no good reason for the Court to extend time and it would be detrimental to the good administration of D to do so. On C's first ground, the Court found that D was only required to refer allegations relating to nurses on the register at the time of the complaint (and 10 of the nurses complained about were not registered at the time) and where the complaint was clearly without basis, D was entitled to dismiss it without referring it to the IC. D had therefore exercised its powers lawfully and so C's second ground also failed. The Court refused the application for judicial review.

**40. R (Mandic-Bozic) v British Association for Counselling & Psychotherapy (Defendant) & United Kingdom Council for Psychotherapy (Interested Party) [2016] EWHC 3134 (Admin)**

C, a psychotherapist, sought judicial review of D's decision to take disciplinary action against her, following complaints made by a patient. The patient had also made identical complaints to the interested party (UKCP), a separate body but one that also regulated the same field. D had refused to stay its proceedings pending the conclusion of the UKCP's proceedings in spite of the standards set by the body accrediting both organisations, which required them to recognise each other's decisions in their decision-making. C argued that D's decision to bring proceedings against her amounted to abusive duplicative action and was therefore unlawful. Mostyn J concluded that cause of action estoppel applied, taking the view that the patient complainant was the real prosecutor in both proceedings, and as such both parties and the subject matter of the proceedings were identical. To allow D to bring proceedings against C would amount to an abuse of process. Alternatively, it would also amount to "*collateral attack*", as it would be manifestly unfair to C to be exposed to the same claim on two occasions.

**Herbert Smith Freehills LLP**