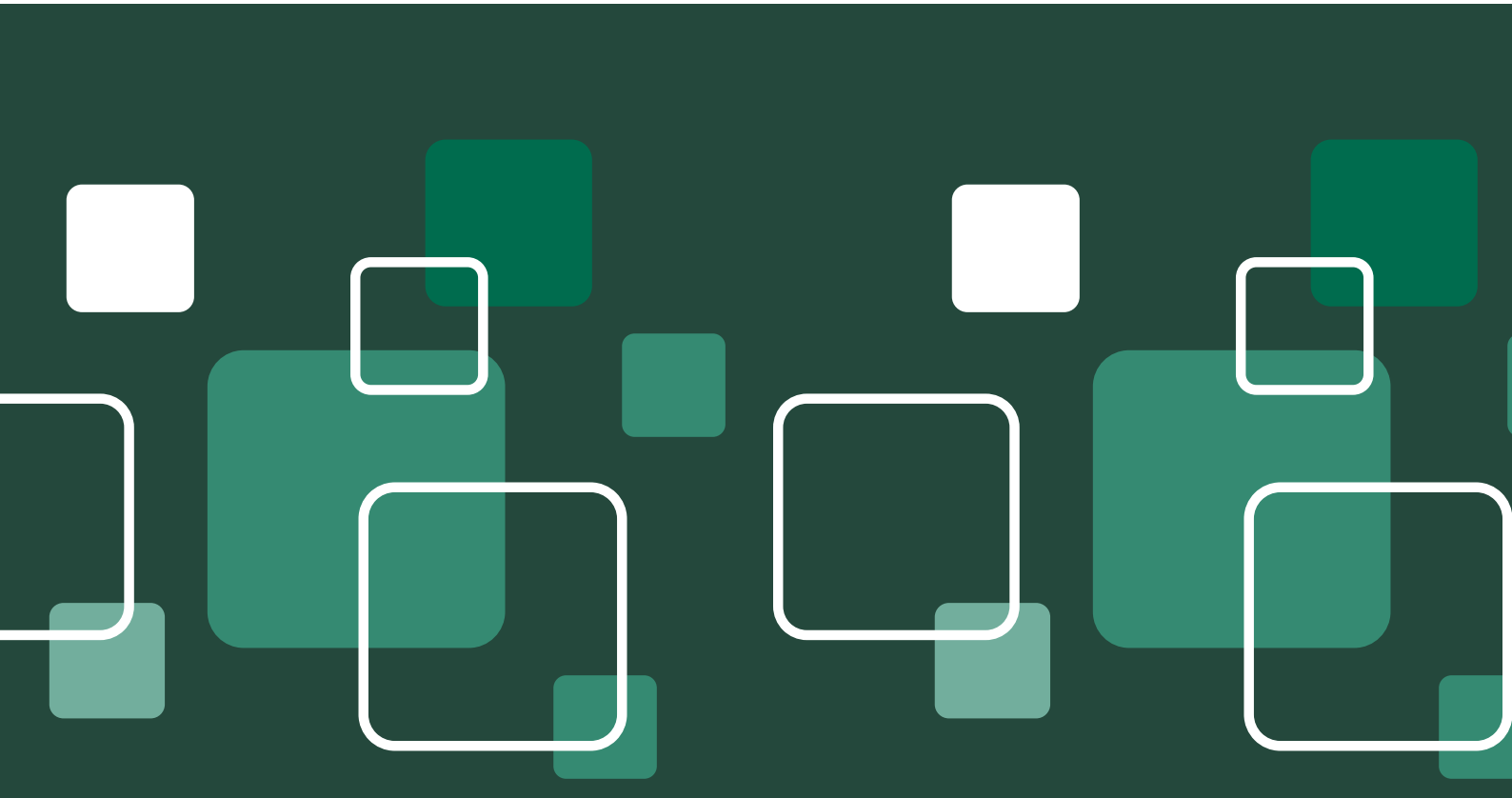
OLD SQUARE CHAMBERS

Professional Discipline and Regulatory Newsletter



Volume 3

IIt is my pleasure to introduce this edition of the Old Square Regulatory Newsletter. This time of year has given us as a team an opportunity to reflect on some of the trends emerging in professional regulation. In this edition I look at the theory and practice of defence costs orders in first instance proceedings, with a particular focus on ***CAT v Flynn Pharma*** [2022] UKSC 14, and ***SRA v Tsang*** [2024] EWHC 1150 (Admin).

The occasionally dry topic of costs is off-set by Tara O'Halloran's excellent appraisal of the landscape of professional regulation over the last year or so. Tara's focus on the dangers of over-regulation and the need for compassion and sense to be applied at all stages of the process is a sentiment shared by many in the sector, and is perhaps part of the feeling underpinning the PSA's recent 'Right Touch Regulation' review.

Joanne Twomey-Calder rounds the edition off with a helpful case digest focussing on two cases this year that have expressed anew fundamental concepts in professional regulation. In the case of ***PSA v GMC and Garrard*** [2025] EWHC 318 (Admin) the High Court provided guidance on cross-admissibility of evidence, whilst ***Alam v GMC*** [2025] EWHC 2907 (Admin) is a reminder of the fundamental principles of charging and proving dishonesty.

As ever, please do get in touch with us if you have any queries or issues arising form the newsletter, or would just like to comment.

As this is our last edition of the year, I wish you all a good festive season and a Happy New Year.

Tim Grey

Costs Against Regulators in Disciplinary Proceedings - Where Are We Now?

Tim Grey

It is sometimes said that costs ought not to be borne by a Regulator, (whether by not making costs awards against unsuccessful members or by making costs awards against unsuccessful Regulators). The rationale, which owes little to the current state of the law, goes something like: the costs will be passed on to the membership and it isn't fair that members are penalised for the sins of the few, even if on investigation, those sins are found not to be proved. The illogical nature of such a position is illustrated by a simple example. A government department cannot and should not escape a costs order in proceedings it loses, simply because to impose such an order means the costs will be passed on to taxpayers. The administration by a party of its own resources, no matter the source of those resources, whether shareholders, taxpayers, members or otherwise, in conducting litigation inappropriately or without success is a risk all litigants bear.

The justification becomes even less attractive when applied specifically to professional regulation. By making costs awards against members, professional indemnity insurance premiums increase across the Regulated profession, so that members in good standing are paying more in any event, even if it's not through subscription fees to the Regulator, which might be expected to raise fees to pay off costs awards made against it.

The "Chilling Effect" Principle

The basis for such a distortion of the accurate position find its origins in the 'chilling effect' principle, a concept which, with supreme irony creates a chilling effect for any who regularly come up against it being quoted on behalf of Regulators.

The ***Baxendale-Walker***[1] "chilling effect" principle was never quite as subversive as the pop-legal definition above would have it. Notwithstanding it having been honed and defined in the landmark case of ***CAT v Flynn Pharma and Pfizer Inc.*** **[2022] UKSC 14** and the further case of ***SRA v Tsang*** **[2024] EWHC 1150 (Admin)** the unadulterated version of the "chilling effect" principle has grown legs in the Regulatory sphere, in spite of the fact it bears only passing resemblance to the true position. The unadulterated test is something close to the following:

Bearing in mind that one of the parties has brought the case in the public interest, is there a good reason to depart from the default position that where the Regulator fails to prove its case no order for costs should be made, bearing in mind that making a costs order against a Regulator may have a chilling effect on the manner in which it regulates.

Flynn Pharma

Whilst that test has remained livid in the minds of all involved in Professional Regulation, it is not the test the Supreme Court endorsed in ***Flynn Pharma***. In giving the judgment of the Supreme Court Lady Rose concluded the following at 97 and 98:

"*In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the* ***Booth*** *line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that the court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it*

[1] R (on the application of Baxendale-Walker) v Law Society [2006] 3 All ER 675

for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in the kinds of proceedings dealt with in ***Booth, Baxendale-Walker*** *and* ***Perinpanathan****, there is a general risk a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.*

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

It would seem then that the properly formulated test when considering costs against a Regulator is more akin to:

Costs follow the case unless it can be shown that such an order made against a Regulator would have a chilling effect on the conduct of that Regulator, given the circumstances of the particular case.

It follows, that where the unsuccessful Regulator asserts a chilling effect subsists, it might be expected to bear the burden of proving such.

Internal Costs Regimes & The "Good Reason" Test

As a matter of Law, the possibility of costs awards against Regulators, is both a reasonable expectation and amounts to an important check and balance in ensuring what has, in recent times, become known as "right touch" regulation.[1] Part of the difficulty, is that numerous Regulators have their own costs regimes, in which for reasons that might well be considered to amount to a conflict of interest, those Regulators draft stricter tests akin to the unadulterated "chilling effect" principle.

Moreover, even when applying that stricter test, Regulators have a tendency to interpret "good reason" in a far stricter sense than ever envisaged by the Court of Appeal (CA) in ***Flynn Pharma*** or by the Court in ***Baxendale-Walker***.

As was emphasised in ***Flynn Pharma (CA)*** and in ***Tsang*** a "good reason" is not akin to "exceptional circumstances." A good reason could included excessive delay, unreasonable conduct by the Regulator, bringing an Allegation or Allegations with no proper evidential foundation, or even the financial hardship occasioned to a party if a costs order is not made.

By degrees, first, in shifting the test back to a ***Baxendale-Walker*** style test, and second by ignoring the interpretation of "good reason" in terms of the gloss thereafter put on it in ***Flynn Pharma (CA)***, Regulators have turned a convenient "blind eye" to the Supreme Court's judgment.

Conflicts of Interest

It is difficult to resist the inference that such ignorance is not, at least in some Regulators, borne of a conflict of interest, not fully cured by the separation of Judicial and prosecutorial functions.

[1] See Professional Standards Authority: "Right Touch Regulation 2025" https://www.professionalstandards.org.uk/improving-regulation/right-touch-regulation

There is currently no publicly available data showing the number of sitting days undertaken by Regulatory Tribunal members before and after a particular member has been party to making a costs award against the Regulator. It would seem appropriate that such data should be produced and carefully analysed within Regulators (even if not made publicly available) to ensure there is no risk of either deliberate or unconscious bias in the appointment of Tribunal members to hear cases.

The pro-active duty borne by Regulators who operate a costs regime ought to be all the greater in encouraging fearless and robust decision-making from tribunal decision-makers, through empowerment and training. It is not clear that such fearlessness is inculcated within induction and ongoing training programmes, such that tribunals feel able to make costs orders against Regulators with the impunity, and with the regularity and frequency that statistically one might expect.

In consequence, the distinct lack of priority given by Regulators three years on, to updating internal costs regimes in light of the Supreme Court decision in ***Flynn Pharma*** takes on a somewhat sinister air, an air Regulators would do well to avoid in ensuring both a perception of "right touch regulation" and in making it a reality.

Tim Grey

Regulating Clinicians: A Word on Behalf of the Defence

Tara O'Halloran

Regulation exists to protect the public. But when it becomes heavy-handed and inattentive to context, it risks harming the very professions it is meant to safeguard. Accountability and oversight are essential, but they must coexist with a genuine commitment to preserving the spirit and vocation of professionals.

The Dangers of Overregulation

Too often, dedicated clinicians—people who have given years, sometimes decades, to patient care—face charges inflated beyond what is fair or necessary. Conduct that fits under one statutory ground is sometimes particularised under two.

The High Court has warned against this tendency:

"It is important that 'deficient professional performance' should not be contorted so that it is a mere synonym for 'misconduct'... [there is a] need for care over charging exactly the same conduct under both heads... It is necessary to keep, so far as possible, some distinction between the two." — ***R (Vali) v General Optical Council*** **[2011] EWHC 310 (Admin)**

Before any charge is brought, regulators should pause for serious reflection: is it truly in the public interest to proceed? Proceedings are rarely swift, and once begun, are difficult to halt—even when later reflection suggests they could have been resolved more proportionately.

The Need to Examine Conditions

Fair regulation requires attention not only to conduct but to context. As the Court observed in ***Andrew Francis Holton v General Medical Council*** **[2006] EWHC 2960**:

"Factors external to and independent of the registrant, such as the pressure of work, any lack of resources, and professional isolation… are relevant factors. His or her performance should be that which is to be expected of a competent practitioner in the circumstances."

Two groups of practitioners are especially vulnerable: those overworked and under-resourced in the public sector, and those in the early stages of their careers. Consider a newly qualified dentist in a training environment dominated by hypercritical supervision and constant fault-finding. When mistakes occur, are they truly examples of "deficient professional performance," or predictable symptoms of a culture unfit for purpose? Without honest inquiry into working conditions, regulation risks punishing symptoms rather than addressing the underlying causes.

The Importance of Listening to the Practitioner

In ***Miller and Another v The Health Service Commissioner for England*** [2018] EWCA Civ 144, the Court of Appeal criticised the attitude that "if it is not written down it didn't happen," calling it: *"an inappropriate way to conduct an investigation… it merely engenders defensive note-taking by doctors rather than clinical good practice."*

Clinical records and corroboration are important, but so too is listening—really listening—to the practitioner's account, with an open mind and a willingness to understand how events unfolded. When regulators fail to do this, they risk encouraging defensive medicine rather than safer care.

Experts and the Courage to Be Fair

Experts instructed by regulators have a primary duty to independence, not advocacy. They must resist the subtle temptation to find against a practitioner simply because allegations exist. Their conclusions should remain under continual review, and they should have the humility—and courage—to revise them when the evidence demands it.

Good Regulation Can Be Compassionate and Astute

The public interest and the interests of practitioners are not opposing forces. They are interdependent. A profession that feels valued, supported, and treated fairly is better able to serve the public.

Behind many case names is a clinician who has missed family events, worked nights and weekends, stayed late to see patients who were not their own, and carried the emotional weight of patient suffering—often without adequate rest or recognition.

The absence of compassion in regulation poses one of the most insidious risks to the public interest because its harms are subtle, cumulative, and easily overlooked. A clinician who once stayed late to help colleagues may decide it is no longer worth the risk. A pharmacist who previously offered community vaccination may quietly withdraw the service. A GP, fearful of another complaint, may retire early. A trainee dentist, demoralised and traumatised, may leave the profession altogether. Each quiet departure represents a loss to the public interest.

Compassionate regulation is not “soft” regulation. It is proportionate, context-sensitive, and humane. It recognises that clinicians are human—and that protecting their wellbeing is part of protecting the public. If clinicians are not treated with care and compassion when they err, the public may soon find care and compassion leaving the professions.

Tara O’Halloran

Case Digest

Joanne Twomey-Calder

In this final edition of the newsletter for 2025, Joanne Twomey-Calder has picked two cases that have been before the Court this year and have either gone under the radar or have perhaps not been as widely covered as their respective importance might have indicated. Both address fundamental issues in professional disciplinary tribunals.

PSA v GMC and Garrard [2025] EWHC 318 (Admin)

At the beginning of the year, the Administrative Court was provided with a welcome opportunity to re-examine the law on cross-admissibility in the case of the ***PSA v GMC and Garrard ibid.*** in other words, evidence of one complaint being evidence that is of sufficient weight in relation to a second complaint.

The case concerned complaints made by two unrelated female patients against Dr. Garrard. In each case the patients complained that Dr. Garrard had spoken in a “weird” manner characterised as chanting, that in each case he had removed some of the clothing of both patients and that he had made controlling or coercive, sexualised comments to them.

The GMC sought to adduce the fact of the two incidents and the similarities of them for the purposes of rebuttal of coincidence, in other words, given the similarities between the two complaints, the chance of coincidence, absent collusion or the tainting of evidence was extremely low.

McDonald J in giving an overview of the present position, gave a timely reminder that the fundamental basis for admissibility is relevance. If evidence is not relevant to an Allegation then it cannot be admissible. For evidence to be admissible it will depend on whether there is sufficient connection and similarity between the facts of the allegations (***R v Chopra*** [2006] EWCA Crim 2133).

Assuming it is or may be relevant to an Allegation the question then in terms of cross-admissibility depends upon the purpose for which such evidence is being adduced and goes not to admissibility but to weight.

McDonald J drew careful attention to the leading cases of ***R v Freeman*** [2008] EWCA Crim 1863 and ***R v H*** [2011] EWCA Crim 730. From each it is clear that there are two bases for cross-admissibility.

The first of those bases, or gateways is as to propensity. While the instant case only concerned two complaints, and therefore might be thought to provide limited evidential scope for propensity to act as a gateway, it is clear that even if only in theory, where two or more complaints are concerned propensity is at least potentially a ground for admissibility.

The second is, as in the instant case, to rebut an assertion of coincidence.

The distinction is an important one in identifying the test to be applied. If the propensity gateway is relied upon then for the evidence of one allegation to be considered to have weight in considering the other, the Tribunal of fact must have found the first allegation proved. It is only logical that such must be the case. It could not be otherwise. Propensity relies upon the fact of the commission of another offence, not the allegation of another offence.

When the question of coincidence is in issue a different approach is required. In that case the Tribunal of fact is entitled and indeed required to look at the evidence holistically and decide whether there is sufficient similarity between the evidence of one complaint and another to enable it to attach weight to the evidence of each complaint in relation to the other. Again, that is only logical. The question of coincidence must necessarily be a pre-cursor to the decision on any finding of fact across the piece, coincidence being of equal application or none to the complaints in question.

Put in the terms of ***Garrard*** at 46:

"Once such evidence is admitted as being relevant, the question becomes one of weight. In deciding the weight to be attached to cross-admissible evidence, the approach will come back to the first distinction. Where the ground relied on is propensity, a finding to the relevant standard of proof is required before weight is attached to the cross-admitted evidence. Where the ground relied on concerns coincidence, i.e. the extent to which the cross-admitted evidence is capable of
disproving coincidence, there is no requirement for a prior finding and the court is
required to consider all the incidents together, holistically rather than sequentially and
taking account of the defence explanation for coincidence, when deciding what weight
can be attached to the cross-admitted evidence."

In summarising the position McDonald J formulated a series of helpful bullets at 47:

"i) There are two primary grounds on which evidence may be cross-admissible. Namely, (a) where it may establish propensity to commit that kind of conduct and/or (b) where it may rebut coincidence

ii) The Tribunal will need to decide on which ground or grounds it is being asked to cross admit the evidence and advise itself accordingly, in terms that are relevant to and reflect the particular circumstances in which the questions of cross-admissibility arise.

iii) The Tribunal will need to take care to distinguish clearly between the grounds and to not advise itself on the other ground if only one ground is applicable, in order to avoid confusion.

iv) The Tribunal will need to consider whether the evidence in question is capable of being cross-admitted, by evaluating whether there is a sufficient connection and similarity between the facts of the allegations

Pvi) Where the evidence is admitted to rebut coincidence, before attaching weight to the evidence the Tribunal will need to advise itself that:

(a)it must exclude collusion or contamination as an explanation for the similarity of the complainants' evidence before it can assess the force of the argument that the allegations are unlikely to be the product of coincidence,
(b)if collusion or contamination is excluded, considering the evidence as a whole, the fact of two patients making such allegations reduces the likelihood of there being an innocent explanation for them

it is not necessary to find one allegation to be proved before relying upon the evidence in respect of that allegation in support of the other allegation concerning the other patient [when considering rebuttal of coincidence].”

Applying those principles to the instant case McDonald J found that the MPT had misdirected itself

“The direction given to the Tribunal in this case is, unfortunately, an example of the difficulties that can and do arise where the direction given seeks to cover both grounds of cross-admissibility where only one ground is relied on and is not tailored to the particular circumstances of the case.”

Per McDonald J at 54

The MPT further erred in applying the test for rebutting coincidence by reason of similarity:

“…the Tribunal adopted three different formulations in addressing that issue. All of which had the effect of elevating the test beyond that which in fact applies. Namely “insufficiently similar to find a pattern”, “sufficiently distinctive to
link what was allegedly said” and the presence of what the Tribunal termed “very substantial differences”. None of those formulations reflect the position set out in the case law, which requires the fact finder to consider whether there is sufficient connection and similarity between the facts of the allegations…“

Per McDonald J at 61

Garrard is a good example of a case of the most helpful kind to practitioners, as it carefully and succinctly reviews all the relevant case law, compiling a set of principles from those cases and applying them to the first instance decision-making as an illustration of the approach Tribunals should take when considering cross-admissibility.

Doubtless though, this will remain a difficult area in professional regulation, if for no other reason than that the majority of the case law derives from the common law concept of similar fact evidence in the Criminal courts, thereafter statutorily codified in the Criminal Justice Act 2003 (CJA). For better or worse the CJA 2003 has no application to professional regulatory proceedings, so uncertainty will likely continue. However, we ought to be grateful to McDonald J and counsel in the case of Garrard for casting some light on an often all too vexed question.

Alam v General Medical Council [2025] EWHC 2907 (Admin)

The recent judgment of His Honour Judge Jarman KC sitting as a judge of the High Court KBD (Admin) handed down on 7 November 2025 serves as a reminder as to the correct approach in making a determination of dishonesty.

HHJ Jarman KC found that the Medical Practitioners Tribunal had fallen into error in making a finding of dishonesty which was difficult, albeit not impossible, to reconcile with the overall consistency of its own overwhelming findings of honesty. Ultimately, the Tribunal failed to properly consider the issue of inherent improbability and misdirected itself as to where the burden of proof lies in establishing dishonesty.

Dr Sarah Alam appealed under section 40 of the Medical Act 1983 against the findings of the Medical Practitioners Tribunal, which determined that in 2018 she had been dishonest in making retrospective entries for 14 patients at a general practice at which she was then a partner. The Tribunal consequently found that Dr Alam's fitness to practise was impaired and imposed a three-month suspension.

Dr Alam appealed on two grounds:

1. The Tribunal failed to review the overall consistency of findings regarding honesty and dishonesty

2. The Tribunal erred in the proper application of the burden of proof, by finding dishonesty based on an absence of evidence of dishonesty.

The allegations before the Tribunal were that Dr Alam made dishonest entries related to a remuneration scheme under the Quality Outcomes Framework (QOF), which rewards practices for inviting patients to annual reviews.

The allegations were made in respect of 28 patients, involving 84 entries on patient notes. Of those, the Tribunal found that 14 patients' notes' entries were made retrospectively and dishonestly.

Dr Alam's evidence was that she herself made an oral invitation to a patient and she assumed that experienced health care assistants would similarly have made oral invitations, although similarly not recorded those in the notes. Importantly, the Tribunal accepted her evidence in these cases, notwithstanding no documentary support.

However, the Tribunal found dishonesty where Dr Alam made a similar assumption (that patient contacts with other more junior members of staff would have made oral invites), finding that Dr Alam's genuine belief turned on the seniority of the relevant clinician vs a junior staff member, focusing on a lack of documentary evidence to support such assumptions.

The first error of principle identified in the Tribunal's approach is that it did not stand back from the minutiae and take an overview of the case on dishonesty given that it accepted that many entries were made honestly by Dr Alam.

The Court noted *"it may be that the GMC is right to say that the case put forward by the Claimant is more appropriately described as one of inherent improbability, rather than logical incoherence as the counsel for the Claimant puts it. It is conceivable that an honest*

person would, engaged in the task which Dr Alam was for the first time, reviewing 1000s of entries under time and other pressures over a weekend to meet the deadline, make some entries without a genuine belief in their accuracy. But this issue of probability was not properly considered as it should have been."

The second error of principle was not to take into account Dr Alam's good character or that good character might make it unlikely that she would make entries dishonestly. Counsel for Dr Alam submitted to the Tribunal that when allegations of dishonesty are made the inherent improbability of doctors acting dishonestly must weigh in the balance.

The Tribunal chair had used the words "less likely" rather than "inherent probability", which the Court questioned could be covered in the good character direction, however the Court found, in any event, that it did not explain why there was no reference at all to this in the Tribunal's determination.

The Court determined the far more likely explanation is that in the intervening 15 days of deliberation the Tribunal became so immersed in detail that when it came to give its determination this factor was overlooked.

Ultimately, the Court held that the unlikelihood of Dr Alam switching in minutes from an honest frame of mind to a dishonest one and the unlikelihood that someone of such good character and integrity should make dishonest entries rather than mistaken ones was so overwhelmingly strong that the findings of dishonesty could not stand and should be quashed.

The Court determined that the Tribunal had misdirected itself as to where the burden of proof lies. Noting specifically, by way of example, where the Tribunal recorded that "on this occasion" it was prepared to give Dr Alam "the benefit of the doubt" (having previously found that the entry was dishonest). This suggested that the Tribunal's findings required Dr Alam to prove a genuine belief, and accepted such a belief existed where it found a reasonable foundation for such a belief. The reference to giving her the benefit of the doubt "on this occasion" strongly suggested that on other occasions when there was

doubt, such benefit was not given. The Court allowed the appeal, finding that the Tribunal erred in placing the burden on Dr Alam to show a genuine belief, when in fact the absence of such a belief was for the GMC to prove on the balance of probabilities.

If nothing else, ***Alam*** is a salutary reminder of the need to get the basic elements right. Misapplying, the burden of proof and the question of good character, led the Tribunal into fundamental errors.

Joanne Twomey-Calder

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For further information on our Professional Regulatory team, please scan here.