



Albion Chambers REGULATORY NEWSLETTER

Challenging Care Quality Commission warning notices

Warning notices are still the enforcement weapon of choice for the Care Quality

Commission (CQC). The latest data Annual 'State of Care' report shows almost a thousand warning notices were issued to adult social care providers in the 2014/2015 period, with only 53 non-urgent cancellations in the same time period. A warning notice can be issued by CQC to mark previous failures to comply with legal requirements, or to identify ongoing failures.

The potential effects of a warning notice are significant: they open the door to subsequent prosecution if the breach is not remedied, and can cause substantial damage to reputation, not least as a result of local press reporting.

Providers should consider with care whether there are grounds for challenge. Common grounds for challenge include:

- **The notice was served on incorrect factual basis.**

- **The facts identified do not amount to a breach of regulation.**

Notices often refer to guidance, rather than regulations, but breach of guidance cannot, in itself, lead to a warning notice. It is always worth checking the precise text of the regulations: there are oddities in the drafting of care regulations which may allow argument to be put. As an example, Regulation 18 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 which requires suitable staffing levels is only breached if the levels of staff are so inappropriate that the provider also

breaches other regulations as a result. A warning notice which simply says 'staffing levels did not meet sector guidance' is therefore defective.

- **The notice is not a proportionate response:**

Under s4(1) HSCA: CQC must "have regard to... the need to ensure that action... is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed..."

If you can argue that the warning notice is not needed, or that risks are minor, you may have a proportionality argument.

- **The CQC enforcement policy has not been followed:**

CQC's enforcement policy documentation includes 'the Enforcement Policy' and 'the Enforcement Decision Tree'. The Enforcement Policy is of limited application; there are no criteria set out for issuing Warning Notices, in contrast to, for example, Requirement Notices. The implication, from the heading of the section dealing with Warning Notices, and from comparison with the section dealing with Requirement Notices, is that Warning Notices should be used where there has been a breach which has had an impact on service users, coupled with a history of poor performance. The Enforcement Decision Tree leaves open all options. For example, a 'medium' level breach usually justifies a Warning Notice, but CQC can step back from that on the basis of previous good history of compliance, or adequate leadership and governance.

If a challenge is appropriate, it may be best to take a double-barrelled approach, where a legal challenge is prepared while a non-legal challenge is explored. Warning Notices are often served at a time of

tension between the provider and CQC, and it is often best to seek to maintain dialogue if possible.

The formal legal process involves representations to CQC. There is no appeal process which is remarkable given the ramifications of the notice. Representations, which must be in writing, may include identifying factual errors of the Warning Notice, similar to factual accuracy representations following an inspection report. Any representations must be received within 10 days, following CQC's guidance, although that may be extended by CQC on request in complex cases.

The form of a non-legal challenge will vary depending on the size of the provider, and the relationship with the inspector. A successful approach may include: making swift changes to practice or policy; providing further explanatory documentation to CQC; seeking to meet with inspectors or the chief inspector of a sector; and seeking external, independent appraisal of the problem which CQC has identified, in order to reach an agreed solution. There is no database of Warning Notices which are withdrawn before publication, or which are threatened but not served. However, it is known that CQC have withdrawn Warning Notices after discussion between senior management at a Trust, and a senior inspector of hospitals. Such a discussion, with the manager armed with both legal advice and clinical information, can prove invaluable in reassuring CQC that public safety is not compromised, and that the provider is serious about taking a constructive approach.

Kate Brunner QC

Too many prosecutors?

Following the case of *Kayardi* in March 2016, social media have had another field day on lawyers' fees, commenting on the right of the individual to bring a private prosecution, and to claim costs from central funds even if defeated. It has been persuasively argued that this situation is now truly absurd, given what has happened – by contrast – to a defendant's right to claim costs.

Fortunately, private prosecutions remain relatively rare, partly because the DPP has the power to take them over and discontinue them. But that does not mean that other inept prosecutions, brought by regulators, are similarly held at bay. I am sure that, just a couple of years ago, we were led to believe that a process known as “de-quangoisation” might just result in fewer of those absurd prosecutions that litter the regulatory field. But the regulators continue to prosecute with enthusiasm. As they are permitted to do. When Parliament legislates to create offences, it does so on the basis that there is no duty to prosecute in each case, simply a discretion entrusted to an independent prosecutor. Proving that the discretion has not been exercised reasonably is far from easy.

We have become used to the eccentricities of prosecutors like the local authorities and the Environment Agency. They have their ways of doing things and, even if they often get a little over-zealous, they prosecute sufficient cases – some of them extremely important – to mean that they normally demonstrate a sound understanding of key issues like public interest and proportionality. Unfortunately, the power to prosecute is not confined. The prosecuting power of tiny but powerful organisations like the RSPCA or the Gangmasters Licensing Authority has come in for interesting scrutiny in recent years (see, for example, *Moss* [2012] EWHC 3650 Admin).

And my recent experience has introduced me to yet another eager prosecutor – a National Parks Authority – that has demonstrated an alarming lack of focus on those key issues. In the case

in question, a couple from London bought an ancient and ramshackle farmhouse, intending to bring it sympathetically into the 21st century. They spent a fortune on surveyors, architects and builders, and to the (admittedly untrained) eye, did a terrific job. Unfortunately, their liaison with the local parks authority was pretty much one way, with emailed requests being ignored or put in the relevant in-tray for months on end. They bashed on. Eventually, the Authority turned their gaze on the farmhouse and began to complain about interference with the listed building status.

Before long a prosecution had been issued for making unlawful alterations to the character of a listed building without consent. The couple were looking at the now customary dilemma – plead guilty and take a fine but avoid significant costs, or take it to trial (with experts aplenty) and end up with a hefty costs bill even if you win.

In fact, the case resolved because the Authority was persuaded to reconsider its position and stop the prosecution a

few months before trial. The defence had referred them to an interesting and useful authority: *R (on the application of East Riding of Yorkshire Council) v Hobson* 2008 EWHC 1003 (Admin). It makes it clear that the appropriate time at which to assess the character of a building of special architecture or historical interest is on completion of the works of renovation or restoration. In this case, the works were nowhere near complete because of ongoing issues over planning, enforcement notices and the like. And until those issues were resolved, it would have been impossible for a jury to assess whether the character of the building had been changed by the building works.

Put shortly, it was plain that, with a bit of give and take on each side, this was a civil dispute that could be resolved sensibly without involving the courts. That, undoubtedly, is what will now happen. But it is another example of a regulatory prosecutor who could be thought to lack the necessary experience of the fundamentals that underpin our criminal justice system. They have the power to drag the honest citizen through the courts and immerse them in that Kafkaesque world. The only check and balance against that is the court's power to award wasted costs, and we all know what a substantial hurdle that is to overcome.

Adam Vaitilingam QC

The Definitive Guide

Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences

From 1 February 2016, any offender appearing before the Court for health and safety, corporate manslaughter and/or food hygiene offences will be distinctly nervous; the new Sentencing Guideline in relation to these offences is meant to send a clear message to businesses in particular that the regulatory authorities expect health and safety to remain a corporate priority. The difference between the old sentencing regimes and the new guideline is in places stark, with fines of £10m envisaged for serious offences, and an explicit recognition that it may be necessary to go

beyond this in the worst cases.

The starting points and ranges identified in the guideline applies to all offenders (in the case of individuals, all those over 18) regardless of their plea – credit for plea is taken into account only after the appropriate sentence is arrived at. The approach of the guidelines is familiar from others, in particular the guideline for environmental offences. The courts will be required to first assess the overall seriousness of the offence based on the offender's culpability and the risk of serious harm, regardless of whether any harm was in fact caused. The guideline then sets a starting point and range of possible fines based on the seriousness of the offence.

In relation to risk of harm the guideline sets out a clear tabular representation of how to arrive at the level of risk; the likelihood of risk on one axis and the severity of the harm risked on the other. Consideration of those two factors produces the level of harm. The court must then consider two additional factors: the number of people exposed to the risk; and whether harm was in fact caused. If either of those factors applies the court must consider either moving the level of harm up a category or at least adjusting upwards within the category range.

The court must then consider the offender's culpability. One notable difference between the guideline as initially drafted and its final form, and between this guideline and the environmental offences guideline, is that for health and safety offences committed by individuals the headings to the categories of offender culpability have been amended to match those that apply in cases of offences committed by organisations. In the final version of the guideline the category headings are "very high", "high", "medium" and "low" as opposed to "deliberate", "reckless", "negligent" and "low". It will remain to be seen but it is suggested that this will operate to the disadvantage of the offender: an offender who has been woefully negligent may find themselves in the "high" bracket of culpability, whereas under the categorisation which focuses on whether the offender's actions were intentional, they would have fallen close to the bottom having been "negligent".

The lists of non-exhaustive aggravating and mitigating factors have changed from the draft guideline. Targeting vulnerable victims is now included as an aggravating factor in relation to health and safety offences. The list of mitigating features in relation to food safety offences is now shorter; the fact that an offender had effective food safety or hygiene procedures in place will no longer justify a downward adjustment in the level of fine. Evidence of steps taken to remedy the problem and the voluntary closure of the business have been collated into a single factor comprising steps taken voluntarily to remedy the problem.

In relation to the levels of fines envisaged by the guidelines, there is no change from the draft, but a significant step up, potentially, from the level of fines previously imposed. For health and safety offences committed by organisations, the level of fine is determined according to category of culpability, harm and level of offender turnover. Large organisations with a turnover of more than £50m could face

fines of up to £10m, whilst medium-sized enterprises with a turnover of between £10m and £50m could face fines of up to £4m. Small companies (those with a turnover of between £2m and £10m) could receive fines of up to £1.6m for a breach of health and safety, and micro enterprises with a turnover of less than £2m could be fined up to £450,000.

The penalties for corporate manslaughter trace a similar pattern, but are much higher. The maximum for a large organisation, for example, would be £20m. For organisations turning over significantly more than £50m the guidelines refer to the need to achieve a proportionate sentence and envisage the possibility of imposing a fine above the suggested range.

Practitioners will need to ensure that clients submit detailed financial information including turnover, pre-tax profit, director remuneration, pension provision, assets and debt exposure for the past three years. The guidelines place renewed emphasis on the court's power to infer that an offender is able to pay any fine imposed unless it has supplied sufficient financial information to the contrary. Whether a fine may put the offender out of business may be an "acceptable consequence" in some bad cases.

When reviewing the fine to ensure that it properly reflects the seriousness of the offence, the court is ordinarily encouraged to add on any quantifiable economic benefit from the offence, such as costs avoided or savings achieved as a result of avoidance of

health and safety procedures. The definitive version of the guideline sets out that where information as to such benefits is not readily available, the court may draw on information from enforcing authorities and others about the costs of operating within the law.

The guideline also includes reference to the court's power to impose remedial orders. Firstly, it is noted that an offender ought to have remedied any specific failings by the time of sentence and if it has not will be deprived of significant mitigation. Secondly, the cost of compliance with any such order should not usually be taken into account in fixing the level of fine, as the order only requires what should already have been done. This appears to echo the policy decision in removing the existence of good food hygiene procedures from the list of mitigating factors: if something ought to have been done anyway, it is neutral and cannot be prayed in aid either in relation to financial impact or general mitigation.

The Sentencing Council has said that it expects that some offenders will receive higher penalties under the new guideline, but that it did not anticipate "higher offences across the board". It is large companies in particular which have been targeted by penalties which, as the Sentencing Council put it, are "fair and proportionate to the seriousness of the offence and means of the offenders". Whether many smaller fish are caught by the net remains to be seen

Anna Midgley

Regulatory — Case Law update

Burden of Proof for Proceedings to revoke licence

Mehrdad Kaivanpor (*Applicant*) *v* Director of Public Prosecutions (*Respondent*) and Brighton and Hove City Council (*Interested Party*) *sub nom* Mehrdad Kaivanpor *v* Sussex Central Justices [2015] EWHC 4127 (Admin)

This issue was considered in relation to proceedings against the applicant in relation to his taxi licence and, in particular, under the Local Government (Miscellaneous Provisions) Act 1976 s.51 in relation to whether he was a fit and proper person to hold such a licence.

The appellant appealed by way of case stated against a Magistrates' Court dismissal of his appeal against a local authority's revocation of his private hire and hackney carriage licence.

The appellant had been a taxi driver and was involved in an accident with a cyclist. Following the accident the appellant stopped, but did not get out of his vehicle to check on the cyclist. He then informed the police and the owner of the vehicle he was driving of the incident within an hour of it happening. He was subsequently charged with driving without due care and attention, and failing to stop at the scene following an accident.

In addition to the criminal prosecution, the local authority took action to revoke the appellant's taxi licence pursuant to the Local Government (Miscellaneous Provisions) Act 1976 s.61, he was informed of his right to appeal and the appellant submitted such an appeal.

The criminal prosecution against the appellant and the appellant's appeal against the revocation of his taxi licence were both

listed for case management purposes at the same Magistrates' Court and, pursuant to a direction by District Judge, the appellant's licensing appeal was listed to be heard immediately after his criminal trial by the same bench.

At his criminal trial the appellant pleaded guilty to failing to stop, but contested the allegation that he had driven without due care and attention. He was found guilty of the due care charge and his licence endorsed with nine penalty points.

Thereafter the same Magistrates proceeded to hear the appeal against revocation of licence (a course the appellant had objected to), and the appellant's appeal against licence revocation was dismissed.

There were various questions for consideration by the Divisional Court, and specifically whether the Magistrates were right 1(a) not to recuse themselves; 1(b) to place the burden on the appellant to show that he was a fit and proper person; (2) whether the decision to dismiss the appeal was perverse.

The appeal was allowed on a limited basis (the Divisional Court confirmed there was no disadvantage in the same bench conducting the regulatory appeal and dismissed any suggestion of bias or perversity), and the matter was remitted to a differently constituted bench for re-hearing. The limited basis upon which the appeal was allowed related to the burden of proof relevant to show whether the appellant was a fit and proper person to hold a licence. The court identified a dichotomy in the statutory schemes between an application and a revocation. Specifically, where a person had applied for a licence, the burden of proof (on the balance of probabilities) rested upon the applicant. However, once a licence had been granted, the burden of proof was on the licensing body (and in relation to the appeal – which was a re-hearing – upon the Magistrates) to satisfy itself/themselves of a change of circumstances (relevant to the issue of whether or not that individual was a fit and proper person) and not for the holder of the licence to show that. The Magistrates in dealing with the appeal, against revocation in this case, had been referred to case law (*Canterbury City Council v AI* [2014] L.L.R. 1 considered and *Muck It Ltd v Secretary of State for Transport* [2005] EWCA Civ 1124, [2006] R.T.R. 9). In deciding this appeal the Divisional Court concluded that the Magistrates had erred in law in giving weight to Canterbury (which suggested the burden of proof fell upon the appellant to establish that he was a fit and proper person to hold a licence) and should have applied the Court of Appeal's decision in *Muck It Ltd* (which suggested the burden fell upon

the authority to be satisfied of the ground of revocation and not the licence holder who had to satisfy to the contrary). Canterbury had a number of limitations and deficiencies; the decision had been reached with only one party represented and was based on the absence of the Court of Appeal authority, and the decision on the burden of proof was not strictly speaking necessary for that decision.

It is worth noting that the *Muck It Ltd* decision related to proceedings in respect of an operator's licence under the Goods Vehicles (Licensing of Operators) Act 1995 s.13. This appeal decision confirms the *Muck It Ltd* decision, and is of general application. The report does not confirm the outcome of the remitted proceedings relating to Mr Kaivanpor!

Directors disqualification arising in the context of sentencing for criminal offences.

R v Lloyd Chandler [2015] EWCA Crim 1825 CA

The appellant was a company director who pleaded guilty to three regulatory offences of engaging in commercial practice which was misleading, contrary to the Consumer Protection from Unfair Trading Regulations 2008 reg.9. By his basis of plea the defendant maintained that a company employee had altered the mileage on the vehicles without his knowledge, however accepted liability as managing director for the misrepresentations, even though he had no personal knowledge of them. The judge imposed fines of £1,250 for each offence with a period of 10 weeks' imprisonment in default and a victim surcharge order. Without warning, the judge then made the disqualification order disqualifying him from being a director for five years pursuant to the Company Directors Disqualification Act 1986 s.2. The appellant company director appealed against that disqualification order.

The appeal was allowed, and the disqualification was quashed, on the following basis:

■ The Judge had not identified the conduct which was said to have made the appellant unfit to be a company director for the purposes of s.6 of the Act. That omission was of particular significance in this case because there had been three offences of fraud on the original indictment which counts had not been pursued in the context of pleas to the regulatory offences. The regulatory offences were strict liability offences incurred as a director of the Company and did not necessarily involve any personal misconduct on the part of the appellant. It was possible that there had been such misconduct (by the appellant's failure to supervise commercial activities of the company) however, without

further investigation there was nothing in the basis of plea that would have founded a factual basis of misconduct.

■ The judge was not bound by the basis of plea, but if he was going to depart from it he should have indicated his intention and given C an opportunity to give evidence and address the particular issues. That was not done.

■ C's previous conviction for fraudulent use of a vehicle licence registration document was disregarded by the judge and thus could not form the basis of the relevant misconduct.

■ If the Judge was going to pursue a director's disqualification, he needed to ensure that C had proper notice of what allegations of misconduct within the meaning of the statute he faced and had an opportunity to make informed submissions about them, *Lo-Line Electric Motors Ltd, Re* [1988] Ch. 477 and *Secretary of State for Trade and Industry v McTighe (No.2)* [1997] B.C.C. 224 applied.

The case confirms the need for a reasoned approach to the imposition of discretionary ancillary orders, and a reminder to practitioners to advise and to take the full instructions in relation to possible ancillary orders on sentence. It is also confirmation of the well-established principle that a judge should bring to the attention of advocates when consideration is being given to a discretionary ancillary order on sentence and to invite submissions to be made.

Benefit from Criminal Conduct – Confiscation

R v Christopher James Mcdowell: R v Harjit Sarana Singh [2015] EWCA Crim 173 CA (Crim Div)

In con-joined appeals, a businessman (M) re-applied for leave to appeal against a confiscation order and another (S) appealed against the sums of benefit that the court had determined with leave of the single judge.

M was an arms dealer who had been convicted of supplying controlled goods without a licence. S was a scrap metal dealer who had traded while unregistered. Each had traded openly through a company of which they were the sole director and shareholder. The court in each case had lifted the corporate veil and treated all the company receipts earned while unlicensed or unregistered as personal receipts. In M's case the benefit had resulted from M's criminal conduct, in S's case from his criminal lifestyle (criminal lifestyle offences to which the statutory assumptions applied). Although in each case, the benefit as found by the court vastly exceeded the amount of the confiscation order, they each challenged

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Call 2006



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Call 2011



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Call 2012



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the orders because they continued to trade and any future proceeds were vulnerable to further recovery.

The appellants argued that (1) they had been convicted of “regulatory” offences and the underlying trading had been lawful but for the absence of, respectively, a licence or registration, so that no benefit had accrued for the purpose of the Proceeds of Crime Act 2002 s.76(4) either to the company, or to the individual; (2) there had been no concealment or evasion to justify lifting the corporate veil; (3) it had been disproportionate and contrary to the ECHR Protocol 1 art.1 to use gross receipts of otherwise lawful trading, when the actual benefit to the company and to the individual was the gross profit after deducting expenses.

Held: the court of appeal refused M’s re-application for leave to appeal. S’s appeal was allowed:

- Whether benefit had been obtained from criminal conduct depended on a proper analysis of the statute that created the offence. The critical question: what is the conduct made criminal by the statute – is it the activity itself or is it the failure to register/ and obtain a licence for the activity?

There was a narrow but critical distinction between an offence of prohibited activity admitted by the offender (or proved against him) and an offence of failure to obtain a licence to carry out an otherwise lawful activity.

Contrary to M’s submissions, the underlying transactions were prohibited and unlawful (the activity was prohibited subject to an exception to the prohibition for activities

authorised by licence in writing granted by the Secretary of State). He had benefited from his criminal conduct and from commission payments received after he had obtained a licence, which was not retrospective.

In S’s case the judge had been wrong to find that his trading activity was criminal conduct from which benefit had accrued. The criminal conduct was the failure to register before carrying on business each day, but S’s trading receipts had been obtained from lawful trading activity not from his failure to register the particulars of his business. As a result of this determination in S’s case, the confiscation order was quashed.

- Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] 1 A.C. 1046 was powerful authority for the proposition that when a company was manipulated for the purposes of fraud, the court would not be restrained by the knowledge that, in law, the fruits of the fraud were received by the company. The corporate veil would be lifted for the purpose of ascertaining who was in control and who had obtained the benefit.

- Where the underlying transactions were lawful and not criminal, the cost of them could properly be treated as consideration given by the appellant for the benefit obtained.

The transactions of M’s company had been criminal and it was a proportionate pursuit of the legitimate aim to deprive him of his receipts from his criminal conduct without regard to the expenses incurred in performing those transactions, *R v Waya (Terry)* [2012] UKSC 51, [2013] 1 A.C. 294 followed (paras 51,56).

The case again emphasises the need to

carefully consider from close examination of the terms of the statute which creates the offence, including the words used to define the criminal conduct admitted, as an essential first step in the analysis of whether the appellant benefited from his criminal conduct. It is worth noting that the application of the s.10(2) POCA assumptions in criminal lifestyle cases does not necessarily, of itself, serve to change the appellant’s position (para 61).

Finally, it is well worth noting a change in the law in relation to registration of scrap metal dealers. The Scrap Metal Dealers Act 1964 (under which this case proceeded) provided a system of free registration. The new law introduced by the Metal Dealers Act 2013 introduces a new scheme of licensing, and provides that the licensing authority will not issue a licence except to suitable persons. The question whether the conduct criminalised under the new provisions is the trading activity or the failure to obtain a licence (as was found to be the case in this appeal under the old legislation) will be the subject of re-argument if a similar case were to come before the court under the new legislation.

Robert Morgan-Jones

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