Neutral Citation Number: [2021] EWCA Civ 1635

Case No: C1/2021/0015

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Decision of HHJ Karen Walden-Smith (sitting as a Deputy High Court Judge) dated 17 November 2020
CO/1930/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08 November 2021

Before :

LADY JUSTICE ASPLIN
LADY JUSTICE CARR
and
LORD JUSTICE SNOWDEN

- -

Between :

ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS	**Appellant**
- and -	
MAKANJU AWODOLA	**Respondent**

- -

Paul Ozin QC (instructed by **ACCA UK**) for the **Appellant**
Joshua Hitchens and Siân McGibbon (instructed by **Advocate**) for the **Respondent**

Hearing date: 21 October 2021

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2 p.m. on Monday 8 November 2021.

LORD JUSTICE SNOWDEN :

1. This is an appeal by the Association of Chartered Certified Accountants ("the Association") against a decision of HHJ Karen Walden-Smith, sitting as a Deputy High Court Judge ("the Judge"). The Judge allowed a claim for judicial review brought against the Association by Mr. Makanju Awodola ("Mr. Awodola"): see [2020] EWHC 3059 (Admin), [2020] 4 WLR 162. The dispute arises out of the alteration of the regulations of the Association relating to appeals against orders made by the disciplinary committee of the Association (the "Disciplinary Committee").

Background

2. The Association is a body corporate established pursuant to a Royal Charter granted on 25 November 1974. It is one of the four UK bodies responsible for supervising and maintaining the conduct and technical standards of professional accountants, including those who conduct statutory audits. The affairs of the Association are managed and regulated in accordance with the Charter, its bye-laws and regulations made thereunder by its governing body, the Council.

3. The Association has two classes of members, namely Fellows and Members, who all sign an undertaking that if admitted to membership, and for so long as they are members, they will observe the Charter, the bye-laws and the regulations "for the time being in force". That undertaking reflects bye-law 7(a) which provides,

> "(a) The Charter, bye-laws and applicable regulations for the time being in force shall apply to each member on and following his admission and, insofar as the Charter, bye-laws and such regulations provide, following his ceasing to be a member. In addition, the Charter, bye-laws and applicable regulations shall similarly apply to each person who undertakes or agrees to be bound by them."

4. Mr. Awodola is an accountant who was an ordinary Member of the Association from 30 April 2005 and a Fellow of the Association from 30 April 2010.

5. The Association received a complaint in April 2016 to the effect that in 2014 and 2015 Mr. Awodola had submitted annual returns to the Irish Companies Registration Office which falsely named a particular firm as auditor of the relevant company, when it was not. Mr. Awodola admitted filing the annual returns in question but contended that the firm had in fact been appointed auditor and denied that he had acted dishonestly or unethically.

6. The complaint was dealt with in accordance with the Association's Complaints and Disciplinary Regulations 2014 which, as their name suggests, govern investigation of complaints and the conduct of disciplinary action taken by the Association against members and ex-members. The complaint was first reviewed in 2016-2017 by an investigating officer and then in August and September 2017 by an independent assessor before being referred on 10 October 2017 to the Disciplinary Committee.

7. Mr. Awodola was served by the Association with the relevant papers and notified on 2 January 2018 that a disciplinary hearing was to be held before the Disciplinary

Committee. Evidential hearings before the Disciplinary Committee took place during August and October 2018.

8. On 19 October 2018 the Disciplinary Committee issued its decision, finding a number of the allegations made out, including that Mr. Awodola had acted dishonestly. It determined that the appropriate sanction was to make a disciplinary order excluding Mr. Awodola from membership of the Association. Other than noting the seriousness of the findings made against Mr. Awodola, it is not necessary for the purposes of this appeal to consider the substance of the complaint or whether the findings of the Disciplinary Committee were justified, and I express no view on such matters.

The Appeal Regulations and Mr. Awodola's application for permission to appeal

9. Bye-law 9(g) authorises the Council to prescribe regulations governing the circumstances in which appeals against a disciplinary order may be brought and the procedure for dealing with such appeals. At the time of the disciplinary order made by the Disciplinary Committee on 19 October 2018, the relevant regulations were to be found in the Appeal Regulations 2014 as last amended on 1 January 2018 (the "Appeal Regulations 2018"). Those Regulations provided in relevant part as follows,

> "3. Appeal
>
> (1) Any relevant person who is the subject of a finding or order made by the Disciplinary Committee … may apply for permission to appeal within 21 days after service of the written statement of the reasons for the decision of such Committee…
>
> 6. Permission to appeal
>
> (3) *Initial consideration of the application notice*
>
> (a) An application notice, whether filed by the Association or by any other party, shall be considered by the Chairman.
>
> (b) The Chairman may grant or refuse permission to appeal….
>
> …
>
> (g) If the Chairman refuses permission to appeal:
>
> (i) where the application notice…related solely to the question of costs, the Chairman's decision is final;
>
> (ii) in all other cases, the appellant may request that his application notice be reconsidered by the Appeal Committee in accordance with regulation 6(4). Such request:
>
> (aa) must be filed with the hearings officer within 28 days after service of the Chairman's written reasons for refusing permission (or such longer

> period as the Chairman of the Appeal Committee which would reconsider the application notice may allow where there is good reason for the appellant having failed to meet the time limit; and
>
> (bb) must be supported by written grounds setting out which aspects of the Chairman's decision he disagrees with and why.
>
> (4) *Reconsideration of the application notice by the Appeal Committee*
>
> (a) In the event that a request complying with regulation 6(3)(g)(ii) above is filed, the application notice shall be reconsidered by the Appeal Committee on the papers in private without a hearing; or, if the appellant or respondent requests to be heard, at a hearing…"

The references to the "Appeal Committee" were to a committee appointed under powers delegated by the Council which included non-accountants, and references to the "Chairman" were to one of a number of persons appointed to chair such Appeal Committee.

10. Mr. Awodola duly filed an application notice dated 9 November 2018 seeking permission to appeal against all of the findings of the Disciplinary Committee and the sanction imposed upon him. That application for permission to appeal was referred to a Chairman of the Appeal Committee who considered it on the papers and refused permission to appeal on 30 November 2018.

11. That refusal and the reasons for it were communicated to Mr. Awodola under cover of a letter from a hearing officer of the Association on the same day. The letter of 30 November 2018 stated in relevant part as follows,

> "Dear Mr. Awodola,
>
> The Chairman has now come back to us with his decision and has refused you permission to appeal. Please find enclosed a copy of the Chairman's decision.
>
> You may request that your application notice be reconsidered by the Appeal Committee. You should submit your request within **28 days** of service of the Chairman's decision, by **02 January 2019**.
>
> Such requests must be made in writing, stating which parts of the Chairman's decision you disagree with and why the Appeal Committee should reconsider the decision of the Chairman.
>
> Please note that no application notice shall be reconsidered by the Appeal Committee unless, in the opinion of the Chairman of the Appeal Committee which would reconsider the application notice, the request complies with this requirement. The Appeal

> Committee will then decide whether permission to appeal should be granted or not."
>
> (emphasis in original)

12. As invited by that letter, on 2 January 2019, Mr. Awodola emailed the Association with a written request, supported by reasons, that his application for permission to appeal be reconsidered by the Appeal Committee at an oral hearing.

The Amendment of the Appeal Regulations

13. Unbeknown to Mr. Awodola, on 1 January 2019, the day before he submitted the request that his application be reconsidered by the Appeal Committee, the Association published on its website a new version of the Appeal Regulations 2014 containing amendments made by the Council (the "Appeal Regulations 2019").

14. Regulation 1(1) of the Appeal Regulations 2019 provided that,

> "These regulations as amended shall come into force on 1 January 2019."

and Regulation 1(2) provided that,

> "These regulations shall apply to all persons who are subject to bye-laws 8 to 11 or otherwise agree to be bound by them."

15. The amendments made with effect from 1 January 2019 included three changes to Appeal Regulations 6(3)(g)(ii) and 6(4) which are central to the instant case, namely (i) the time within which a request for reconsideration of an application for permission to appeal had to be made was reduced from 28 days after the initial refusal on paper, to 21 days, (ii) the reconsideration of the application for permission to appeal was to be undertaken by the Chairman rather than by the full Appeal Committee, and (iii) the applicant was not able to request an oral hearing to reconsider the application.

The determination of Mr. Awodola's application for permission to appeal

16. The Association's hearing officer referred Mr. Awodola's request for reconsideration of his application for permission to appeal to a different Chairman than the one who had initially refused it. The second Chairman also refused the application on the papers on 14 February 2019. That decision was communicated to Mr. Awodola under cover of a letter of 18 February 2019.

17. In his decision of 14 February 2019, the Chairman noted that Mr. Awodola had objected to the appeal process starting under one set of Appeal Regulations and then being finished under another; and that Mr. Awodola had contended that the reconsideration should be undertaken by the Appeal Committee under the Appeal Regulations 2018. The Chairman also noted that the Association had submitted that,

> "reconsideration is not formally part of the appeal process; had [Mr. Awodola] served the [request for reconsideration] before 1 January 2019, it would have been dealt with under the [Appeal Regulations 2018]; … the [request for reconsideration] has been

> submitted after the Appeal Regulations 2018 have ceased to have effect and can only be considered under the [Appeal Regulations 2019]."

18. The Chairman recorded that he had obtained independent legal advice that confirmed his view that Mr. Awodola's request for reconsideration could only be dealt with under the Appeal Regulations 2019, as these were the regulations in force when it was submitted.

The judicial review proceedings

19. Mr. Awodola, acting in person, issued a claim form on 9 May 2019 seeking judicial review of the Chairman's decision of 14 February 2019. Among other grounds, Mr. Awodola contended (i) that the decision of the Chairman to reconsider the application for permission to appeal rather than it being referred to the Appeal Committee was contrary to the Association's bye-laws, and (ii) that it was contrary to natural justice for the Association to change the Appeal Regulations and apply them to him midway through his appeal process.

20. Mr. Awodola was given permission to seek judicial review by Michael Fordham QC (as he then was) on the ground that,

> "ACCA erred by not allowing the appeal committee to hear [the application for permission to] appeal as stipulated in their appeal procedure but instead applying new rules to the existing appeal."

21. The claim for judicial review was heard by the Judge in November 2020. By this time, Mr. Awodola was represented, *pro bono*, by Mr. Hitchens and Ms. McGibbon. His arguments had, as a consequence, developed, as had those of the Association. The primary arguments of both sides related to the interpretation of the Association's bye-laws and the Appeal Regulations. In addition, counsel for Mr. Awodola also sought to raise arguments to the effect that irrespective of their strict interpretation, the Chairman had a discretion not to apply the Appeal Regulations 2019, and that the application of those Regulations was procedurally unfair to Mr. Awodola or contrary to his legitimate expectations. Those contentions were disputed by the Association.

22. At the heart of the debate before the Judge was bye-law 11(c). Bye-law 11 provides for the application of and interpretation of bye-laws 8 to 10. Those bye-laws set out the liability of members and ex-members of the Association for disciplinary action, provide for the Council to make regulations for the procedures relating to disciplinary proceedings (including appeals), and impose an obligation on members to co-operate with the disciplinary process.

23. Bye-law 11(c) provides,

> "For the avoidance of doubt, a person shall be liable to disciplinary action in accordance with the bye-laws and regulations in force at the time the matters complained of took place. All disciplinary proceedings, however, shall (for the avoidance of doubt) be conducted in accordance with the bye-laws and regulations in force at the time of such proceedings."

24. In addition, both sides referred to Appeal Regulation 24, which was unchanged in the Appeal Regulations 2018 and 2019, and which provides,

> 24. Transitional provisions
>
> (1) The grounds of appeal available to the appellant shall be those in force at the date of the finding or order which is the subject of the application notice.
>
> (2) The test to be applied when considering whether permission to appeal should be granted shall be the test in force at the date of the application notice.

The Judgment

25. In her judgment, the Judge focussed on bye-law 11(c) and did not mention Appeal Regulation 24. She expressed the view that the meaning of bye-law 11(c) was "clear and obvious" and that it meant that the Association was obliged to refer Mr. Awodola's renewed application for permission to appeal to the Appeal Committee in accordance with the Appeal Regulations 2018.

26. The Judge explained her decision as follows in paragraphs 24-25 of her judgment,

> "24. In my judgment, ACCA did fall into error in making the determination that the 2019 Rulebook applied. By reason of byelaw 11(c), ACCA are bound to conduct the disciplinary proceedings in accordance with the regulations in force at the time of the proceedings. While it appears that notification of the complaint was made in 2017, no-one has sought to suggest to me that the disciplinary proceedings themselves commenced in 2017 and that the 2017 Rulebook should apply. Rather, the disciplinary hearings, the decision of the Disciplinary Committee, and the application for permission to appeal all took place in 2018. The disciplinary proceedings were part of a continuing action and that renewed application for permission to appeal is part of that continuum. The fact that the application was made at the end of the 28-day period allowed for a renewed application for permission to appeal and therefore was made in 2019 when new regulations were in force, does not alter the fact that the disciplinary proceedings were taking place in 2018. The disciplinary proceedings did not stop and then start again because of the renewed application for permission to appeal. Until such time as the 28-day period for renewing the application for permission to appeal was made, the proceedings had not come to an end.
>
> 25. The failure of ACCA to recognise that the appeal process was all part of the disciplinary proceedings and therefore all part of what had been continuing through 2018 had the consequence that Mr. Awodola was denied that which he had been entitled to when the proceedings commenced, namely the

> opportunity to renew an application for permission to appeal before a full Appeal Committee with, if he requested it, a right to an oral hearing. While it is understandable that ACCA wished to streamline its processes, the interpretation given by ACCA that the renewed application for permission to appeal was governed by the 2019 Rulebook has had the impact that the effect of removing a right that Mr. Awodola already enjoyed and is consequently procedurally unfair."

27. The Judge also rejected an argument by the Association that the changes made on 1 January 2019 were merely procedural and that, by analogy with cases on the interpretation of statutes, they could apply to disciplinary proceedings already in progress. She said, at paragraph 28,

> "28. Reference has also been made to *Bennion on Statutory Interpretation* in support of the proposition that there is an exception to the presumption of retrospectivity in the case of procedural changes. However, this case is not concerned with statutory interpretation, but construction of a bye-law in a Royal Charter. It has a clear and obvious meaning."

28. The Judge ended her judgment by setting out the order she proposed to make in paragraph 31 of her judgment as follows,

> "…I will quash the determination of ACCA dated 14 February 2019 that Mr Awodola's application for a renewed application for permission to appeal is refused by the single Chairman and order that his renewed application for permission to appeal the determination of the Disciplinary Committee made on 19 October 2018 is considered by the Appeal Committee in accordance with the provisions of regulations 6(3)(g)(ii) and 6(4) of the 2018 Rulebook."

That intention was reflected in the order made by the Judge (albeit that there was no specific reference to Regulations 6(3)(g)(ii) and 6(4)).

The Appeal

29. For the Association, Mr. Ozin QC advanced two grounds of appeal. The first was that the Judge misconstrued the purpose and effect of the second limb of bye-law 11(c). He contended in his skeleton argument that such provision deals expressly with all procedural matters, and that its purpose is,

> "… to achieve complete clarity and simplicity as to which procedural rules govern any disciplinary hearing or determination by articulating the simple rule that, without exception, the parties, regulatory decision-makers and ultimately the court should look to the iteration of the Appellant's bye-laws and regulations in force at the time that the actual procedural question arises for any decision-maker at any stage in the disciplinary process."

Mr. Ozin submitted that this interpretation is consistent with what he described as a general presumption, evident in the cases on statutory interpretation, that procedural changes take effect immediately upon promulgation and apply to all current and future cases.

30. Mr. Ozin also argued that the Judge's reasoning that Mr. Awodola was entitled to rely upon the appeal procedures in force at the commencement of, or during, the "continuum" of disciplinary action against him (or at least those parts of it which took place in 2018) was imprecise and unworkable. He observed that the Judge had not clearly explained at what point in the disciplinary process her "continuum" had commenced and suggested that the Judge's approach would cause considerable uncertainty, because the steps in a disciplinary case could span several years. He also suggested that the Judge's approach might prevent the Association making changes to its disciplinary regime for the benefit of members already subject to such proceedings.

31. Mr. Ozin's second ground of appeal was that the Judge's interpretation of bye-law 11(c) was incorrect, because it was inconsistent with the more limited transitional provisions of Appeal Regulation 24. He objected that the Judge had not dealt with this point in her judgment or explained how the two provisions could be reconciled.

Analysis

32. This case turns on the interpretation of the Charter, bye-laws and relevant regulations of the Association, which have contractual force as regards its members by virtue of the undertakings that they sign on becoming members. The interpretation of contracts and similar instruments is a unitary exercise, giving due weight to the ordinary and natural meaning of the words used in the context of the instrument as a whole, and involving an iterative process in which the rival suggested interpretations are checked against the provisions of the instrument and their consequences are investigated: see e.g. Wood v Capita Insurance Services Limited [2017] AC 1173 at paragraphs 10-13.

33. The focus of the judgment below was on bye-law 11(c), which the Judge appears to have considered in isolation from the other bye-laws. In my judgment, however, bye-law 11(c) has to be read in the context of bye-laws 11(a) and (b). Together, those bye-laws provide as follows,

> "(a) A member, relevant firm and registered student shall be liable to disciplinary action whether or not he was a member or registered student or (as the case may be) it was a relevant firm at the time of the occurrence giving rise to such liability.
>
> (b) A former member, former relevant firm and former registered student shall continue to be liable to disciplinary action after his or its ceasing to be a member, relevant firm or registered student in respect of any matters which occurred whilst he or it was a member, relevant firm or registered student, provided that:
>
> > (i) a complaint is referred to the committee responsible for hearing the complaint,

> (ii) disciplinary action is otherwise commenced, or
>
> (iii) he or it is otherwise put on notice of the complaint,
>
> within five years of his or its so ceasing to be a member, relevant firm or registered student (as the case may be), save where exceptional circumstances exist and it is in the public interest that disciplinary proceedings are brought later than five years after he or it so ceased to be a member, relevant firm or registered student.
>
> (c) For the avoidance of doubt, a person shall be liable to disciplinary action in accordance with the bye-laws and regulations in force at the time the matters complained of took place. All disciplinary proceedings, however, shall (for the avoidance of doubt) be conducted in accordance with the bye-laws and regulations in force at the time of such proceedings."

34. When read together, it is apparent that the focus of bye-law 11(c) is on the situations outlined in bye-laws 11(a) and 11(b), namely where disciplinary action is taken against a member, relevant firm or registered student in respect of matters which occurred when they were not a member, relevant firm or registered student; or, where they have ceased to be such member, relevant firm or registered student, but the matters occurred whilst they were a member, relevant firm or registered student. That focus is the reason for the appearance of the words "for the avoidance of doubt" at the start of bye-law 11(c), referring back to the immediately preceding bye-laws 11(a) and 11(b) that might have caused such doubt.

35. The purpose of the first sentence of bye-law 11(c) is thus to make it clear that although the Association is taking disciplinary action at a later date, the liability of a respondent is to be determined in accordance with the bye-laws and regulations which were in force at the time that the matters complained of took place.

36. In my judgment, the second sentence of bye-law 11(c) is also directed at such a situation. That is indicated by the use of the word "however" which provides both a link, and a contrast, to the first sentence. The second sentence of bye-law 11(c) seeks to clarify, again "for the avoidance of doubt", that although the first sentence provides that liability falls to be determined in accordance with the bye-laws and regulations which were in force at the time that the matters complained of took place, the disciplinary proceedings themselves are to be conducted in accordance with the bye-laws and regulations in force at the time of such proceedings – even if the person has ceased to be a member some time earlier, and the relevant bye-laws and regulations have changed in the meantime.

37. In short, notwithstanding that it was the focus of the judgment below, I do not consider that bye-law 11(c) is really directed at the issue that arises in this case, which is whether the Chairman was right to determine that the new Appeal Regulations 6(3)(g)(ii) and 6(4) which had come into force with effect from 1 January 2019 applied to Mr. Awodola's case, or whether the equivalent provisions of the Appeal Regulations 2018 continued to apply.

38. That conclusion is underlined by the fact that the bye-laws do not contain any definition of "disciplinary proceedings" which might assist in the interpretation of bye-law 11(c). Nor does the second sentence of bye-law 11(c) attempt to identify with any precision any particular time during such proceedings to which it is referring. That is because the purpose of bye-law 11(c) is only to distinguish between the time at which the events or matters giving rise to the complaint took place, and the later time at which the Association is taking action against the member or ex-member. For that purpose it is unnecessary that bye-law 11(c) be more specific about the particular point in time during such disciplinary proceedings to which reference is being made.

39. I also do not agree with the Judge that, simply as a matter of language, it is "clear and obvious" what the reference to "the time of such proceedings" in the second sentence of bye-law 11(c) must mean. On one reading of her judgment, the Judge appears to have taken the view that the "the time of such proceedings" meant "the time of commencement of such proceedings", but her judgment does not clearly state that this is so. Purely as a matter of language, I consider that it is equally possible to read the second sentence of bye-law 11(c) as providing that the proceedings should be conducted in accordance with the bye-laws and regulations in force at the time the question arises in the proceedings.

40. I further concur with Mr. Ozin's criticism that Judge did not clearly identify in her judgment precisely when "the continuum" of disciplinary proceedings to which she referred should be regarded as having commenced. Simply to describe the appeal process as being part of a "continuum" or as part of proceedings that "had been continuing through 2018" does not actually answer the question of whether the regime for the conduct of such proceedings could be changed during such process.

41. As I have indicated, the real question in this case was whether Regulations 6(3)(g)(ii) and 6(4) of the Appeal Regulations 2019 applied to Mr. Awodola's case. The provisions that might be thought to be of primary relevance to that question are bye-law 7(a) which provides that "the applicable regulations for the time being in force shall apply to each member", and Regulations 1(1) and 1(2) of Appeal Regulations 2019 which brought them into force and indicated how they were to apply.

42. In passing I should observe that the express transitional provisions in the Appeal Regulations do not provide any assistance. Regulation 24(1) simply provides that the grounds upon which an appellant may rely are those set out in the Appeal Regulations at the time of the making of the order which is to be the subject of the appeal, and regulation 24(2) provides that the test which is to be applied to determine whether permission should be granted is that which is in force at the date of the application notice filed by the appellant. Neither provision bears upon the issue in the instant case, which does not concern the effect of any changes to the grounds of appeal or the test for the grant of permission.

43. As indicated above, the Association's primary contention was that on and from 1 January 2019, the Appeal Regulations 2019 should be applied, in all circumstances and without exception to its members, in order to provide "complete clarity and simplicity" for all concerned. However, when that contention is tested and its consequences investigated as part of the iterative process of interpretation, the position is by no means that clear or simple.

44. So, for example, the logic of the Association's contention is that from 1 January 2019, decisions on renewed applications for permission to appeal that were outstanding would not be taken by the Appeal Committee, but by a Chairman acting alone on the papers. So, even if an appellant had made a valid request under the Appeal Regulations 2018 for a renewed oral hearing of his application for permission to appeal prior to 1 January 2019, if that application had not been determined by 1 January 2019, the Association's contention dictated that it would thereafter be determined by a Chairman acting alone on the papers. As a matter of strict logic, that would be so even if there had already been an oral hearing of the application, or one was still in progress but had been adjourned over the New Year period.

45. When asked, Mr. Ozin was unable to confirm whether or not such situation had arisen in practice or how it had been dealt with by the Association. It is, however, notable that in its response to Mr. Awodola's objection, as summarised in the decision of 14 February 2019, the Association was recorded as having accepted that the Appeal Regulations 2018 would have been applied in such a case. The reason for that concession is not difficult to see. It would manifestly be unfair to an appellant who had followed the then extant Appeal Regulations 2018 in a timely fashion and secured the right to have his application reconsidered at a hearing before the Appeal Committee, to deprive him of the opportunity to put his case in that way and to have it decided by such a panel – especially if such a hearing had already taken place.

46. Likewise, I put it to Mr. Ozin in argument that the Association's approach would also mean that if an appellant had filed his request for a reconsideration of his application for permission, say, 25 days after the initial refusal (i.e. in compliance with the Appeal Regulations 2018), after 1 January 2019 this would no longer be a request that met the criteria in Regulation 6(4) of the Appeal Regulations 2019, because it would not have been filed in accordance with regulation 6(3)(g)(ii) of those amended Appeal Regulations which specified a shorter time limit of 21 days for such request to be filed. On a strict reading of regulation 6(4) of the Appeal Regulations 2019, this would mean that there was no valid request for a reconsideration at all. That would be a manifestly absurd result.

47. Mr. Ozin's answer to these points was essentially to submit that if the Association's desire for certainty and efficiency in the application of its Appeal Regulations caused some unfairness to individual respondents, that might be unfortunate, but it was a price that had to be paid for the greater good of the Association. When pressed on the point, he ventured that if such situation arose, the Chairman might, in practice, exercise a discretion not to apply the bye-laws and Appeal Regulations strictly so as to avoid manifest unfairness. I do not accept that submission. Mr. Ozin did not explain the source of the Chairman's alleged authority to depart from the Association's bye-laws and Appeal Regulations in that way, and it was cogently pointed out by counsel for Mr. Awodola that the existence of any such discretion on the part of the Chairman had been firmly and categorically denied by Mr. Ozin in his arguments before the Judge.

48. Such examples significantly undermine the Association's supposedly "clear and simple" approach to the application of the Appeal Regulations 2019. A possible alternative approach, which both sides adopted and relied upon in argument before the Judge, is to apply, by analogy, principles derived from cases involving the interpretation of statutes, and in particular on what is often called the question of retrospectivity. The development of the law and the modern approach of the courts in this regard was

summarised by Lord Woolf MR in R v Secretary of State for the Home Department ex parte Chowdry [1998] INLR 338 at 344-345,

> "The question of unfairness is of significance because if an Act is retrospective it is necessary to have regard to whether it is fair or unfair for it to have that application. In passing legislation, Parliament can be assumed not to intend to produce results which are unfair, therefore unless Parliament makes it clear that a result which is unfair was an intended result, the courts will assume that that unfair result is not the one that Parliament intended. If Parliament makes it clear that its intention is to produce a result which it may or may not acknowledge is unfair, then courts have to give effect to that intention.
>
> The same approach has been traditionally adopted by these courts for many years. In the past the approach was achieved by distinguishing between changes which affected substantive rights of an individual and changes which were only procedural in effect.
>
> Generally, the view was taken that if the only effect was procedural, then there would be no unfair taking away of the individual's rights. If the changes were only procedural it was readily to be inferred that Parliament intended them to have effect forthwith once the legislation was passed. This was so even if, for example, procedures had already commenced prior to the Act coming into force. If on the other hand the situation was one where there were substantive rights which would be affected by the change, to take them away retrospectively would in ordinary circumstances not be regarded as a situation which Parliament would have intended to bring about. It was for that reason that it was said in such a situation that there was a presumption against retrospectivity.
>
> The well-known division between procedural and substantive changes did have a drawback. It was often difficult to determine whether a change made in the law was properly to be regarded as procedural or substantive. Because of the problems this could create, which could involve a court having to find its way through a maze of previous decisions, the emphasis over recent years has changed. The source of that change is to be found in a decision of Staughton LJ in the case of Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712. In a judgment which has frequently been cited since that time, Staughton LJ, at page 724f, identified this principle:
>
> > "Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not

> retrospective. Rather it may well be matter of degree the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

Similar remarks to those of Staughton LJ can be seen in the speech of Lord Mustill in the case of l'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486. That case was concerned with an arbitration where the problem as to the possible retrospective effect of the Arbitration Act 1950, as amended by the insertion of a new section 13A, was under consideration. The arbitrator had adopted the approach of simply saying that, because the new section 13A had been inserted into the Arbitration Act 1950, it must be regarded as having a retrospective effect. Lord Mustill pointed out that the attractive simplicity of that argument did not mean that it could be accepted. He considered in detail the proper approach to the interpretation. He made it clear that the advantage of the approach laid down in the Tunnicliffe case is that it avoids having to solve the problem in a mechanistic way. At page 525 he added:

> "Precisely how the single question of fairness will be answered will depend on the interaction of several factors, each of them capable of varying from case to case. Thus the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

In that passage Lord Mustill summarises what I, in current circumstances, would suggest is the appropriate approach to adopt in relation to the interpretation of statutes when a question of retrospectivity arises."

49. To that citation from Lord Mustill's speech in l'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, I would add his further observations at pages 527-528, commenting on the long line of old authorities drawing a distinction between accrued substantive and procedural rights. Lord Mustill concluded,

> "This distinction is so firmly embedded in the law as to lead easily to an assumption that every right can be characterised uniquely as either substantive or procedural, and that the assignment of a particular right to one category rather than the other will automatically yield an answer to the question whether a particular statute can bear upon it retrospectively. If this assumption were correct, it would call up an elaborate discussion, in the light of numerous reported cases, of whether the rights potentially affected by section 13A are properly regarded as substantive or procedural. My Lords, I believe that such a discussion would be unprofitable, partly because the distinction just mentioned may be misleading, since it leaves out of the account the fact that some procedural rights are more valuable than some substantive rights, and partly because I doubt whether it is possible to assign rights such as the present unequivocally to one category rather than another. Thus, whilst keeping the distinction well in view, I prefer to look to the practical value and nature of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event."

50. These principles have since been applied to disciplinary procedures of professional regulatory bodies, albeit in the context of the interpretation of statutory provisions: see e.g. R v The Prothetists and Orthotists Board ex parte Lewis [2001] ACD 57, affirmed [2001] EWCA Civ 837; and R v General Dental Council ex parte P [2017] 4 WLR 14.

51. In support of the Association's argument that the Appeal Regulations 2019 were merely procedural in nature and thus should apply to pending as well as future proceedings, Mr. Ozin placed reliance upon the decision of the Court of Appeal in R v Makanjuola [1995] 1 WLR 1348. That was, however, a criminal case on very different facts. The court decided (refusing permission to appeal) that a statute which abrogated the rule that a jury had to be given a warning by the trial judge about convicting an accused on the basis of the uncorroborated evidence of an accomplice, was a procedural provision which applied to a trial where the defendant had been charged before the section came into force.

52. In support of its decision, the Court of Appeal simply cited the 1992 edition of *Bennion on Statutory Interpretation* to support its observation at page 1351B-C that,

> "The general rule against the retrospective operation of statutes does not apply to procedural provisions."

The court does not, however, appear to have been taken in argument to any of the relevant authorities including, in particular, l'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, which had been decided in 1993, after the 1992 edition of *Bennion* upon which the court relied. Accordingly, I do not consider that R v Makanjuola can be regarded as setting out the current state of the law.

53. As I have indicated, at paragraph 28 of her judgment, the Judge dismissed these authorities on the basis that the instant case did not concern the interpretation of a statute. Whilst I accept that the two situations are not the precisely same, I do not agree

with the Judge that no assistance can be derived by analogy from the general approach illustrated by the cases.

54. Rather, in the same way as Parliament can be assumed (unless the contrary intention appears) not to intend to produce results which are unfair when it passes legislation, the very nature and role of the Association as a professional regulatory body is such that the objective observer, tasked with ascertaining the meaning of its bye-laws and disciplinary regulations, would at least start with the assumption that the Association would not intend to promulgate changes to those bye-laws and regulations which would produce results that were unfair to its members. The bye-laws and regulations should therefore not be interpreted in a way that produced such unfairness unless very clear words were used by the Association to show that this was precisely what it intended.

55. Applying such an approach, the first point to note is that given the status of the Association, the operation of, and sanctions which can be imposed under, the Association's disciplinary regime are capable of having the most profound impact upon the professional reputation and livelihood of its members. Accordingly, it should be obvious that the disciplinary regime must be operated with scrupulous fairness and the effect of changes to the regime upon those subjected to it should be carefully scrutinised.

56. Secondly, it should be noted that the relevant changes at issue in this case concern a right to seek permission to appeal that was conferred by Regulation 3(1) of the Appeal Regulations (which was unchanged on 1 January 2019). Appeal Regulation 3(1) provides,

> "Any relevant person who is the subject of a finding or order made by the Disciplinary Committee … may apply for permission to appeal within 21 days after service of the written statement of the reasons for the decision of such Committee …"

It is self-evident that such right to file an application for permission to appeal against a disciplinary order is an important right of significant value to a member of the Association.

57. Thirdly, either from the date of the disciplinary order itself when time starts to run under Appeal Regulation 3(1), or certainly once the application notice seeking permission to appeal has been filed, the identity of the person or persons who will make the decision on the grant of permission is a matter of considerable importance to the appellant.

58. The importance of the identity of the decision-maker and a particular route of appeal has been considered in a number of cases. In particular, Mr. Hitchens and Ms. McGibbon referred to Colonial Sugar Refining Company v Irving [1905] AC 369, which concerned the Australian Commonwealth Judiciary Act 1903 which abolished a right of appeal to the Privy Council and replaced it with a right of appeal to the High Court of Australia. The proceedings in question had been commenced before the passing of the 1903 Act, but the relevant decision of the Queensland Supreme Court was given after the 1903 Act had come into force. The Privy Council held that the 1903 Act should not be interpreted as having removed the appellant's right to have the case considered by the Privy Council.

59. In giving the advice of the Privy Council, Lord MacNaghten stated, at page 372,

> "The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

60. Although that reasoning was couched in the old distinction between substantive and procedural rights, there can be no doubt that it recognises and reflects the importance of the identity of the particular tribunal that considers an appeal. In particular, if (as with the Appeal Committee) the panel consists of professional and lay members, the appellant will have the benefit of a number of persons considering his arguments, discussing it between themselves, and bringing their collective expertise and thoughts to bear on the issues.

61. Fourthly, although a system under which an appellant is not entitled to request an oral hearing may be entirely fair, there may be significant practical differences for an appellant between reconsideration at an oral hearing and a determination of his application on the papers alone. For example, written submissions for determination on the papers alone may need to be prepared in a very different way to a document which is designed as a summary to be elaborated upon at an oral hearing where particular points can be further articulated, clarified and emphasised. Accordingly, where (as here) the request for reconsideration needed to be supported by a reasoned document, to remove the right to request an oral hearing one day before the end of the 28 day period for preparation of such document carried a real risk of prejudice to an appellant.

62. Taking all these factors into account, rather than engage in the unprofitable debate about whether the changes made by the Appeal Regulations 2019 were substantive or merely procedural, I have no doubt that the relevant rights to an oral reconsideration by the full Appeal Committee under the Appeal Regulations 2018 could reasonably be thought to be of significant practical value and importance to an appellant. As such, once the underlying disciplinary order had been made, or at very least once an application notice seeking permission to appeal had been filed in accordance with Regulation 3(1) of the Appeal Regulations 2018, I consider that it would be manifestly unfair to an appellant to remove those rights and to apply the amended Regulations 6(3)(g)(ii) and 6(4) of the Appeal Regulations 2019 to the determination of that application instead.

63. Accordingly, absent very clear words to the contrary, I do not consider that the bye-laws and regulations of the Association should be interpreted so that the provisions of Regulations 6(3)(g)(ii) and 6(4) of the Appeal Regulations 2019 applied to the

determination of an application for permission to appeal that had been filed prior to the date upon which those provisions came into force. There are, however, no such clear words. I have indicated why I do not consider that bye-law 11(c) is designed to address this issue. I also do not consider that the words of bye-law 7(a) and Appeal Regulations 1(1) and 1(2) provide the necessary clarity. Although expressly dealing with the coming into force and application of the relevant amended regulations, their entirely general words simply do not bear the weight that Mr. Ozin sought to place upon them.

64. On the second ground of appeal, Mr. Ozin argued that the Judge's approach produced a result that was inconsistent with the specific transitional provisions of Appeal Regulation 24.

65. I can see that if the Judge decided that the meaning of bye-law 11(c) was that each and every provision of the Appeal Regulations in force at the time of the commencement of the underlying disciplinary proceedings applied to the determination of the appeal, Appeal Regulation 24(1) (which provides that the grounds of appeal are those which are in force at the date of the disciplinary order) would be potentially inconsistent with bye-law 11(c) if there were a change in the meantime. The same argument would apply to Appeal Regulation 24(2) if there was any change in the test to be applied when considering an application for permission to appeal between the date of commencement of the proceedings and the date of the application notice.

66. On the approach to interpretation that I have outlined above, however, the point does not arise. This case does not turn on the wording of bye-law 11(c) and there is nothing in Appeal Regulation 24 – which is dealing with two different and discrete points - that conflicts with bye-law 11(c).

67. Those conclusions are sufficient to dispose of the appeal. Albeit by a different route, I have reached the same result as the Judge below – namely that the pre-existing Regulations 6(3)(g)(ii) and 6(4) of the Appeal Regulations 2018 continued to apply to the determination of Mr. Awoloda's application for permission to appeal, rather than the equivalent provisions of the Appeal Regulations 2019. In my judgment, therefore, the Judge was right to quash the decision of the Chairman given on 14 February 2019, and the appeal must be dismissed.

68. I cannot, however, leave the case without dealing briefly with two related points.

69. First, and as I have indicated above, Mr. Ozin submitted that the result reached in this case might inhibit the Association from implementing changes to its disciplinary regime in future. I do not agree. The answer is simple: if the Association wishes to alter rights enjoyed by its members who are the subject of extant disciplinary proceedings (including appeals), it should take care to consider the potential consequences of the proposed changes on such members. The Association can (and should) then make it clear what consequences it intends for such members, by enacting specific transitional provisions and giving them appropriate publicity.

70. That leads to the second point. In the instant case, it is unclear what, if any, consultation process, led to the changes on 1 January 2019. However, the changes were not publicised within or without the Association until they appeared on its website, and nor were the hearing officers dealing with existing cases made aware of them in advance. That explains why the letter sent to Mr. Awodola on 30 November 2018 did not

mention, or even hint, that a change in the relevant Appeal Regulations was afoot. Nor did the letter warn Mr. Awodola that if he did take until the end of the stated period to file his request for reconsideration and supporting grounds, this would be dealt with in an entirely different way from that stated in the Association's letter.

71. As it is, however, the conclusions on interpretation that I have reached above mean that it is not necessary to consider whether this approach by the Association, which led to its hearing officer sending the letter of 30 November 2018, gave rise to any other discrete rights or legitimate expectations, breach of which Mr. Awodola could have complained as a matter of public law, independently of the position under the Association's Charter, bye-laws and regulations.

LADY JUSTICE CARR :

72. I agree.

LADY JUSTICE ASPLIN :

73. I am grateful to Snowden LJ for his careful and comprehensive analysis of the relevant provisions and authorities in this case, and I entirely agree with all of his conclusions. I add a few words in relation to the proper construction of the relevant byelaws and the Appeal Regulations 2014 (as amended). One hardly needs authority for the proposition that a construction which results in manifest unfairness of any kind, is unlikely to be the correct one, unless there are very clear words which point in that direction. It seems to me that the reasonable bystander would start from such a premise. This is likely to be all the more so given the relevant factual matrix. The Association is a regulatory body and the Appeal Regulations are concerned specifically with appeals from disciplinary orders and a disciplinary order may have extremely serious consequences for the member or fellow.

74. As Snowden LJ has pointed out, the interpretation adopted by the Association leads to results which are both absurd and harsh. That is a very clear indicator that that interpretation cannot be correct. Furthermore, it cannot be justified on the basis of certainty and efficiency. It seems to me, therefore, that if one applies the normal principles of construction, one arrives at the conclusion that the changes to Appeal Regulations 2018 by the shortening of the time to make a request for reconsideration of an application for permission to appeal from a disciplinary order, the change in the person or body by whom or by which such an application is considered and the removal of the right to an oral hearing, contained in the Appeal Regulations 2019, should not be construed to have had retrospective effect.