Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 4 October 2014

Albion Chambers REGULATORY NEWSLETTER

Squeaking pips

The extraction of proceeds of Regulatory Crime

An analysis of three cases decided this year leaves the score 2-1 to regulators in the field of confiscation. The spring saw victories from the perspective of regulators both in *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52 and *R v Scott King* [2014] EWCA Crim 621. However, the decision in *R v Salah Ali* [2014] EWCA Crim 1658 favoured the arguments of the defence in establishing the limits upon what will be considered a defendant's benefit where there has been failure to comply with an enforcement notice, and may leave a bad taste in the mouths of those dealing with repeated and cynical breaches of regulations for financial gain.

The headline of *Zinga* may be briefly stated; those who bring private prosecutions are also able to invite the court to proceed under s.6 of the Proceeds of Crime Act 2002. The Court of Appeal was clear that there is nothing in the statute which prevents this, and also that the fact that powers of investigation are only conferred on certain officers was no bar to private prosecutors pursuing a confiscation order; it was held that the Act makes a distinction between those who can investigate and those who can prosecute. A private prosecutor will clearly need assistance from those officers authorised to investigate by the Act at the confiscation stage. The involvement of the police and the agreement that the police would receive a large percentage of any compensation order in Virgin's favour in that particular case, about which the court expressed concern, is not for discussion here.

King concerned Unfair Trading Regulations offences, the appellant having pleaded guilty to offences of falsely claiming or creating the impression that a trader is not acting for purposes relating to his trade/business (Regs 12, 13 and Para 22 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008). The appellant had advertised and sold 58 cars as a private seller, whereas in fact this was his business. His purpose was to avoid providing a guarantee or warranty. A confiscation order was made in the sum of £109,970; which represented his benefit from this particular criminal conduct, quantified by reference to the turnover of the business.

It was argued by the appellant that this order was disproportionate, as the profit of the business had only been in the region of £11,000, taking into account the purchase price of the cars, and the appellant's activities were not unlawful per se, unlike those of e.g. drug dealers. It was pointed out that the purchasers of the vehicles had received full value, and were protected by implied terms of quality (because a contract cannot exclude or restrict the effect of s.14(2) as regards the consumer). The appellant relied on the decision of the Supreme Court in *Waya*, and suggested that the case was analogous to cases of full restoration.

The Court disagreed, and said that the case fell on the same side of the line as *R v Beazley*[1] (in which wheel trims were offered for sale bearing the logos of named car manufacturers in spite of the lack of any licence to do so, but in which the defendants openly advertised the parts as not produced by the manufacturer, and in all other respects operated a lawful business). The Court held that a distinction is to be drawn between "cases in which the goods or services are provided by way of a lawful contract... but the transaction is tainted by associated illegality... and cases where the entire undertaking is unlawful... in this case the entire enterprise was characterised by the deliberate misrepresentations of the appellant" (paras 32 and 33). Thus, deliberate flouting of regulations may lead to the entire turnover of what would otherwise have been a lawful business being categorised as the offender's benefit. The Court's refusal to categorise the confiscation order as disproportionate recognises the impact upon purchasers of a vendor's failure to comply with the regulation of consumer sales.

The operation of PoCA to the advantage of regulators in that decision may be contrasted with the decision in *Salah Ali*. Mr Ali converted houses into blocks of flats without permission, gathered the rental payments, and ignored enforcement notices. There was evidence that he viewed the fines he received in the lower courts as a 'business expense'. In respect of one particular block of flats, having been convicted of failing to comply with an enforcement notice (requiring him to use the premises as a single residence), a confiscation order of £1,438,000 was made. That figure was reached applying the criminal lifestyle assumptions, and including within the benefit figure:

(i) rent received prior to the expiry of the period within which Mr Ali could have complied with the enforcement notice; and

(ii) rent on properties which had also been converted without permission, but in respect of which there was no enforcement notice.

The issues on appeal were:

(i) Should the s.10 assumptions be applied where a defendant is absent through ill-health?

(ii) Should the judge at first instance have adjourned for the provision of further medical evidence (it being suggested by the appellant that had he done so he would have concluded that the appellant was not voluntarily absent and thus would not have applied the assumptions)?

(iii) Does a defendant's particular and

general benefit within sections 6 and 10 include rent where there has been no enforcement notice issued in respect of a property, or in respect of a period before the expiry of the time for compliance with an enforcement notice.

In relation to (i) and (ii) the appellant argued that the assumptions ought not to apply where a defendant is involuntarily absent because otherwise the sick would be punished by comparison with those who deliberately abscond, in relation to whom s.27(5) means that the assumptions are not applied. This argument was rejected, as the Court said that when an absconder is caught, the prosecution can by virtue of s.27(6) continue with the proceedings and deploy the assumptions. The decision of the Court below to proceed without further medical evidence and to apply the assumptions was upheld.

Point (iii), the Court said, "involves the determination of two questions. The first is whether the appellant's benefit (both particular and general benefit)... includes rents received where no enforcement notice has been served or where, if one has been served, the time for compliance has not yet lapsed. The second is whether, if the basic proposition is that such rents do not generally qualify as the appellant's benefit under PoCA, they will do so where the conduct amounts to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. The point of law raised by these questions is of practical importance because breaches of planning law may not be discovered for a considerable period of time".

The court noted that the answer to these questions lies in having close regard to the statutory definitions, which clearly refer to criminal conduct as meaning "offences". A breach of planning control is not criminal per se; it is the failure to comply with the enforcement notice which is an offence and which may generate PoCA proceedings. The appellant's conduct did not constitute an offence in relation to any particular property until an enforcement notice was actually served and until the relevant notice period had expired. The confiscation order was therefore reduced by almost 60% to £544,358.

The comfort for regulators lies in the fact that the Court did not however close the door on the argument regarding inchoate offences. The Court noted that there is no indication on the face of the statute that conduct which is criminal because it amounts to an inchoate offence is to be treated differently from other criminal conduct. The difficulty lay in a determination of whether the conduct amounted to an inchoate offence; in relation to breaches of planning control analysis of conditional intent and conditional agreement is required because the conduct is not intrinsically criminal. In other words, the question was; is there evidence that Mr Ali said to himself (or agreed with others if there was to be reliance on a conspiracy) "I will adopt this course of action and if I am served with an enforcement notice my intention is that I will not comply with it". As the court said; "The conditionality or contingency planning element of a person's intention or the agreement made with another does not necessarily preclude there being a criminal attempt or conspiracy... But what has to be shown is that there was an ex ante intention or an agreement not to comply with any enforcement notice served" (para 62). The Court simply – and reasonably - avoided the difficulties involved in such an analysis by concluding that it is necessary for there to be a clear finding in the confiscation proceedings that the conduct under consideration amounts to an attempt or conspiracy, in order for the court to proceed on that basis in relation to the figure to be confiscated.

Those concerned with the prosecution of these kinds of "career criminals" should give early consideration to the charges to be brought; if there is evidence which supports an attempt or conspiracy the scope of which goes wider than the completed offence, charging such an offence or producing clear evidence of it at the confiscation stage, may enable the Court to make a confiscation order at a level which in fact strips a cynical criminal of the benefits of their conduct.

Ignatius Hughes QC

1. [2013] EWCA Crim 567

Company or not to company

Implications for sentencing

In our last newsletter I wrote that over the past 18 months many of us practising in the regulatory sphere have noticed a distinct shift in policy, both EA and HSE, to indict the directors alongside the company in regulatory proceedings. This article looks at recent legislative changes in order to highlight some of the issues to be considered where a client has the option of being prosecuted as an individual or as a company.

What's changed?

Two things. With effect from 1 July 2014, new sentencing guidelines for Environmental Offences came into force, applying retrospectively to all cases sentenced on or after this date. The guidelines make a clear distinction between individuals and companies when considering sentence, with larger fines for companies and the potential for custodial sentences for individuals.

On 10 March 2014, section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was brought into force. This section of the Act amends the Rehabilitation of Offenders Act 1974 to shorten the period of time after which a conviction becomes 'spent'. For offenders dealt with by way of a fine, the conviction will now be deemed spent 12 months after sentence is passed.

Who will this affect?

The changes will be of greatest significance to owners of small businesses (£0-£10m turnover) being prosecuted for an environmental offence both as a corporate entity but also in their personal capacity as a director. In such circumstances, the prosecutor will sometimes accept a guilty plea either on behalf of the company or the individual, and agree to drop the charges against the other. Solicitors and lay clients are then left to weigh up the merits of either approach.

Additionally, the effects of s.139 LASPO 2012 may be felt in regulatory proceedings against individuals. Earlier this year one of our new tenants, Alexander West, argued that a Magistrates' Court conviction for a breach of drivers' regulations was not admissible as part of a driver conduct hearing in front of the Traffic Commissioner, as the conviction was now 'spent' as a result of the changes to the legislation. Judgment is awaited.

So what's the difference?

There are two key differences to highlight as a result of these changes. The first is the level of sentencing for environmental offences, and the second is rehabilitation for regulatory offences generally.

As we mentioned in our last newsletter, the new Environmental Offences Sentencing Guidelines treat companies and individuals differently. Whilst companies are dealt with solely by way of fines, individuals can also be dealt with by way of community orders and even custodial sentences. However, where the comparison is solely in respect of the level of fine to be ordered, often individuals will receive a lesser fine than companies.

For example, if a small company with a turnover of £5million is guilty of an offence which is considered to be Negligent Category 2, such as failing to prevent a leakage into a waterway, the fine for the company will be between £6,000-£55,000. The corresponding fine for an individual will be a Band D or Band E fine, which is 200%-500% of their net weekly income. Working on the basis of a director earning £80,000 p.a., the net weekly pay would be around £1,000, and the fine would therefore be £2,000-£5,000, a much smaller sum.

The second consideration is rehabilitation. Under s.5 of the Rehabilitation of Offenders Act 1974, as amended by s.139 LASPO 2012, convictions against individuals which are dealt with by way of a fine will become 'spent' 12 months after sentence is passed. This means that for a director of a company who is convicted of a regulatory offence, once 12 months have passed he or she will no longer have to declare the conviction when making applications for licences, permits and exemptions.

Further, for individuals who are dealt with by professional bodies in respect of disciplinary proceedings, where those disciplinary hearings are held more than 12 months from the date of the relevant conviction, that conviction will often as a general rule be inadmissible unless an exception applies.

The question that naturally forms on everyone's lips at this point is "will s.139 LASPO apply to companies?" Interestingly, while the Act is silent on the point, it seems as though it will not. The Rehabilitation of Offenders Act 1974 was originally designed to help individuals convicted of crimes re-engage with society and find employment without their convictions holding them back. As such, it seems as though it applies only to individuals, which is consistent with the interpretation other bodies such as the HSE and the Traffic Commissioner have given.

A further consideration

As previously stated, the Environmental Offences Sentencing Guidelines discriminate against those companies with higher turnover, imposing greater financial penalties, aimed at punishing the company according to its size. The enterprising company director may see this as an incentive for corporate restructuring if, for example, the company carries out several functions or operations under the same trading name. Where a branch of the company operates in waste management, for example, the new guidelines may present an incentive to sever this part of the company so that its turnover is assessed individually rather than using the turnover of the whole company as the relevant figure.

Final thoughts

As is always the case in these situations, there are a multitude of considerations to factor into the decision-making process. Where a company director has the choice of being prosecuted as a company or in his personal capacity, the discussion above shows the new legislative changes provide some interesting tactical decisions for company directors and those that advise them.

Jason Taylor

Case Law Bulletin

Polyflor Ltd v Health & Safety Executive [2014] EWCA Crim 1522

Serves to illustrate that, tactically, practitioners may be best to focus on whether a defendant has done all that is reasonably practicable to avoid a risk, rather than on the argument that there is no reasonably foreseeable risk.

The case concerned one offence contrary to s.33(1)(a) of failing to protect so far as reasonably practicable the health and safety of an employee. The employee in question was doing maintenance on part of a granulating machine which had become jammed, and during the process a permit to run the machine without guards was obtained. No safety advice or indication of the precautions which should be taken accompanied that permit. The employee sped up the machine's rollers, stuck a spanner in them and his hand was drawn into the rollers breaking his arm. He accepted in his evidence that he had taken a risk and that what he had done was foolish. The prosecution's expert said at the conclusion of this evidence "at the end of the day, if someone's going to do something stupid you cannot stop them."

The argument on appeal was that this evidence did not support the prosecution's case either that the injury was attributable to any breach of the s.33 duty, or that the nature of the accident was proof of the existence of a risk attributable to a system of work, therefore the trial judge should have withdrawn the case from the jury.

The Court referred to *R v Tangerine Confectionary Ltd v Veolia ES (UK) Ltd* [2011] EWCA Crim 2015 in saying that the foreseeability of risk is relevant to whether a risk to safety exists. This does not require the prosecution to prove that the accident which occurred was foreseeable; the offences creased by s.33 are not of failing to take care to avoid a specific accident. The Act is concerned with exposure to risk of injury, and the extent to which injury is foreseeable is part of the inquiry into the level of risk. The trial judge had asked himself the question "when operated without a guard, is there a risk that somebody may insert something into the machine?" to which the answer was yes.

The Court of Appeal agreed and dismissed the appeal. The Court agreed with the prosecution that running the machine with the guarding removed was permitted under a permit to operate the machine, such that there was in place a system whereby employees were exposed to a clear risk to health and safety, which was sufficient for the evidential threshold to be met.

The Court noted, however, that no evidence was called to demonstrate that the appellant had done all that was reasonably practicable to avoid the risk. Whilst acknowledging that this was a legitimate tactical decision, the Court said, "we venture to suggest that a jury is more likely to be persuaded that an employer has probably done all that could reasonably have been done to obviate an obvious risk if it adduces a positive case that other options have been considered, but for whatever reason none has been considered reasonably practicable". It is not often the Court of Appeal offers tactical advice on jury advocacy; it may be worth grabbing this nugget with both hands!

Lycamobile UK Ltd v Waltham Forest London Borough Council [2014] EWHC 1829 (Admin)

The perils of the Magistrates' Court.

The appellant company was convicted following guilty pleas to offences of displaying an advertisement in contravention of the Advertisement Regulations and s.224(3) of the Town and Country Planning Act 1990. The company provided global mobile network services. They had displayed posters to that effect within the respondent's area of authority. At half time the defence invited the Magistrates to stay the case for abuse because the council had not given advance notice of the proposal to remove the posters, as they were required to do so by s.225(3), and their failure to do so deprived the appellant of the opportunity to take all reasonable steps to secure the removal of the display. To have taken those steps would have amounted to a defence under s.226(6)(b). The legal advisor stated that s.225 was not in force. Subsequently, the half time submission was withdrawn, and guilty pleas entered. The legal adviser was wrong. The argument on appeal by way of case stated was that the Magistrates were incorrect to accept those pleas and convict the appellant based on procedural irregularity.

It was held that the Magistrates had not in fact been invited to rule on whether the section was in force, and so could not be said to have made any erroneous finding. The Court said that to accede to the defence argument would bring into its jurisdiction the impact of discussions between lawyers and clients where there had been no ruling by the magistrates, which would be wrong. The appeal failed.

R v (1) Jonathan James Clayton (2) Paul Donald Simon Dockerty [2014] EWCA Crim 1030

What is the appropriate forum for challenge of an enforcement notice?

The appellants pleaded guilty to failing to comply with an enforcement notice contrary to s.179 of the Town and Country Planning Act 1990. The question on appeal was whether the judge ought to have investigated whether criminal proceedings should have been stayed for abuse. The notice in question prevented the appellants from allowing long-term residential lets of the flats they owned. The notice (which had been the basis of a previous prosecution) could only be issued if the council was able to prove that the change of use had been fewer than four years prior to the issue of the notice. Between the inspection which revealed the existence of the long-term lets and the issue of proceedings, the appellants were told that the council had been in possession of information at the time of the issue of the notice that the change of use had taken place more than four years prior to issue. The appellants invited the judge to stay the proceedings on the basis that for them to be tried would offend against the Court's sense of justice.

The trial judge refused to stay proceedings on the basis of the prosecution submission that s.285(1) of the Act and the decision of the *House of Lords in R v Wicks* [1998] AC 92 make it plain that the Crown Court does not have jurisdiction to entertain the argument. The Court of Appeal agreed with the judge and the appeal was refused. Section 285(1) provides that the validity of an enforcement notice shall not be questioned except by an appeal under Part 7. The Court suggested that the appellants should have applied to quash the enforcement notice directly. The Court referred extensively to Wicks and noted the Court's observations that it is not open to the Crown Court to hear an argument on abuse in all cases, it depends on whether the Crown is required to prove that the notice is valid in order to prove its case in relation to the indicted offence. The statute under which the prosecution is brought may or may not require the prosecution to prove that the Act in question is not open to challenge on any ground available in public law. The Court said "Once it is recognised that the validity of the order lies at the heart of the abuse of process complaint, the provisions in s.285 and the principles enunciated in Wicks are applicable." (para 45).

The Court rejected the argument that because the appellants did not know of the wrongdoing until late in the day a collateral challenge should be allowed, but said that the circumstances would have justified a stay until the validity of the notice had been determined on appeal or, if no valid appeal could be lodged, in judicial review proceedings.

John Sweeny (Claimant) v *(1) Westminster Magistrates' Court (2) London Regional Asset Recovery Team* (Defendants) *& Environment Agency* (Interested Party) [2014] EWHC 2068

Highlights the need for care in the drafting and preparation of applications for search warrants by regulators.

The Claimant challenged the lawfulness of a search warrant issued by magistrates on an application by the police on behalf of the Environment Agency. The premises to be searched included business premises where there was a waste transfer and recycling station. The warrant, it was argued, failed to identify so far as practicable the items which it was sought to seize as it should have to comply with s.15(6)(b) of PACE. The Claimant argued that the application was extensively defective. It failed to set out the statutory requirements for the warrant to be granted, it failed to set out how the requirements were satisfied by reference to the relevant facts relied upon including all facts and matters said to show that a reasonable belief was justified.

There was a failure to identify offences with reference to the facts said to demonstrate their commission. There was a failure to disclose information within the Environment Agency's knowledge (e.g. that the EA knew that waste had been cleared by the claimant company, or that there had been cooperation with previous requests for interviews). There was reference made to 'evidence' within the application but no evidence was identified in relation to any of the six sites searched.

The appeal was allowed and in essence the Court accepted the appellant's criticisms. It was acknowledged in the Court's judgement that an applicant's ability to identify precisely the type of documents which may be sought during a search may be hampered by the scope of the investigation; a broad investigation necessitates a broad search. However, the Court said that this application failed to specify with any precision at all the nature of the material sought. It was noted that the qualification "variation or linked to the same", added to the named companies/individuals in relation to which documentation was sought, produced the "result... that the search could include any material relating to any business activity of any named individual". The information failed to identify which, if any, indictable offence had been committed. The Court noted that s.89(1)(b) and (c) of PACE require that the material on the premises is likely to be of substantial value and relevant evidence. The Court struggled to see how the Justices could have been satisfied that there were reasonable grounds for believing that relevant material was present, in light of the failure to identify what, if any offence was alleged.

Walker & Sons (Hauliers) Ltd v Environment Agency [2014] EWCA Cri 100

A decision which will please environmentalists... there is no 'due diligence defence by the back door'.

The question was regarding the effect of Regulation 38(1)(a) of the Environmental Permitting (England and Wales) Regulations 2007. The appellant company purchased a site and awarded a contract for demolition of the buildings on it to another company, which began illegally to receive and process

Continued on back page

Albion Chambers Regulatory Team incorporating Health and Safety

Ignatius Hughes QC
Call 1986
QC 2009 Recorder

Adam Vaitilingam QC
Call 1987
QC 2010 Recorder

Team Clerks Bonnie Colbeck, Nick Jeanes, Ken Duthie

Stephen Mooney
Call 1987

Alan Fuller
Call 1993

Jason Taylor
Call 1995
Team Leader

Kate Brunner
Call 1997 Recorder
Upper Tribunal Judge

Richard Shepherd
Call 2001

Anna Midgley
Call 2005

Derek Perry
Call 2006

Edward Hetherington
Call 2006

Alexander West
Call 2011

Alexander Small
Call 2012

waste on site. There were complaints about the resulting acrid smoke. The director of the appellant company was interviewed under caution and said that he had seen evidence of burning and crushing but had believed that that was associated with the demolition work. However, at trial, the company admitted being aware of waste operations being carried out at the site. The issue before the trial judge was confined to the meaning of the words "knowingly permit" in Regulation 38(1)(a). The dispute between the prosecution and defence was whether all the prosecution need to prove was that the defendant knowingly permitted a particular waste operation and that as a matter of fact that waste operation was not in accordance with an environmental permit, or whether the prosecution had in addition to prove that the defendant knew that the operation was not in accordance with an environmental permit.

The Court reviewed previous authorities in which it was held that once a defendant knew that controlled waste was deposited on land, the strict obligation imported by the rest of s.33 comes into play. It was pointed out that there are means of checking whether there are permits in place and that ignorance should not be defence to an environmental offence in those circumstances. Reference was also made to the Explanatory Information attached to the draft 2004 Regulations in which it was noted that strict liability was a deliberate choice, made in order to secure higher environmental standards.

Anna Midgley

Regulating the regulators

The Tribunal system

In the summer of 2014 a Scottish tax tribunal sat down to a tea of Jaffa cakes, meringue, tea cakes and Snowballs. A Snowball is a marshmallow ball wrapped in chocolate and rolled in coconut. It is a cake, not a biscuit. We know that now because the tribunal reached that finding on 27 June, saving two bakers £2.8 million in VAT. Cakes are exempt from VAT; biscuits are not.

On the same day in London, a Social Care Tribunal decided that Ofsted had been right to close down MiniMe nursery, as those running it were 'naive and uninformed' and children were at risk.

On the same day, no doubt, parking tribunals were deciding whether parking signs were so obscured by summer foliage as to make them unreadable, and tickets unlawful, and Social Security tribunals were hearing how ATOS and the DWP had incorrectly assessed claimants as being fit for work.

This remarkable range of work is carried out daily up and down the land by First-tier Tribunals, bodies about which many lawyers know little. Nearly 900,000 cases were decided by tribunals in 2013-2014 [1]. So what do tribunals do? They play a vital role in regulating the interaction between the individual and the State, often the State acting through a regulator. If the State, through HMRC, imposes a tax which you dispute, you can appeal to the Tax Chamber of the First-tier Tribunal. If the State, through the Care Quality Commission, refuses to register you to open a carehome, you can appeal to the Health and Social Care Chamber.

The current tribunal system in the UK is just a few years old old, a babe-in-arms compared with the court system alongside which it operates.

The birth of the modern Tribunal System

In 2000 the then Lord Chancellor set up a review of the tribunals in England and Wales. The review, headed by Sir Andrew Leggatt, identified three major flaws with the system. Firstly, it was disjointed and fragmented; 137 separate tribunals had grown up, dealing with the whole range of political and social life, operating under different procedural rules. Secondly, many tribunals were not independent but were funded by the bodies whose decisions they reviewed. Sir Andrew wrote: *"The tribunal neither appears to be independent, nor is it independent in fact. Responsibility for tribunals and their administration should not lie with those whose policies or decisions it is the tribunals' duty to consider. Otherwise for users, as has been said, 'Every appeal is an away game.'"* The General Commissioners of Income Tax, as an example, depended wholly on the Inland Revenue to obtain the relevant information they needed to take their decisions. Thirdly, tribunals were not accessible, and there was a growing perception that lawyers were required to assist appellants through the morass of procedural and technical complexities.

The review was acted on, and the Tribunals Courts and Enforcement Act 2007 brought radical change. Two levels of independent tribunal were created. The First-tier Tribunal is the first port of call for the individual who wants to challenge the State. The Tribunal is divided into six chambers dealing with different areas, such as tax and social security. One of the First-tier chambers, the General Regulatory Chamber, has subsumed a great many tribunals which heard appeals against sixteen different government regulatory bodies including the Charity Commission and the Gambling Commission.

Appeals from the First-tier Tribunal are heard by the Upper Tribunal. The Upper Tribunal is a superior court of record, giving it equivalent status to the High Court and meaning that it can both set precedents and can enforce its decisions (and those of the First-tier Tribunal) without the need to ask the High Court. There are only four chambers in the Upper Tribunal; Tax and Chancery, Immigration and Asylum, the Lands Chamber and the Administrative Appeals Chamber. While the first three are linked to particular First-tier chambers, the Administrative Appeals Chamber has a broad remit and hears appeals on matters of law from a number of different First-tier chambers. One landmark feature is the ability of the Upper Tribunal to hear some judicial reviews; the first time that applications for judicial review have been heard outside the High Court of Justice.

A child of our times?

Have the reforms had their desired effect? The system is certainly more cohesive. If a measure of independence is a system which is not shy to disagree with the State, then that, too, has been embraced. As an example, within the Social Security chambers almost 40% of DWP decisions were overturned in a two and a half year period examined recently [2].

Accessibility has been achieved through informality and simplicity.

The tribunals operate under rules which, although they are particular to each chamber, share common features. Many tribunal regulations contain an overriding objective which the Tribunal must consider whenever making a decision, and unlike the overriding objectives in the court system, the tribunal must *'avoid unnecessary formality and seek flexibility in the proceedings'*. The informality is apparent in the processes of appeal, which are simple and generally free, and in the tribunal hearings themselves, which are not in court rooms but in more relaxed surroundings, with the tribunal judge and lay member, sitting around a table with the appellant.

Alongside this informality is a reduction in complex evidential rules. Many tribunal rules contain phrases like *'The tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in England and Wales'*, and the general approach is to admit all evidence and take a view about its weight.

Most of those who appear before the Social Security Tribunal represent themselves. Those who are represented usually have friends speaking for them; a very few have lawyers. This is, no doubt, largely a situation imposed on appellants as legal aid is generally not available, but the signs are that they do not need lawyers. A study in the 1980s, before the reform of the tribunal system, showed that representation had a substantial effect on the outcome of a tribunal. A claimant who was represented had their chance of success increased from 20% to 35% in most tribunals, an average added value of 15%[3]. The study was repeated more recently, and representation makes far less difference now. In some chambers, being represented makes no difference at all. In Social Security tribunals, it adds 6% chance of success. The study considered that was partly the result of the inquisitorial approach, where the panel members investigate issues through questioning of the appellant, rather than passively require submissions to be made[4].

Lawyers may not add much value in the Social Security chamber, but legal expertise is still frequently relied on in other chambers, such as the Tax chamber. A lawyer was clearly required to persuade the Tax chamber why a Snowball is a cake. The reasons? A Snowball has cake characteristics. It is usually eaten at a table, it is usually eaten with cutlery, and it is frequently eaten to celebrate a Scottish office birthday.

Kate Brunner

1. Gov.uk Tribunal Statistics quarterly.
2. Gov.uk ESA Appeal outcomes.
3. Genn and Genn (1989) The effectiveness of representation in Tribunals.
4. Adler, Tribunals ain't what they used to be, University of Edinburgh.