


Article written by Jamie Smith QC and Helen Evans on 20th March 2018.

What can the collapse of Carillion teach us about the overlapping web of powers available against companies, their directors and auditors?

Carillion PLC collapsed in January 2018. By the end of March 2018, at least three strands of regulatory or disciplinary procedures were being pursued as a consequence of the way the company had allegedly been conducted. The Financial Conduct Authority ("FCA") quickly announced that it was launching an investigation based on Carillion's market updates. In late January 2018, the Financial Reporting Council ("FRC") announced that it was investigating Carillion's auditors. In late March 2018, the FRC announced that it was also investigating the conduct of two directors of Carillion, which it has power to do as long as the directors in question are members of the accountancy profession.

The multiple investigations into Carillion follow closely behind the FRC and FCA signing a new Memorandum of Understanding ("MOU") on 20 December 2017. This MOU specifies that unless there are overriding reasons not to share information, the FRC will notify the FCA of any material investigation it intends to conduct into a statutory audit or the conduct of accountants with regard to an FCA supervised firm. Likewise, the FCA is compelled to inform the FRC of its investigations. The MOU also envisages that where both the FRC and FCA have power to appoint investigators, they should seek to agree amongst themselves which investigations should be undertaken by which body. Where both parties are investigating, they are supposed to attempt to coordinate their efforts, including their interviews of witnesses.

But what can a respondent do if it believes that two bodies with overlapping or complementary powers have not taken proper steps to coordinate and streamline their efforts? The provisions of the MOU between the FCA and the FRC appear designed to deter respondents from instituting judicial review proceedings, providing for instance that then MOU is not intended to confer legal or procedural rights or create "legitimate expectations" amongst third parties.

Despite these provisions, the law on "double jeopardy" may assist respondents who feel that they are being unfairly pursued by two sets of regulators. Two sets of disciplinary proceedings against the same professional, arising out of the same or connected underlying facts, were considered by Mostyn J in *R (on the application of Mandic-Bozic) v British Council of Counselling and Psychotherapy* [2016] EWHC 3134 (Admin). At that stage, Mostyn J remarked with surprise that there was "*no case in the books where two regulators in the same field have been considering identical complaints at the same time.*"

The facts of the *Mandic-Bozic* case were quite extreme. The respondent was a member of two bodies governing psychotherapists. A patient made a complaint about her to both. Both bodies dealt with the complaint, which was described by Mostyn J as "*word-for-word identical*", in turn. The respondent applied to stay the second set of proceedings as unfair, oppressive and unlawful.

Mostyn J held that where the parties and the subject matter of the litigation are the same in both the first action and the prospective second action there is a near total bar on re-litigating. However, where two separate parties bring disciplinary proceedings, a key question is whether there is an abuse of process. It is for the party trying to stop the second action to show that either it would be manifestly unfair to him or her that the same issues should be re-litigated, or that to permit re-litigation would bring the administration of justice into disrepute.

In *Mandic-Bozic*, Mostyn J was prepared to regard both sets of proceedings as having been brought by or on behalf of the initial complainant (the psychotherapist's client). He treated the two regulatory bodies as the complainant's "*privies*" and found that the second action was barred by cause of action estoppel. This approach is not just confined to cases where an individual complainant is behind two complaints. It can also be invoked where two different emanations of the state bring successive proceedings against a respondent, as was the case in where the Crown Prosecution Service and then the Secretary of State pursued the disqualification of directors in *Secretary of State for Business, Innovation and Skills* v *Weston* [2014] EWHC 2933 (Ch). If the FCA and FRC end up bringing proceedings relating to Carillion with overlapping scope, these arguments may resurface.

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