*Application to the Professional Conduct Committee on 28 November 2005 by J— L— and R— L—, both chartered architects.*

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NOTICE OF APPLICATION FOR PRELIMINARY RULINGS

The Committee is aware that we maintain that the accusations of "unacceptable professional conduct", which are being prosecuted against us under the Board's Standard 8 policy, are without foundation. The proceedings have evidently been conducted according to a prearranged method of operation, probably in accordance with legal advice from the Board's solicitors or a barrister instructed by them; but it is our conviction that the initiation and conduct of the proceedings has been without statutory or other authority known to the law.

You will be able to understand that the concerns we have in these proceedings, about the risk or certainty of prejudice affecting the outcome of the proceedings, have only partly been mitigated by the removal of a former Board member who had been selected to form the hearing quorum (Mrs. Barbara Saunders).

A source of prejudice of another kind is the common interest which the Board, the Investigation Committee and the Professional Conduct Committee have in upholding the validity of the present Standard 8.

This results in paragraphs 1-34, occupying more than [15] of the pages which follow. There is a half page summary at the end.

One source of prejudice is due to the Board's claim to the effect that the Board can safely rely on certain "legal advice" to secure decisions against us, by persuading the Committee to hold that there is no basis for our rebuttal of the Board's accusations. Another is due to the Board's claim to the effect that the Board can safely rely on some status as a "regulatory" authority to secure decisions against us, by persuading the Committee to hold that there is no basis for our rebuttal of the Board's accusations.

There is also the prejudicial character of the Board's intentions shown by "document 28" (Mr. Coleman's letter to the prosecuting solicitor), which the Board is claiming to withhold from production: see previous correspondence as referred to in R— L— letter of 07.09.2005 to the Board Chairman H. Lloyd (RL Bundle Items 41 and 42) ; and there are other sources of prejudice, and of conceptual confusion, which are very apparent to us and to others who are well enough informed to see what is happening, but which may be less obvious to the Committee members themselves.

A third is due to the threat which results from the Board's practice of naming on the ARB website any person charged, including one who is in fact innocent, and routinely publishing, in the form of the "Decision", statements about them, to which they have not consented and about which they can have no practical certainty of redress. This happens almost immediately after the hearing, remaining for a prolonged and indefinite period.

We felt less than reassured by one of the Chairman's remarks at the hearing on the 5th

October [2005]. When replying to part of our application, the prosecuting solicitor, lacking anything more cogent to say, disparaged as merely "bizarre" (by reference to a judge of the Crown Court, a wholly different kind of tribunal) our concern about the Chairman being inclined to make a finding or ruling which would follow or support decisions which he had given in previous cases (knowing that they would be published on the ARB website). That was both beside the point and discourteous on the part of the prosecuting solicitor. But we must respectfully mention that the Chairman, in giving the Committee's decision, evidently could find no better reasoning to give us and chose to use the same word when summarily dismissing that part of our then application.

If the cases proceed to a hearing we would need and seek formal assurances about these concerns, and we now submit notice of a preliminary application to that effect. Three of the four initial preliminary applications are outstanding. The second of them was taken first, when we appeared before the Committee on 5th October, and resulted in the adjournment for another member of the full Committee to be selected to replace Mrs. Saunders. In the circumstances, the occasion for the first application has passed, and the present Application is to be in place of it.

When making the present Application to the Committee we intend to ask that the following be taken into account. On the 5th October the Committee as then constituted decided to adjourn. Of the four applications of which we had given notice, three were stood over. One of those had been for an adjournment to give the Board time to reconsider the matter and withdraw the charges. In the time which has passed during the adjournment, it has been open to the Board's prosecuting solicitor to seek further instructions from the Board, and it has been open to the Board to have given further instructions, whether asked for by the solicitor or not; but we have had no proposal from the solicitor or the Board for the matter to be concluded by an application to the Committee on the part of the Board for leave to withdraw the charges against us. Nothing of that kind has been forthcoming.

In the circumstances, now that the time for a hearing has now been fixed we have been left with the necessity of making an Application ourselves, as set out below. We would be willing to consider any proposal there may now be for letting this Application take effect unopposed, and it may be that the Committee would wish to put that possibility to the Board's prosecuting solicitor at the hearing, if it has not been volunteered before. But we shall in any event seek the protection of certain formal rulings, duly recorded and issued to us (presumably by the Clerk on behalf of the Committee), as contained in the Third Part, and otherwise as then appears to be appropriate.

In the meantime, the present notice of Application is given without prejudice to our rights - generally, which are reserved.

It may be that this Application is "unprecedented" in the literal sense. But please note that we are not proposing that the Committee should make any ruling which is outside its capacity, competence or jurisdiction. There is extensive documentation which supports our case but, in order to bring the main issue into focus, we have selected from this certain letters in the Board's possession mentioned in para 7. A copy of the document mentioned in paragraph 11 ("The Status of the Architects Registration Board") has been in the possession

of the Board from May/June 2003, when it was issued by the RIBA (and officially communicated by the RIBA Chief Executive on behalf of the President to the Board Chairman, who acknowledged receipt of it).

The purpose of the Application is to enable the Committee to proceed with disposing of our two cases in a manner agreeable with the spirit of Rule 12 (of the PCC Rules), and in a convenient, economical and manageable way. It is as follows:

NOTICE OF APPLICATION, in three parts

Having regard to the points and information set out after the third part, we apply to the Professional Conduct Committee for a ruling in three parts to the following effect:

THAT BEFORE THE HEARING OF THE CHARGE IS COMMENCED, IT BE ACKNOWLEDGED, DECLARED AND DIRECTED BY THE PCC AS FOLLOWS:

FIRST: That it is acknowledged, declared, and directed:

- THAT, in connection with or in the course of the present proceedings, the legal advice which the Board has alleged supports the validity of the present proceedings (as mentioned in 21 below) shall not be capable of being cited or relied on prospectively or retrospectively (in argument or otherwise) as a basis for any decision adverse to us, the accused.

- THAT if that advice is within the knowledge of the Committee, or if any member of the Committee has knowledge of it, that fact shall be made known to the accused at the outset of the hearing, or upon it later coming within the knowledge of the Committee or of a member, as the case may be (so that we the accused may have a chance of answering it).

-THAT in any event in the present proceedings nothing in such legal advice shall be treated as having any binding, compelling or persuasive force or influence on we the accused or on the Committee (such as a ruling of a superior court of law may have, which has been open to argument on both sides, has formed part of the reasoned judgement of an authoritative judge or judges in open court, been made available for public scrutiny and criticism. and is subject to counter-argument in any proceedings where it may be cited).

SECOND: That it is acknowledged, declared, and directed:

-THAT, in connection with or in the course of the present proceedings, no assertions made in any Minutes or other record or in any publication of the Board, or made otherwise by or in the name of the Board, or by any member of the Board or person in the Board's employment, to the effect that the Board has the status of a "regulator" shall be capable of being cited or relied on prospectively or retrospectively (in argument or otherwise) as a basis for any such decision adverse to we the accused, save where and the extent that any such assertion is proved to have been derived from a credible, independent and authoritative source, binding upon we the accused.

-THAT if any such source is within the knowledge of the Committee, or if any member of the Committee has knowledge of it, that fact shall be made known to us the accused at the outset of the hearing, or upon it later coming within the knowledge of the

Committee, or of a member, as the case may be (so that we the accused may have the opportunity of answering it).

-THAT, in any event in these proceedings no such assertion shall be treated as having any binding, compelling or persuasive force or influence on us the accused or on the Committee, save as above mentioned.

THIRD: That the PCC effectively terminates the proceedings by declaring or directing before the hearing of the charges are commenced-

-THAT the proceedings against us be quashed and deemed to be annulled and THAT

(1) any statements made in connection with the proceedings by or at the instance of the Investigation Committee or Registrar to the effect that the accused were prima facie in breach of the Code issued by the Board under Section 13 of the Architects Act 1997, or were prima facie chargeable under the Act for unacceptable professional conduct, shall be deemed to be withdrawn;

(2) the Board makes no record adverse to us the accused in this respect, and in particular makes no entry of any kind on the Board's website (save as mentioned below about an agreed statement)

(3) no further proceedings against the accused arising from the same facts, or arising from a recurrence of similar facts in any subsequent year, shall be initiated;

(4) a copy of the transcript of the proceedings before the Committee on 5th October and at the adjourned (preliminary) hearing be formally communicated to the RIBA;

(5) if the Board and we the accused so decide, an agreed statement may be published to the Press, subject to the approval of the Committee.

The points and information mentioned above are as follows:

PRINCIPAL POINTS, 1-15

1

Any proceedings before this Committee, including proceedings in connection with Standard 8, can have validity only under Part III of the Architects Act 1997 and not otherwise.

2

The present proceedings are solely in connection with Standard 8 of the code issued by the Board under Section 13 of the Act: see Investigation Committee Report (signed as chairperson by Jane Rees, a member of the Board; formerly Acting Registrar, from September 1999 - April 2000; previously, Registrar of the Insurance Brokers Registration Council 1986-1998, created under the Insurance Brokers (Registration) Act 1977 and dissolved under the Financial Services and Markets Act 2000: this is further mentioned below).

3

We, namely R— L— and J— L—, are in the position of persons who consider, seriously and

with reason, that our moral and material rights are threatened by groundless accusations of "unacceptable professional conduct" which the Board has made against us. Our resistance to the Board's request for information in the name of "monitoring" or otherwise cannot be attributed to unacceptable professional conduct on our part. It is our conviction that the initiation and conduct of the present proceedings has been without statutory or other authority known to the law. We are entitled not to have been pursued in this way by the Board or its Registrar / Chief Executive on the Board's behalf; and we apply to the Committee to terminate the proceedings as set out above in the THIRD part of the Notice of Application.

4

We have made known to those acting for the Board that the validity of the present proceedings under the Architects Act 1997 is, and at all times from its inception has been, contested by us as a matter of principle: see letters R— L— to H. Lloyd, (RL bundle nos. 31, 41, 59, 85, 88) and J— L— to H. Lloyd (JL bundle nos. 53, 54, 56, 62, 63, 69).

The fact (if it is so) that a large majority of registered persons have voluntarily completed the PII Compliance Certificate, as requested in connection with the annual retention fee demand and Standard 8, cannot be relied on as validating these proceedings against us; nor can the fact (if it is so) that some of those who had not completed the certificate have been charged on the basis of their admissions that they had in fact not complied with Standard 8 in other respects.

5

The case against each of us depends upon an unsustainable proposition. It is unsustainable because it cannot credibly be maintained against us that it was within Parliament's intention when Section 13 of the governing Act was passed to enable provisions of Part III of the Act to be used in this way (or that the Act as passed allows it). When Parliament has an intention for something of this kind, different provisions are enacted, such as the Board Chairman has proposed (see 8 below), and as exemplified by the Insurance Brokers (Registration) Act 1977, or the Financial Services and Markets Act 2000 mentioned at 2. above; and see section 47A of the Financial Services Act 1986 (quoted in R. v. SIB and IBRC, ex parte IFA and London Insurance Brokers Mutual Ltd. QB Divisional Ct, [1995] 2 BCLC:) see also Part II "Registration" of the Architects Act, section 9 "Competence to Practise". (Note also 34. below)

6

The proposition mentioned in 5 above is to the following effect: that a registered person shall be liable to be deemed guilty by the PCC of "unacceptable professional conduct" where there is in fact no evidence against him for such conduct within the meaning of the governing Act, but only evidence

(a) that his name has been put to the Investigation Committee by the Registrar / Chief Executive Officer for no reason founded on fact or external complaint,

(b) that in so doing, the Registrar / Chief Executive Officer acted not upon a

complaint or evidence of anything amounting to "unacceptable professional conduct" unequivocally and undoubtedly within the meaning of the governing Act, but in execution of a policy of the Board (which the Board has claimed to have instituted for the purpose of enabling the Board itself to perform a "monitoring" function), and

(c) that any alleged "suspicion" about the persons accused was and remained wholly unsubstantiated and supposititious at all stages, viz: (1) when the cases were first referred by the Registrar / Chief Executive Officer (Mr. Robin Vaughan) to the Investigation Committee (2) when the Investigation Committee (Chairperson Ms Jane Rees) decided that the cases should be put to the Professional Conduct Committee, (3) when the notices of charge were formulated and we the accused were called upon to answer them, and (4) thereafter.

7

The documents to and from the Board mentioned in letters of 10th November 2005 to the Board Chairman, and quoted below, are enough to show that the validity of these proceedings has always been in doubt; and that the doubt was reasonable, and has not been removed by any authoritative ruling known to the law. See also 8. below.

The point at issue is encapsulated in Annex Part l, section 2, of the RIBA consultation letter dated lst November 2001 from Richard Hastilow CBE, Chief Executive RIBA to Robin Vaughan, Registrar and Chief Executive, ARB:

> "*Is the proposed new standard a standard which the Board can properly incorporate in the code of standards of professional conduct and practice contemplated in Section 13(1) of the Architects Act 1997 ?.....* in so far as it concerns the supply of evidence to the Board, the proposed new standard is wholly unrelated to practice as an architect."

See also certain letters from the Board to another member of RIBA, Mr. Ian Salisbury, which are mentioned in the letter to the Board Chairman from Mr. R— L— and Mr. J— L— of 10th November 2005 (RL Bundle No. 94 and 95) as follows:

> " ..... Following the decision of the PCC on 5th October to adjourn, we are now writing to you with a request for certain other documents within the possession of the Architects Registration Board to be produced at the resumed hearing (with the usual number of copies which the Committee requires), namely:
>
> (1) The RIBA Consultation letter of lst November 2001 and Annex Part 1 (and Part 2 if the ARB or its PCC so desires)
>
> (2) The Architects Registration Board file copy of three letters, namely
>
> (2a) Letter from the Acting Registrar dated 23rd December 1999 addressed to Mr. Ian Salisbury.
>
> (2b) Letter from the Acting Registrar dated 19th January 2000 addressed to Mr. Ian Salisbury.
>
> (2c) Letter from the Registrar dated 27th June 2002 addressed to Mr. Ian

Salisbury."

These three letters include the following:

(2a) of 23rd December 1999 and 2b of 19th January 2000, from the Acting Registrar: ".....The Board has made rules concerning this matter and therefore it does fall within their statutory remit....." / " ..... The Rules concerning professional indemnity insurance are contained within the Architects Code Standards of Conduct and Practice and in particular Standard 8 ....." "..... the Chairwoman wrote to all architects in March 1998...."

(2c) of 27th June 2002 from the Registrar: ..... "..... when I wrote to you on 9th May I enclosed with that letter a copy of a letter to Richard Hastilow at RIBA which apprised you of the Board's legal advice relating to the Board's position on monitoring.... I will again, in further form, apprise you of where we stand, particularly in response to your letters to Judge Humphrey Lloyd QC, which he has asked me to answer on his behalf and with his approval... ...your letter of 13th May 2002 was put before the Board's legal advisers prior to the Board meeting of 23rd May and to the Board on that day..... It is satisfied that it has not acted beyond its powers.....your letter appears to be looking to debate the reasoning leading to the legal conclusion which the Board has accepted ..... you may wish to consider the following:

> 1 ".....under Section 13 of the Act..... Parliament has authorised the Board to establish in the Code a set of standards by which an architect's professional conduct maybe judged...."
>
> 2 and 3 (mention the Code as issued in December 1999)
>
> 4 "The Board in 2001.... provided a means of enabling the Board to monitor its provisions being directly relevant to the Board's responsibility for professional conduct. The Board's general objectives encompass advancing the protection given to the client of an architect or third party who might otherwise suffer as a result of inadequate insurance....
>
> 5 "The amplification of the standards is thus well within the power given by Section 13(1) of the Act. It deals with the standard of an aspect of professional conduct and practice, namely the extent of insurance that is to be expected. It is therefore expressly authorised by the Act.... Section 13.... has to extend to aspects of professional conduct and practice which in the view of the Board are part of or consequential on primary obligations and for which standards need to be established. It is certainly not expressly prohibited by the Architects Act..... Section 23..... gives the Board power to make rules generally ...which also shows that the Act is to be read reasonably and that the exercise of a power which might fairly be considered to be incidental or consequential is not beyond the powers of the Board .... No question of ambiguity arises...."

The production of these by the Board will let MJ— L— and myself prepare our case for presentation to the Professional Conduct Committee in as concise a form as we are able. If the Board so desires we would have no objection to you, or the signatories of the letters from the Board, attending the hearing to give evidence under examination upon the letters'

contents.

**END of quotation of letter, 10th November 2005 from Mr. R— L— and Mr. J— L— to the Board Chairman**.

8

On 16th September 2004, the Board Chairman, Mr. Humphrey Lloyd QC, presented to the Board the report mentioned in Minute 16 (open session): q.v.

> EXCERPT: para. 4(xi) possible changes which "cannot be made without amending the Act..... are listed at Appendix C" .....Section 13:..... under draft EU Directives professional people will be required to have professional indemnity insurance ..... It would be sensible for the Board to be given an explicit power to monitor compliance with the Code of Conduct ..... and for the Registrar to be able to remove from the Register those who do not participate in this monitoring.

That was cautiously expressed. But the only probable explanation seems to be that it had been known for some time that the Board had put itself on shaky ground, at least so far as concerns a conscientious dissenter, such as the present accused; or that the Board knew there was less than sufficient certainty of the kind which puts beyond doubt questions about the validity of the accusations.

9

The probable explanation of the Board Chairman's statement in 8 confirms the view that previous statements made on the part of the Board, about the validity of the present Standard 8 and of the enforcement proceedings (including those from Ms. J. Rees and Mr. R. Vaughan quoted at 7 above), have had the character of advocacy, as distinct from the wholly objective and unvarnished truth (inadvertent or other refusal to answer or side-stepping of the question, diversion of attention to other questions, non sequiturs, inexactitudes in the form of verbal shifts of meaning for the purpose of persuasion or making a favourable impression on others insufficiently well-informed to notice).

10

A more fundamental problem underlies these proceedings.

11

In the first place: the proceedings are open to the objection stated in the document issued by the RIBA in May 2003 ("The Status of the Architects Registration Board" page 8) in the following way:

> "..... the Board could not rightfully import into the code matter which is invented or otherwise extraneous to..... [the intent of s.13 of the Act] ..... and a judicial body such as the Board's Professional Conduct Committee ought not to allow a decision adverse to a registrant result from such extraneous matter, particularly where compliance has been demanded by the Board or with its authority, under threat of coercive action..... For the purposes of Part III any such extraneous matter which has been mistakenly imported by the Board should, in justice to registrants (and

eligible applicants), be treated by the Board (and its Professional Conduct Committee) as a nullity as soon as it has been identified."

('The Status of the Architects Registration Board" has been in the possession of the Board from May / June 2003, when it was issued by the RIBA, and officially communicated to the Board Chairman, who acknowledged receipt of it.)

12

In the second place: so far as giving a fair hearing to that objection is concerned, the Committee is liable to the objection of (what we may call) "common interest" prejudice, in that the Board, the Investigation Committee and the Professional Conduct Committee have evinced a common interest in maintaining the validity of the present Standard 8, as described in 13 and 14.

13

When the Board's present Standard 8 is considered together with the way in which disciplinary proceedings have been conducted, it becomes inescapably apparent that:

(1) the proceedings have been conducted according to a pre-arranged method of operation (probably in accordance with legal advice from the Board's solicitors or a barrister instructed by them), to the intent that Standard 8 will be used as a basis for initiating proceedings which will result in the imposition of penalties, which will then be publicised, so as to be both a threat and a warning to registered persons, and an advertisement which the Board considers will reflect well upon itself; and

(2) in connection with that method of operation, the Board and the two of the Board's Committees which have been appointed under the governing Act (the Investigation Committee and the Professional Conduct Committee), have evinced a common interest in maintaining the validity of the present Standard 8.

14

It is within the knowledge of the Board and of the Professional Conduct Committee that the method of operation is as follows:

(1) in cases where the architect has not completed the Standard 8 certificate the Registrar / Chief Executive Officer has been referring the case to the Investigation Committee,

(2) the Investigation Committee has then decided to refer such cases to the prosecuting solicitor for report to the Professional Conduct Committee,

(3) the prosecuting solicitor, in communication with the Registrar / Chief Executive Officer or other officials of the Board's staff appointed under the Registrar / Chief Executive Officer, has framed the charges according to a standard formula (..... "unacceptable professional conduct ..... (a)..... (b)..... (c)")

(4) the Professional Conduct Committee has shown its willingness to convict upon such charges, and unquestioning acceptance of the validity of Standard 8 has been included in the reasons for the Committee's decisions, which have been published as part of the ARB

website, as well as other announcements by the Board about them.

15

The state of affairs as described in 13 and 14 is not identical with that described in para 89ff of In Re P. (a Barrister) (a decision of the Visitors to the Inns of Court delivered Jan. 24 2005, reported in The Weekly Law Reports 23 Sept. 2005: [2005] 1 WLR 3019, at page 3048; Headnote read for the information of the Professional Conduct Committee by MJ— L— in support of our Application on 5th October); but it is practically indistinguishable, in that a common interest, in maintaining the validity of the present Standard 8, has been evinced by the Board and the two Committees.

In the present proceedings, the conclusion seems unavoidable that the Board, by its Committee, will be seen or held to be judging in its own cause (there is no other complainant) : see BUNDLES ; letters R— L—: nos. 31, 34, 41, 59, 85, 86, 87, 88; and letters J— L— nos. 53, 54, 56, 61, 62, 63, 69.

SUPPLEMENTAL POINTS AND INFORMATION 16-34

16

We are both members of the RIBA. Such reasons as there might be for claiming the validity of the proceedings such as the present, are no more than doubtful at most, and this has been made known by the RIBA to the Board, to the members of RIBA and to others (including by documents in the accused's R.L. BUNDLE items 1-28, specifically 16-24 - RIBAJ June 2003 + "S.A.R.B"; RIBA Practice Bulletin No. 302(4, 5); No. 283 (8, 9, 10); No. 214 (11, 12, 13); No. 202 (25, 26); and No. 147 (28); also other RIBA announcements.) See further 7 above.

17

It is reasonable to hold that common law principles (and common sense) suggest that the Investigation Committee and the Professional Conduct Committee would have no alternative but to let us have the benefit of any doubt on an unresolved point of law (if such it is) where that had influenced the conduct in question.

18

It is understood that in professional conduct proceedings generally, the burden of proof is on the party in the position of the prosecutor, and that authoritative case law (including the Judicial Committee of the Privy Council) has established that the standard of proof must be practically indistinguishable from that required in criminal cases, frequently explained by the presiding judge to a jury as "beyond reasonable doubt". (JCPC: Campbell v Hamlet, 25 April 2005; reported (7 Sept.) [2005] 3 All E.R. p.1117.)

19

In the present proceedings the Board has taken the position of "legislator", as well as prosecutor; the alleged offence is claimed to be against the Board's written or unwritten law, in the form of Rules, guidelines, policy, usage and practice, previously decided cases, and any directives or authority given directly or indirectly to the Investigation Committee, the

Chief Executive, the Registrar or others; and a Committee of the Board is acting as judge (as prescribed by and under the governing Act). The standard of proof could be no less in such proceedings than as stated in 18. above.

20

It is not open to the Professional Conduct Committee to hold against us in these proceedings that the doubt mentioned in 7. and 16. above is of no consequence or is removed, or would be removed, by any of the following:

(aa) the fact that Dr. Kelly, when first chairperson of the Board, made known her firm conviction that it was or should be made beyond doubt: see 26.- 28. below;

(ab) the fact (if it is so) that those who recommended her for appointment to the Board were of that conviction;

(ac) the fact (if it is so), that the government department which appointed her to the Board was or later became of that conviction;

(ba) the fact (which was presumably so) that when the present Standard 8 was issued the Board (unanimously or by a majority) was of the conviction that it was "arguably" maintainable (in a lawyer's opinion), ALTERNATIVELY, beyond doubt, or would be put beyond doubt in due course by the fact of acquiescence on the part of most registered persons, on a case by case basis against non-acquiescent persons, and eventually as an accomplished fact;

(bb) the fact (which presumably was so) that the Board (by a majority) was of that conviction at the time when the Registrar referred the cases to the Investigation Committee.

(bc) the fact (which presumably was so) that the Investigation Committee (unanimously or by a majority) was of that conviction (ALTERNATIVELY, considered themselves bound or instructed under the policy of the Board) at the time when the Decision authorising the prosecuting solicitor's report was made.

(ca) the fact (if it is so) that the Professional Conduct Committee (unanimously or by a majority) has been of that conviction, or has acted upon the assumption that it was beyond reasonable doubt or not in any doubt or had not been put in doubt, ALTERNATIVELY, has considered the Committee to be bound, or instructed under the policy of the Board, to act on that assumption.

21

In response to the reasons for doubting the validity of proceedings such as the present which have been made known by the RIBA to the Board as mentioned in 7. and 16. above, the Board has made known that there is or has been available to the Board certain unpublished and undisclosed legal advice which has been supplied to the Board, to which the FIRST PART of the present Application refers.

In respect of that legal advice, the Board has been in the position of the lay client who has been supplied with advice by a practising solicitor (or firm) or barrister / advocate acting in

a professional capacity; alternatively, the Board has received the advice formally or informally through a government department, or from a legally qualified or other member or former member of the Board or of a Committee of the Board, or from a legally qualified or other person now or formerly in the Board's employment, or in another way.

And the Board has made known that it has decided to rely on that legal advice for claiming the validity of the action the Registrar and of the Investigation Committee which has resulted in the present proceedings coming before the Professional Conduct Committee (see ARB website and other announcements).

22

That advice includes the Opinion of the Board obtained between May and November 2003 through the Board's solicitors (who are also instructed by the Board as prosecutor in these proceedings) from Mr. Timothy Dutton, a Queen's Counsel in private practice as an advocate of the English Bar, who had previously been engaged by the solicitors to prosecute under Part IV of the Act ("use of title 'Architect'"): for further details see 34(j) below.

23

The action of the Registrar and of the Investigation Committee, which has resulted in the present proceedings coming before the Professional Conduct Committee, have in fact been in pursuance of the Board's policy based or reliant upon that legal advice for Standard 8 cases (see 7. above and the prosecuting Solicitor's document "Outline Submissions", Sept / October 2005, and submissions recorded in the transcripts of the March 2005 cases).

24

The Board has withheld the legal advice from publication and from disclosure to the RIBA.

(In the circumstances, this may indicate concern about protecting the position of the Board and the Board's members, solicitors and others having regard to any relevant indemnity insurance covering the risk of alleged liability in connection with the conduct of the Board's affairs, to which Mr. Henchley, a solicitor and Board member, was heard [by a person in the public seating] to make reference when presenting his report to the open session of the Board, 7th November 2005, item7.)

25

It is probable that one or more members of the Professional Conduct Committee knows (a) of the Board's legal advice, and (b) that the Board relies upon it in connection with the Standard 8 cases.

(NB. concerning induction and other meetings of the Professional Conduct Committee and procedure development, these are within the knowledge of the Committee, and have been mentioned on the ARB website: e.g. Annual Report 2001 (Standard of Proof etc.) and Agenda / Minutes November 2005; see also for the Investigation Committee Report on procedure for cases not deemed serious or weighty enough to be referred for report to the Professional Conduct Committee.)

26

Assertions on the part of the Board have been made to the effect that the ambit of the Board's functions, capacities, powers, duties and responsibilities are to be inferred, ascertained, evaluated, projected, judged or determined upon the basis that the Board has a status as a "regulator" , as mentioned in the SECOND PART of the present Application.

27

In the present proceedings decisions of the Registrar (Mr. Robin Vaughan) and of the Investigation Committee (Ms. Jane Rees Chairperson) have been in pursuance of the Board's policy, in which the Board's first chairperson, Dr. Barbara Kelly, CBE, had been an active influence. For statements of Dr. Kelly's conviction about the Board as a "regulator" see Annual Reports passim, e.g. for 1999 / 2000.

> (a) " Public Relations..... It seems that the role of a statutory regulatory body is not clearly understood ..... The fact is that the Architects Act 1997 gives us a clear mandate to operate. The Board's responsibility is to ensure that that mandate is delivered. ARB is not a club you can join if you wish. It is a regulatory body, with extensive responsibilities for registration, consumer support, validation and assessment, and regulation".

But it must respectfully be objected, that in truth there is little of that to be found in the Act, or by necessary inference. It has the character of bold invention. It may have been more or less descriptive of a body such as the statutory Insurance Brokers Registration Council (para 2 above), or of the Securities and Investments Board under the Financial Services Act 1986, or of the Financial Services Authority under the Financial Services and Markets Act 2000. It may have been influenced by R. v. SIB and IBRC, ex parte IFA..... QB Div.Ct, [1995] 2 BCLC, mentioned in 34 (i) below.

In the Act of 2000 "regulatory" references are plentiful such as "The Regulator", the "regulatory objective", " Regulated Activities ", "exempt regulated activities" (in the case of members of "the professions"); but in the Architects Act 1997 such references are conspicuous by their absence.

See also, the Law Society website which, for solicitors, makes use of expressions such as "Regulated by....." (Similar usage can be found for barristers and for commercial activities such as banking, insurance and money-lending: for such occupations, the activity or function is usually restricted, not merely the use of the title of the occupation, as in the case of the practice of the profession of an architect).

In 1996/7 Parliament was not constituting the ARB as a regulator of the profession or practice of architecture: see Note on REGULATORY STATUS at 34. below. As "regulator" of the use of the title, this is limited to making rules as prescribed in s.20(4).

> (b) "Looking to the Future .....I recognize that the relationship between the profession and its regulator can be an uncomfortable one, but if the ARB is to remain in the forefront of regulation, we need advice, support and above all, understanding from all our stakeholders."

But it must respectfully be objected that this seems to say that obedience to the Act takes second place in Dr.Kelly's estimation to fulfilling the ambition of being "at the forefront of regulation" (in competition with unspecified rivals); and it is unlikely that the previous career experience of either Ms Jane Rees, Acting Registrar 1999-2000, or of Mr. Robin Vaughan (Registrar and Chief Executive from 2000) had prepared them to be able to contribute to rectifying such convictions of the Board chairwoman, who would have been involved in their appointments.

28

And it must respectfully be objected that the excerpts at 27(a) and (b) manifest a propensity to mistaken overstatement and conceptual confusion, and that the resulting policy in connection with Standard 8 cases, once initiated, has been and has continued to be skewed accordingly. See also at 34(h) below concerning the Financial Services Act 1986.

29

The Board is not (and would not claim to be) a body competent to give an authoritative ruling on a disputed point of law, whether or not one or more of the Committee is legally qualified; nor is the Board's Investigation Committee, nor is the Board's Professional Conduct Committee.

30

The Professional Conduct Committee has a certain authority to make decisions which could affect a person's legal rights or liabilities, such that its proceedings would be "judicial proceedings" within the meaning of the Copyright, Design and Patents Act 1988, s.178 (but not necessarily otherwise); and it is claimed that at a hearing the Committee sits as near as can be as if it were an independent body comprised of unbiased and impartial members, and that the chairman has been appointed to "sit judicially" (as mentioned by Mr. Verdin: see transcript of hearing on 5th October 2005, page 19 line 6).

31

But it is understood that the Committee's "jurisdiction" (as with similar bodies) is not (and is not claimed to be) to decide upon points of law as if it were a court, made up of or presided over by a judge or judges appointed under the Crown, for deciding appeals, or for awarding civil remedies in actions between parties, or for imposing penalties for offences ranging from violent crime to infringement of car-parking regulations. (This is with no disrespect to any legally qualified chairman: the same would apply if the chairman had, like Lord Woolf now in private practice, presided over the Common Law Courts, as Lord Chief Justice.)

32

There is no provision for something like the "case stated" procedure from a magistrates court or an arbitrator, or the like statutory procedure for Employment Tribunals; and it is unreasonable to compel an accused person (or us) to incur the added burden of obtaining an authoritative ruling from the courts, including legal fees and other costs, or in the words of Mr. Justice Colman and another, to incur "the risk of a profligate waste of time and money"

(In Re P., a Barrister at para 102). (Judicial review or appeal under Section 22 of the Act is unlikely to be appropriate.)

33

So far as possible an accused (including us) should avoid relying on case-law: he will usually lack the skill and knowledge to be able to deploy the decided cases effectively, or to counter any cited against him; and the members of the Professional Conduct Committee (which, as mentioned in 29. above, is not a body competent to give an authoritative ruling on a disputed point of law) will usually lack the particular skill and knowledge to be able to evaluate the effect of case-law on contentious issues. (This may not apply to a legally qualified member of the Committee, but see 31. above.)

34

NOTE on:

REGULATORY STATUS, & APPLICATION OF "PURPOSIVE" RULE OF STATUTORY CONSTRUCTION

The following useful information has been brought to our attention. It is based on details of certain legislation passed by the same Parliament (assembled 27th April 1992) which enacted certain repeals and amendments to the then Registration Acts. The amendments were consolidated in the Architects Act 1997 without further amendment (by the next Parliament). For the legislative history of the 1997 Act, see introductory annotation in Current Law Statutes, and the Table of Derivations printed at the end of the Act.

(a) The Deregulation & Contracting Out Act 1994 was passed before the 1996 amendments which now stand part of the Architects Act 1997. (The 1994 Act has since been amended).

(b) The long title of the 1994 Act is "An Act to amend ..... statutory provisions and rules of law in order to remove or reduce certain burdens affecting persons in the carrying on of trades, businesses or professions or otherwise for deregulatory purposes....." ; the title of its Part I is "Deregulation" .

(c) Those words signify that, if by or under any Act (such as the Architects Act 1997) there are "statutory provisions" which are within the class of those which result in "burdens affecting persons in the carrying on of trades, businesses or professions", then the "deregulatory purpose" of the Act may apply.

(d) With that in mind it becomes apparent that in the 1996 Act (amending the then Registration Act) Parliament was not, in fact, re-constituting the ARCUK / ARB as regulator of the profession or practice of architecture in any generally purposive sense (comparable with the statutory Insurance Brokers Registration Council under the Insurance Brokers (Registration) Act. 1977 (para. 2 above), or of the Securities and Investments Board under the Financial Services Act 1986, or of the Financial Services Authority under the Financial Services and Markets Act 2000).

(e) It follows that the purpose of the Architects Act 1997 as a whole and in its Parts is nothing other than what is expressly prescribed in the Act (and the amending Act of 1996),

for replacing certain of the provisions which were ancillary to the overall purpose.

(f) The overall purpose derives unambiguously from the inception of the Register under the originating Act of 1931 (and as amended by later Acts, including the 1996 Act) viz.:

> - continuing to keep the Register of Architects, for recording the names of persons who (under Part II of the Act and subject to Part III) were (or would become) and remain entitled to be exempt from liability to prosecution under what is now Part IV of the 1997 Act.

(g) There is nothing in this Act which requires or suggests that resort should be had to other legislation (such as the Insurance Brokers (Registration) Act 1977, or the Financial Services and Markets Act 2000 mentioned above, or the Acts governing the "regulation" of the various branches of the legal profession) in order to import whatever guidance may be thought to derive from there concerning the theory, principles or practice attributable to regulation or regulatory authorities generally.

(h) Familiarity with the law and practice of the regulation of investment business under the Financial Services Act 1986 seems to have been a source of some confusion which has affected the Board: that Act made provision or a regulatory authority (Securities and Investments Board) to be responsible for "monitoring and enforcement" in connection with "investigation of complaints". That kind of regulatory activity seems to have created a mindset which is inappropriate to the body responsible for the Register of Architects under the Architects Act 1997.

(i) In 1995 the Insurance Brokers Registration Council was the second respondent in a judicial review case when the SIB, as first respondent, was ordered by the Queen's Bench Divisional Court to write to the IBRC among other " self-regulatory" bodies that nothing in a certain statement which the SIB had published (on " Pension Transfers") was to be read as requiring any firm to take any step which would invalidate its insurance cover without its insurer's consent. It has been mentioned in 2 above that Jane Rees was Registrar of the IBRC in 1986-1998. The remarks in the Court's judgment (reported in [1995] 2 Butterworths Company Law Cases) included:

> - (p.87h) "The industry was ....facing a problem of exceptional magnitude, and a proper solution was urgently required."
>
> - (p.81h) The Financial Services Act 1986 conferred no express power on the Secretary of State or the SIB to impose any sanction on an authorized investment firm.... Nor was any such power implied.... "If it be objected that implied terms have no place in Parliament's legislation, then it is enough that the SIB could have no such power unless it was provided by statute...."
>
> - (p.85c) A draft statement by the SIB Chairman was quoted stating: "It is likely that our powers will be examined closely, and quite possibly tested by litigation during this difficult process." That was followed by a paper for a meeting stating "We can expect litigation (judicial review, individual lawsuits with investors)"; then followed a Board meeting where "Board members explored the distinction between 'expectation' and 'requirement' in relation to the approach in the statement...."

- (p.87f)..... to be considered "whether the SIB, by the terms of the statement, were asserting powers which they did not have. Such a course, which might be described as jactitation of powers, should in the court's judgment be subject to the remedies of judicial review in an appropriate case."

- (p.87i) "If and to the extent that the statement gave the impression of a claim to greater power than the SIB possessed ..... to the untrained eye.... it would not have deceived any regulatory bodies nor a great many of their members...."

(j) Timothy James Dutton (Q.C.1998) is an advocate of some seniority and standing at the English Bar, as a member of Fountain Court Chambers, Temple, a Recorder, and the "Leader" of the S.E. Circuit (2004 for 3 years). His entry on the Chambers website states ".....appeared often for regulators and regulated (professions and financial institutions) in cases involving professional negligence, conduct, and the use of statutory powers .... RECENT CASES.... The Architects Registration Board 2003: summary of opinion is published on the Internet by the Board on the ARB website concerning the statutory duties of the Board."

(The information in this Note is included to supplement the points 1-33. and not because the Committee has the capacity to make a ruling in this respect.)

SUMMARY OF 1-34:

(1) The proceedings should be allowed to go no further and should be quashed (as set out in the Third Part of the Application Notice) in that the proceedings are, and are known to be:

(a)- without any, or any sufficient, foundation in law or fact;

(b)- vitiated by the Board and its Investigation Committee and Professional Conduct Committee having a common interest in upholding the disputed validity of the present Standard 8.

(2) Resistance to the Board's request for information in the name of "monitoring" or otherwise cannot be attributed to unacceptable professional conduct on our part.

(3) The case against each of us depends upon an unsustainable proposition.

(4) The ARB policy in connection with Standard 8 cases has been skewed from the outset by the propensity to disregard the Act, which has been shown by ARB Annual Reports.

(5) The doubtful validity of the present proceedings was acknowledged more than a year before the first preliminary hearing in the present proceedings (on 5th October 2005) in the Report from the Board Chairman (H. Lloyd) and the Registrar (R. Vaughan) on "Promoting Greater Clarity and Flexibility for the Framework of Architectural Regulation", received by the Board in September 2004.

(6) The certainty or probability that we were entitled to resist the Board's request for information, as we have done, has not been denied by an authoritative ruling known to the law.

## Chronological list of References

| | |
|---|---|
| 1977 | Insurance Brokers (Registration) Act |
| 1986 | Financial Services Act |
| 1994 | Deregulation and Contracting Out Act |
| May 1995 | *R. v. SIB and IBRC, ex parte IFA*.... QB Div.Ct, [1995] 2 BCLC |
| 1996 | Housing Grants, Construction and Regeneration Act |
| 1997 | Architects Act, with Table of Derivations |
| 1999 / 2000 | ARB Annual Report: Dr. B. Kelly, Chairwoman |
| 23/12/1999 | Acting Registrar, (J. Rees) to I. Salisbury |
| 19/01/2000 | Acting Registrar, (J. Rees) to I. Salisbury |
| 2000 | Financial Services and Markets Act |
| 1/11/2001 | RIBA Consultation Letter, R. Hastilow to R. Vaughan |
| 2001 | ARB, PCC Annual Report (Standard of Proof &c) |
| 27/06/2002 | Registrar R. Vaughan) to I. Salisbury |
| May / June 2003 | RIBA "Status of the Architects Registration Board " (S.A.R.B.) Jun / Nov 2003 T. Dutton's opinion advising the ARB |
| 16/09/2004 | "Promoting greater clarity and Flexibility for the Framework of Architectural Regulation" received by the Board from the Chairman and Registrar. |
| Feb? 2005 | Decision of Board members appointed by the Board as Investigation Committee: J. Rees) acting on reference from Registrar / Chief Executive, (R. Vaughan) |
| 15/03/2005 | (Transcripts available of) Hearings of charges using ".... a.... b.... c..." formula, by PCC (P. Verdin, Chairman with B. Saunders and J. Spencely); P. Cadman as prosecuting solicitor (relying in part on s.23 of the Act) |
| Sep / Oct 2005 | Prosecuting Solicitor's "Outline Submissions", P. Cadman. |
| 5/10/2005 | (Transcript available of) Hearing of one of the four Preliminary Applications in the present proceedings by the PCC (P. Verdin, Chairman with B. Saunders and J. Cuthbertson); P. Cadman as prosecuting solicitor these charges using " .... a..... b..... c..... formula. |
| Jan / Sep 2005 | *In Re P (A Barrister)* delivered/ reported WLR. |
| Apr / Sep 2005 | *Campbell v Hamlet* delivered / reported All E.R. |
| 7/11/2005 | R. Henchley, solicitor, Board Member: mention of Board's indemnity insurance cover, when presenting his report to the Board, item 7. |

## CONTINUATION OF NOTICE OF APPLICATION – 19th December 2005

After we had submitted our Notice of Application we were informed about certain documents in the possession of the Board which, if the Application is opposed, should be produced at the Hearing [on 10 January 2006] to enable members of the Committee to assess the value of statements and representations made on behalf of the Board, concerning the basis and validity of these proceedings.

For convenience we now set out our points and information in numbered paragraphs from 35 - 41, in continuation of the 34 points and information included in our Notice of Application as follows:

35

In the event of the Application being opposed, it will be necessary for the Committee to assess the purport and evidential or other value of statements or representations made on the part of the Board, having regard among other things to the Divisional Court's remark about a (probably) deceptive statement issued by the SIB, quoted in 34(I), viz:

> - (p. 87i) " If and to the extent that the statement gave the impression of a claim to greater power than the SIB possessed ..... to the untrained eye,... it would not have deceived any regulatory bodies nor a great many of their members ....."

(NB: This case was within the knowledge of the board, as shown by the exchange of letters in the Board's possession mentioned below.)

36

Consideration of certain documents in the possession of the Board will enable members of the Committee to have a truer and fairer view than they otherwise would of statements or representations about the basis and validity of these proceedings, whether on the ARB website (including the Board's introductory statement about Mr. Dutton's opinion) or in letters or otherwise from the Chairman (Mr. H. Lloyd) or any other member of the Board or the Registrar / CEO (Mr. R. Vaughan), or any of the staff employed by the Board under the CEO, or the Board's prosecuting solicitor, or the firm of solicitors which has been advising the Board (and the same firm which obtained the opinion from Mr. Dutton) and has been participating in the formation and execution of the method of operation mentioned in 13.

37

The documents are:

| | | |
|---|---|---|
| (a) | 16th January 2002 | ARB (A. Peacock) to Architect (J.A.G.) |
| (b) | 21st January 2002 | Architect (J.A.G.) to ARB (A. Peacock): reply to (a). |
| (c) | 22nd January 2002 | ARB (A. Peacock) to Architect (J.A.G.): reply to (b) |
| (d) | 10th February 2002 | Architect (J.A.G.) to ARB (A. Peacock): reply to ©) |
| (e) | 14th February 2002 | ARB (A. Peacock) to Architect (J.A.G.): reply to (d) |
| (f) | 17th April 2002 | Architect (J.A.G.) to ARB (A. Peacock): reply to (e) |
| (g) | 18th April 2002 | ARB (A. Peacock) to Architect (J.A.G.): reply to (f) |

Excerpts from letters:

37(a) 16th January 2002 ARB (A. Peacock) to Architect (J.A.G.)

".....the title "Architect" is protected to enable consumers in the market to identify a class of persons with high professional standards set to meet the public interest. The Board wishes

to ensure that insurance requirements now meet the need of the consumer in the construction industry today..... As a statutory regulator, the Board is charged with regulating the profession and upholding standards.... With regard to your query about the wording of Standard 8, the Board took legal advice about the provision that allows it to seek evidence of Professional Indemnity Insurance. The Board was advised that this was entirely proper. The imperative 'must' was not an error and reinforces the importance the Board attaches to adequate and appropriate Professional Indemnity Insurance..."

37(b) 21st January 2002 Architect (J.A.G.) to ARB (A. Peacock): reply to (a)

"..... You describe ARB as a statutory regulator. This would suggest that the Board has a duty to regulate the practice of architects. Surely, if that was the case, the legislation, now consolidated in the 1997 Act, would not have been drafted as it has been. This leads to the point raised in the last item of my earlier letter. The imperative shall (or 'must') is rightly avoided in the ARB Code bearing in mind the provisions of sections 13, 14 and 15 of the 1997 Act. Its introduction in the new clause of Standard 8 is anomalous and, I believe, inappropriate. Besides other things, it implies that non-compliance necessarily renders a registered person subject to disciplinary sanction."

37(c) 22nd January 2002 ARB (A. Peacock) to Architect (J.A.G.): reply to (b)

".....the statutory purpose of Part III of the Act includes the maintenance of professional standards and from this follows the laying down of a Code of Practice and the establishment of a system whereby compliance with the Code can be sensibly monitored. There may be no express provision for monitoring compliance with the Code in the Act but such power can sensibly be implied an the basis of a common sense approach. I think if you look at recent case law you will see that the courts are very reluctant to view matters which are reasonably incidental to the statutory scheme as being ultra vires and quite rightly so!"

37(d) 10th February 2002 Architect (J.A.G.) to ARB (A. Peacock): reply to (c)

"..... In your third paragraph you make various assertions but I am afraid I do not see how these connect with the point I was making. This was that the Standards laid down by the Board are essentially points of guidance rather than regulations, and the language used should reflect this. Be that as it may, you raise the matter of 'monitoring' and the statutory power of the Board to do this. There is certainly a question on this issue. You mention recent case law and I would be grateful if you could let me know the names of the cases which support the Board's position."

37(e) 14th February 2002 ARB (A. Peacock) to Architect (J.A.G.): reply to (d)

" ..... I have nothing further to add to my letter of 22nd January. There are a whole range of cases on the subject of ultra vires and the general reluctance of the courts in recent years to interfere with regulatory matters and you may care to look at some or all of the following: A v. B (Governor of Bank of England intervening) (1991) 1 Bank LR 60 at. 68; R. v. SIB ex parte FAA (1995) 2 BCLC 76; R. v. Personal Investment Authority, ex parte Lucas Fettes (1995) OPLR 18."

37(f) 17th April 2002 Architect (J.A.G.) to ARB (A. Peacock): reply to (e)

".....I have now had a chance to read the reports of the eases you cited..... I am not sure precisely what the ARB feel can be drawn from these cases. None of them appear to concern the question of the power for an authority to conduct administrative acts which are not expressly provided for in the governing statute. The A v. B (Governor of the Bank of England intervening) case had to do with express powers under the Banking Act 1987. Similarly, the SIB case concerned the issue of guidance under the express powers under the Financial Services Act 1986. The PIA case was concerned with the translation of the SIB guidance into action required of its members. Are you able to point to the particular aspects of these cases which you feel supports the Board's position?"

37(g) 18th April 2002 ARB (A. Peacock) to Architect (J.A.G.): reply to (f)

"..... As I understand it what those cases demonstrate (in a general sense) is the reluctance of the courts in recent years to interfere with regulatory matters and in general we are confident that the courts will endeavour to assist regulators in dealing sensibly with practical issues such as PII."

38

Our first comment on that exchange of letters is that the quality of reasoning in the letters from ARB clearly shows that the ARB has no legal foundation for the validity of these proceedings, and that the Regulation Department, which is responsible for instructing the Board's prosecuting solicitor, has been badly misguided in these matters.

39

Our second comment is to express concern at the statement in the last of the letters 37(g) 18th April 2002 ARB (A. Peacock) to Architect(J.A.G.):

> "... in general we are confident that the courts will endeavour to assist regulators in dealing sensibly with practical issues such as PII."

In the circumstances of the present case, it has become increasingly apparent that there is reason to believe that the Registrar / CEO, Ms. Rees and the Investigation Committee, the "Head of Regulation"(Mr. Coleman) and the Board's prosecuting solicitor hold and expect that the Board is entitled to have a like confidence that the PCC "will endeavour to assist regulators in dealing sensibly with practical issues such as PII", where by that is meant: the Professional Conduct Committee will be disinclined to accept objections such as ours, which happen to be inconvenient to the policy and method of operation which the Board has decided upon.

40

We hold that there cannot be the slightest doubt, first, that in passing Part III of the governing Act into law, Parliament was not giving the Board the power to act in that way; and secondly, that the Board has no other source for its authority than the Act itself.

41

In giving Notice of this Application, we have endeavoured to offer every opportunity to enable the Board's prosecuting solicitor to let the Application proceed unopposed, or

opposed in part only, with a view to keeping down the time at the Hearing and generally in the interest of a fair hearing and case management. In this connection we ask the Committee to take into consideration the contents of our letter to the solicitor dated 19th December2005 as follows:

**Letter from Mr. R— L— and Mr. J— L— to Mr. P. Cadman of 19th December 2005**

> In view of your reply (letter 14th December and fax 16th December) to our letters of 28th November, and previous letters, we see that you are leaving us with no alternative at this stage to prepare for the hearing on the basis that our Application will be opposed. We consider this is harassing treatment of us, and that your replies have had no proper regard to the interest of fairness, case management or proportionality. We cannot even be sure that you have given full attention to the contents of our letters.
>
> We note that in your fax. of 16th December you state that it is not your intention to call as witnesses any of the 5 persons as part of your case against us. We take this also to mean that you do not propose to call any of the 5 persons to give oral evidence to contest what we have set out in our Notice of application about the statements made by them. If we are mistaken about that, please let us know without delay.
>
> Depending an the way in which you oppose our joint applications, or present the Board's case against either of us, or any questions or remarks of the Committee, it may be necessary to have oral evidence from Mr. I. Salisbury, to enable the Committee to have a true and fair view, and in the circumstances, we reserve the right to have such evidence taken. We understand that he will be present at the hearing.
>
> You will have seen that we refer to a number of Acts of Parliament, these have been accessible on library shelves, but we do not believe that we should have the further burden of providing copies of them for the Committee. If you wish to contest what we have stated about them, you will be in a position to obtain copies for the Committee.
>
> Concerning the remarks in your letter of the 14th December, it can be seen, by reference to the 34 points and information in support of our Application that the first part of it is not, as you have put it "misconceived", but a necessary protection for us to have a fair hearing. We note what you have to say about a barrister's opinion not being put forward as evidence, but we are informed that it is not impossible for these matters to be in issue, where that a barrister has advised, and what has been advised, could be the subject of oral evidence. You will no doubt accept that. the same applies to a solicitor's legal advice, and, in some circumstances, any advocate's representations. Your reply seems to indicate that you may be unaware of the importance the Board has attached to Mr. Dutton's opinion, as the Board itself has made known by publishing a "summary" of it on the ARB website; and the importance Mr. Dutton attaches to it, by referring to this same summary on the chambers' website advertising his professional services.

We are not certain what leads you to mention a point turning on terminology, but you may not be aware that the following appears on the ARB website (emphasis added), which, as mentioned in our Notice of Application, is inconsistent with the Board's actual practice of claiming to have an extensive mandate by reason of being a regulator:

> "'The Board as Regulator': It has been suggested that the Board is not a "regulator" of the architect's profession..... The precise generic description that any individual chooses to give to the collection of statutory duties imposed upon, and the powers available to the Board under the 1997 Act is in any event irrelevant for the purposes of the questions asked," [by the Board when obtaining this information for its own use] "for they largely involve issues of statutory interpretation which require the legislation to be construed without using epithets."
>
> ref ARB website Press Gallery, summary of Mr. Dutton's opinion 10/11/2003.

We note that you persist in claiming that there is evidence against us which could support a charge of unacceptable professional conduct.

So far as we are concerned, the proposal in our letter to letting all or part of the 34 points and information to be taken as read remains open.

We note what you have to say about MJ— L—'s letter to you of 23rd September, but we wrote to you about this because we desired to have your written response to avoid further mistake or misunderstanding, and we again ask for your answers to this in the terms put to you in MJ— L—'s further letter to you of 3rd October 2005 receipt of which you have not even acknowledged, let alone answered. We think it is the duty of a prosecuting solicitor in proceedings such as these to avoid frustrating efforts to identify matters in issue.

We have asked you to see that the documents which are in the possession of the ARB are available to the Committee. We have seen copies from other sources and have been able to quote from them, but they are not our documents and, since the Committee will no doubt wish to see them, it must be right that the party who has the originals or file copies of the originals (as recipient or writer) be responsible for producing them, and such intervening correspondence as that party may wish to rely on as explanation. You have, we believe, acknowledged that you yourself are not a party to them such that you could make any representations about them which would amount to evidence; or if you were to do so, it would be subject to cross-examination and counter-evidence.

In the interest of a fair hearing and convenient case management, we now write to you to confirm the following:

**A. Production of Documents:**

That as the Board's solicitor you will see that the following documents which are in

the Board's possession are produced by the Board at the Hearing (together with the number of copies required by the Committee):

1. Annual Reports 1997-2005
2. Annual Retention Fee Notices 1997-2006, together with any covering letter or similar, and PII Compliance Form.
3. Minutes of Board Meetings: May 2003, September 2003, September 2004, May 2005.....
4. To the extent not already covered by para. 1 of your letter of 14th December, the documents mentioned at 7, and 8, and at 37 of the Continuation.

Depending on the way in which you oppose our joint applications, or present the Board's case against either of us, or any questions or remarks of the Committee, it may be necessary for reference to be made to any of the above documents, to enable the Committee to have a true and fair view for the purposes of Rule 12 and/or sections 13-15 of the Act.. In the case of copies for the Committee, please ensure that a good photocopying facility is available at the venue. Alternatively, would it be possible for such documents to be treated as exhibits in themselves?

**B. concerning Russell Cooke; that**

1. Your firm has been the source of legal advice given to the Board.
2. The senior partner (Mr. John Gould) is regularly in attendance at meetings of the Board.
3. The firm, or Mr. Gould, or a practising barrister instructed by the firm / Mr. Gould has been the source of the legal advice mentioned in the Registrar's letter of 27th June 2002 (referred to extensively within Item 7 of the Application).
4. Mr. Gould was in attendance at the Board meeting in May 2003 when the objection of a Board member, Mr. Salisbury, to obtaining counsel's opinion through the same firm was overruled by the Chairman (Mr. H. Lloyd QC) with the concurrence of certain others (as was witnessed by a person in the public seating).
5. The firm has been involved in the formation and execution of the "prearranged method of operation" mentioned at para 13 of the Notice of Application.
6. If you intend to oppose the production of (your) numbered document 28, you will depose by affidavit the detailed circumstances in which you issued it to Mr R— L—, as fully and frankly as a claimant would be required if applying for an injunction, and submit to cross-examination on the affidavit at the hearing.

**C. <u>as the Solicitor instructed to act for the Board</u>:**

Please confirm that (the remarks in your letter of 14th December notwithstanding) you are not claiming to have been authorised by your client, the Board, to depart from the case to which the Board is committed, and in particular as shown by the documents mentioned in our Notice of Application; and that, as the Board's solicitor you can have no authority in presenting this case against us concerning the validity of these proceedings other than is the case of the Board itself, as evidenced in such documents, or otherwise on the ARB website or in the records of the Board's proceedings.

For the avoidance of further injuring our professional and personal reputations, please confirm that you accept on behalf of the Board, that if our Application (or such part of it that is then appropriate) is upheld

1. The "order" will be formally and authentically drawn up by the Clerk and issued to us, as well as to the Board.
2. In particular please confirm that you are not able to depart from the open and public statement issued on behalf of the Board by the Board Chairman in his letter of 7th June (RL bundle item 29) para 6 where he says "but architects are not being charged with unprofessional conduct for not having made the statement required by Standard 8."
3. The Committee's Decision (usually delivered by the Chairman at the end of the Hearing) will not be placed on the ARB website or otherwise published, save to the extent agreed, as mentioned in the Application."

We reserve the right to present this letter to the Committee at the hearing.

...

**End of letter of 19 December 2005**

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