Neutral Citation Number: [2021] EWHC 762 (Admin)

Case No: CO/4888/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

Zuber Bux	**Appellant**
- and -	
The General Medical Council	**Respondent**

- -
- -

Ramby de Mello & Rashid Ahmed (instructed by **Marks & Marks Solicitors**) for the **Appellant**
Peter Mant instructed directly by the **Respondent**

Hearing date: 24 March 2021

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Approved Judgment

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MR JUSTICE MOSTYN

Mr Justice Mostyn:

1. Dr Zuber Bux ("the appellant") appeals against the findings of the Medical Practitioners Tribunal ("MPT") made on 9 and 14 October 2019 and against the decision given on 16 October 2019 directing his erasure from the Medical Register.

2. On 9 October 2019 the MPT made findings of fact that the appellant had acted in a state of conflict of interest, dishonestly and for financial gain. Based on those findings, on 14 October 2019, in the impairment phase of the proceedings, the MPT found that the appellant's fitness to practise was currently impaired by reason of misconduct. On 16 October 2019, in the sanctions phase of the proceedings, the MPT directed that the appellant be erased from the Medical Register, with an immediate order for his suspension.

3. The facts found proved fell into four categories, namely:

   i) that the appellant acted in a state of conflict of interest by accepting instructions (through an agent, Medico Legal and Litigation Services Ltd ("MLLS")) to prepare medico-legal reports in respect of holiday sickness claims, from a firm of solicitors (AMS Solicitors Limited ("AMS")), in which his wife, Mrs Sehana Bux, was a salaried partner;

   ii) that in one case he gave a deliberately false answer (in a reply endorsed with a statement of truth) to questions posed to him as an expert under CPR 35.6;

   iii) that he made diagnoses without proper evidence, without identifying the existence of a range of opinions, and had in his reports failed to follow the requirements of CPR Part 35; and

   iv) that he improperly performed a circumcision procedure in the community and in so doing failed to recognise or advise in terms of the risk of doing so.

4. Although there is a formal appeal against the fourth category of found facts, that was not pursued before me.

5. The reports which were the subject of the proceedings were written by the appellant in 2016. The appellant had started undertaking medico-legal work in about 2008. The work involved writing expert medical reports for the benefit of claimants who had made holiday sickness claims in the County Court. The appellant was instructed, through MLLS acting as an agent, by a variety of solicitors, including AMS.

6. In 2011, in circumstances which I will describe later, the appellant paused his medico-legal work, but resumed it in 2016, accepting instructions from that point solely from AMS via MLLS. Thereafter, he produced expert medical reports on an industrial scale. Between 2016 and 2017 he wrote reports in 684 cases which generated a substantial part of his income. For each report he was paid £180 plus VAT. Therefore for those reports he received £123,120 plus VAT. These fees were paid into a service company, Bux Incorporated Ltd, of which he held 55% of the shares and his wife 45%.

7. The way the system worked was as follows. A claimant, alleging food poisoning said to have been suffered while on holiday, would instruct AMS to make a claim on a conditional fee basis. AMS would commission a medical report from the appellant. In an interlocutory judgment given on 6 August 2018 by HHJ Gregory in the County Court at Liverpool (to which I will turn later) it is recorded at [30] that:

> "… each letter of claim is sent out in the name of Mrs Sehanna Bux and identifies Dr Bux within the schedule of nominated medical experts."

8. The reports were written by the appellant, so far as I can tell, on a boilerplate basis. They were superficial, unanalytical, devoid of any differential diagnoses, and were invariably supportive of the claim. They would generally conclude with the words (or words to the same effect):

> "I am of the opinion that the symptoms are due to infective gastroenteritis as a consequence of food poisoning. On the balance of probabilities, this was due to inadequate food preparation and food handling at the hotel..."

9. It has not been suggested to me that even once the appellant wrote a report which was unfavourable to a claimant.

10. Once written, the report would be sent to the defendant travel company, which would pass it on to its insurers. In almost all cases the insurers would accept the claim, and would pay up the relatively small amount of damages sought. The success of the system depended critically on production of a favourable medical report supportive of the claim.

11. Of course, in the event that a report were to be written which was unfavourable, then the claim could not be pursued, and no costs covering the fee would be recovered. The fee was, however, payable irrespective of the success of the claim, and would, in the event of the failure of the claim, have been paid from the profits otherwise generated by the scheme. But the evidence I have read does not suggest that this happened other than rarely, if at all.

12. If a report were written which disclosed that the expert was married to a salaried partner in the firm of solicitors which instructed him then it can easily be apprehended that the insurers would likely not accept the report but would, rather, challenge the claim, and seek to disqualify the expert. Therefore, there was a strong financial motive, as the MPT found, to keep quiet about that connection in order to keep up the lucrative throughput of uncontested claims.

13. It was inevitable that the scheme, which had all the hallmarks of a corrupt practice, would be eventually exposed. In 2018 the GMC received complaints about the appellant's conduct. The complaints raised allegations about the independence of the appellant's reports; his failure to disclose his personal connection with AMS solicitors who instructed him; and the lack of any evidential base or reasoning in his reports.

14. Those complaints led to the GMC laying the charges against the appellant, which in turn led to the findings and sanction referred to above.

15. The grounds of appeal can be summarised as follows:

    i) there was no conflict of interest, that issue having been decided in the appellant's favour by a preliminary-issue judgment given by HHJ Gregory in the County Court at Liverpool in one of the claims where the appellant was acting as an expert witness;

    ii) as there was no conflict of interest, there was no duty on the appellant as expert to disclose anything;

    iii) the flawed finding by the MPT that there was a conflict of interest, and a breach of the duty to disclose it, contaminated the findings on improper diagnoses, dishonesty and financial motive;

    iv) the MPT applied an incorrect legal test to the question of dishonesty, and its finding in that regard was thereby vitiated; and

    v) the sanction of erasure was disproportionate, unduly harsh and unreasonable.

    Mr de Mello accepted in his submissions that if I were to dismiss grounds (i) – (iv) then dishonesty having been sustained, the sanction of erasure could not be challenged.

The duties of an expert witness in civil and regulatory proceedings

16. The duties of an expert witness in civil proceedings are prescribed by CPR Part 35. It is the duty of an expert to help the Court on matters within his or her expertise; and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid (CPR 35.3).

17. It is axiomatic that the evidence of an expert should be independent, unbiased and objective. CPR PD 35 paras 2.1 and 2.2 state:

> "2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate".

18. These rules reflect earlier caselaw. In *Whitehouse v Jordan* [1981] 1 WLR 246 Lord Wilberforce said:

> "Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

19. In his well-known guidance in *The Ikarian Reefer* [1993] 2 Lloyds Rep 63, 81 Cresswell J stated:

> "An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise."

20. In *Vernon v Bosley (expert evidence)* [1998] 1 FLR 297 Thorpe LJ used a vivid metaphor to describe the expert's duty of independence:

> "The area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the expert must be ever-mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement"

21. The obligation to give an unbiased opinion plainly carries with it the obligation to disclose any actual or potential conflicts of interest. Surprisingly, there is no explicit reference to this either in the rules or the Practice Directions. This is notwithstanding that in *Toth v Jarman* [2006] EWCA Civ 1028 at [119] the Court of Appeal suggested that the Civil Procedure Rule Committee should amend the standard terms of the declaration in an expert's report to state that the expert has not left undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis for the court's decision.

22. The current standard terms for an expert's declaration are found in CPR PD 35 para 3.2. This prescribes the contents of an expert's report. Sub-para (9) provides that the report must contain a statement that the expert:

> "(a) understands his or her duty to the court, and has complied with that duty; and (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014."

That Guidance provides at para 16 that:

> "Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts…(e) have no potential conflict of interest."

Conflict of interest

23. What exactly is a conflict of interest? A conflict of interest (or, perhaps more accurately, a conflict of interest**s**) will arise when an expert witness's opinions are either (1) actually influenced, or (2) capable of being influenced, by his personal interests. The former state is obviously rare and where done consciously involves considerable moral turpitude. The latter state is more common and involves no wrongdoing. I shall call these the first and second types of conflict of interest.

24. Let me illustrate the second type of conflict of interest with an example. An expert witness accepts instructions to give evidence in favour of a litigant with whom he is having a relationship. He is actually conflicted under the second type before he has

written down a word of his expert report, because the existence of the relationship is capable of influencing his opinion.

25. In many cases it is not possible to be categorical whether a conflict of interest has arisen. In such cases the descriptive language is that that there is a "possible" conflict of interest, or that there is a "serious risk", or "significant risk", of a conflict of interest arising. This is the descriptive language used in different regulatory spheres, respectively the GMC[1], SRA[2] and BSB[3].

26. Where the conflict in question is only prima facie suggested by the facts it is properly described as a "potential" conflict.

27. So, reverting to my example above, the expert is "potentially" conflicted if the facts about the existence of the relationship are less than clear. If the relationship had ended years earlier then you would say that he was potentially conflicted; whether he was actually conflicted would depend on further factual investigation.

28. Let me to give another example of a potential, as opposed to an actual, conflict. Here, a solicitor wishes to instruct a top expert in a piece of litigation. However, the previous summer, as part of her firm's marketing strategy, the solicitor had taken the expert to Wimbledon for the day with full hospitality. That largesse would not mean that a state of actual conflict of interest existed between the solicitor and the expert. However, there would be a potential conflict of interest which would need to be disclosed (see below for the duty of disclosure).

29. It is true that in the caselaw the expression "a potential conflict of interest" is sometimes used to describe an actual conflict of interest of the second type. In *Toth v Jarman* there are references to "a potential conflict of interest" in [102], [112], [113], [114] and [132]. It is clear that when using that phrase Sir Mark Potter P was in fact referring to an actual conflict of interest, albeit of the second type. In contrast, in [111], [112], [114] and [121] he speaks of "a possible conflict of interest." Here, it is clear that he is referring to what I have categorised as a potential, or yet-to-be-proved, conflict of interest in paras 25 and 26 above.

30. Conflicts of interest come in different forms. In *Rowley v Dunlop* [2014] EWHC 1995 (Ch) David Richards J at [21] identified three common forms. First, the situation where the expert has, or may have, a financial interest in the outcome of the litigation. Second, where the expert has, or may have, a conflicting duty. Third, where the expert has, or may have, a personal or other connection with a party which might consciously or subconsciously influence, or bias, his evidence.

31. Variations on these examples are found in professional codes of guidance. The SRA Guidance on Conflicts of Interest (which is not specifically directed at expert witnesses) mentions acting for a client in relation to a matter which may conflict with "a financial interest of yours or someone close to you" or "a personal or business

[1] See www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/acting-as-a-witness-in-legal-proceedings at para 23
[2] www.sra.org.uk/solicitors/guidance/conflicts-interest/
[3] www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/28a6e3bc-c6fd-4610-be413a06fea5f8ff/second-edition-test31072019104713.pdf

relationship of yours."[4] The GMC Guidance on Acting as a Witness in Legal Proceedings instances the position where "you have been professionally or personally involved with one of the people involved in the case in the past, or you have a personal interest in the case."[5] The GMC Guidance on Financial and Commercial Arrangements and Conflicts of Interest says "Conflicts of interest may arise in a range of situations. They are not confined to financial interests, and may also include other personal interests."[6]

32. Issues about conflicts of interest can arise in civil litigation, as well as in professional disciplinary proceedings such as this. In civil proceedings the usual issue is whether the evidence of an expert witness should be either declared inadmissible or afforded no weight because of the existence of a conflict of interest. In regulatory proceedings the issue is normally whether the registrant should be sanctioned for having given expert evidence without having declared a conflict of interest.

33. The existence of a conflict of interest by an expert does not necessarily disqualify him, or render his evidence inadmissible, or of no weight. In *Factortame (No 8)* [2002] 3 WLR 1104 Lord Phillips MR stated at [70]:

> "This passage[7] seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a pre-condition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the Court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

See also *Armchair Passenger Transport Ltd v Helical Bar Plc* [2003] EWHC 367 (QB) where Nelson J at [29] summarised the procedural steps that would apply where an expert witness was found to be under a conflict of interest.

The duty of disclosure

[4] See FN2
[5] See FN1
[6] www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/~/link.aspx?_id=08E175591385481698E0431097B6EA80&_z=z
[7] in *Liverpool Roman Catholic Archdiocesan Trustees Inc. v Goldberg (No. 3)* [2001] 1 WLR 2337

34. In the passage from *Factortame (No 8)* cited above, Lord Phillips highlighted the crucial importance of the court being made aware of an expert's conflict of interest "as soon as possible". Here we find the expert's duty to declare such a conflict of interest, where he has one, at the earliest opportunity.

35. This duty was spelt out *Toth v Jarman* where Sir Mark Potter P stated:

> "[102] However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. **This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible.**
>
> …
>
> [108]… If there was a conflict of interest which was not obviously immaterial, it should have been disclosed by Professor Hull to the defendant's solicitors and by them to the appellant's solicitors. … The likelihood is that the relevant information would not have been known to Mr Toth or to the court without disclosure and explanation, and it plainly raised a question as to a conflict of interest. **In such a situation, the expert should disclose such information to enable the court and the other party properly to assess the conflict of interest**.
>
> …
>
> [112] … We can understand that (in the absence of guidance from the court) a party who calls an expert witness at trial, or serves an expert's report in advance of trial, may be aware of a potential conflict of interest but consider that it is not material and that it therefore need not be disclosed. **However, for the future, we do not consider that a party should take the course of non-disclosure.** We say this because it is for the court and not the parties to decide whether a conflict of interest is material or not. The court may take a different view from that of the parties as to whether an expert has a conflict of interest which might lead the court to reject the independence of his opinion … **Similarly, in the interests of transparency and of deflecting suspicion, the other party ought to have the information as soon as possible**. We do not consider that the parties can properly agree that a conflict of interest which is otherwise disclosable need not be drawn to the attention of the court. **A party who is in the position of wanting to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should draw the attention of the**

> **court to the existence of the conflict of interest or possible conflict of interest at the earliest possible opportunity**. By the same token, it is obviously desirable for the other party to make any objection that it may have to the admission of expert evidence at as an early a stage in the proceedings as practicable.
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> …
>
> [113] **The obligation to disclose the existence of a conflict of interest in our judgment stems from the overriding duty of an expert, to which we have already referred and which is clearly laid down in CPR 35.3, and also from the duty of the parties to help the court to further the overriding objective of dealing with cases justly (CPR 1.3).** The court needs to be assisted by information **as to any potential conflict of interest** so that it can decide for itself whether it should act in reliance on the evidence of that expert."
>
> (emphases added)

36. In *Rowley v Dunlop* Richards J held at [29]:

> "**It is important that the other parties to the litigation and the court should have available to them information as to any connection of an expert to the litigation or to the parties to the litigation or to any person who may benefit from the litigation.** It is only the disclosure of such information that will enable the court to determine whether the expert's evidence is admissible and, if it is, the weight to be attached to it. The information provided by Mr Frenkel shows that he and Mr Cohen considered whether there was a conflict of interest and shows that they concluded that there was none. It follows from what I have previously said that I agree with that conclusion, but the very fact that they considered the matter shows that there was material information which needed to be disclosed. This non-disclosure, however, does not lead to the conclusion that Mr Cohen's report should be excluded." (emphasis added)

37. And in *EXP v Barker* [2017] EWCA Civ 63 Irwin LJ held at [51]:

> "Our adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the Court over any other loyalty or obligation, **and on the rigour with which experts make known any associations or loyalties which might give rise to a conflict**." (emphasis added)

38. These passages demonstrate clearly that there is a high duty of candid disclosure imposed on an expert witness who has any degree of belief (other than a belief which is unreasonable or de minimis) that he may be under a conflict of interest. He must disclose details of a potential conflict of interest at as early a stage in the proceedings as possible. He must disclose any associations or loyalties which might give rise to a

conflict. He must disclose any material that is suggestive of a conflict of interests, and will not be pardoned, if he fails to do so, by a later finding that there is no conflict of interest.

39. The reason that such a high duty is imposed is to reflect the well-nigh canonical principle that justice must not only be done but be seen to be done: *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

40. This duty is spelt out in the GMC Guidance on Acting As a Witness in Legal Proceedings at para 23 which states:

> "If there is a possible conflict of interest - for example, you have been professionally or personally involved with one of the people involved in the case in the past, or you have a personal interest in the case - you must follow our guidance on conflicts of interest. You must also make sure the people instructing you, the other party and the judge are made aware of this without delay. You may continue to act as an expert witness only if the court decides the conflict of interest will not affect the case."

41. Similarly the Guidance on Financial Commercial Arrangements and Conflicts of Interest states at paragraph 12:

> "you should … declare any conflict to anyone affected, formally and as early as possible".

42. Mr de Mello has argued that the GMC regulatory standard, both in respect of what constitutes a potential conflict of interest, and in respect of the scope of the duty to disclose, exceeds that set by the CPR and the caselaw. In this respect he has drawn a comparison between the conflict of interest jurisprudence and the judicial recusal jurisprudence. I admit to having been initially attracted to this parallel, but I am persuaded by Mr Mant that it is a false analogue. The principles governing judicial recusal are well known and are to be found in numerous authorities of which some of the more prominent are *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, HL; *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451; and *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357. Superficially, the demarcation of judicial bias between actual bias and apparent bias is similar to the demarcation between an actual and potential conflict of interest. But the boundary is not the same. I have sought to explain above that an actual conflict of interest will arise when an expert witness's opinions are capable of being influenced by his personal interests. In such a circumstance the expert is actually conflicted, not merely potentially conflicted. However you would not say, comparably, that a judge was actually biased in such circumstances. Rather, you would say that there was apparent bias - that the reasonable man would say that there was a real danger of bias.

43. The duty of disclosure imposed on a person acting in a judicial capacity has recently been explained by the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. At [136] Lord Hodge held that arbitrators have a legal duty to make disclosure of facts and circumstances which would, or might reasonably, give rise to the appearance of bias. Mr de Mello argues that the

deployment of the concept of reasonableness inserts a benchmark of objectivity into the exercise which is absent in the conflict of interest regulatory standard. I agree that there is a shade of difference between the expression of the two standards, but I think that in the real world the difference between the two duties is non-existent. Mr Mant rightly argued that the difference is an exercise in splitting hairs. Obviously, there is no duty on an expert witness to disclose material which does not reasonably suggest a conflict of interest.

44. I recapitulate:

i) An actual conflict of interest will arise when an expert witness's opinions are actually influenced, or are capable of being influenced, by his personal interests.

ii) A potential conflict of interest will arise where the facts are reasonably suggestive of such a conflict.

iii) An expert witness has a duty to disclose to those instructing him, and to the court, a potential conflict of interest, that is, all facts and matters which might reasonably suggest a conflict of interest.

iv) The duty of disclosure as provided for in the GMC Codes of Guidance does not differ from the legal duty of disclosure.

45. Failure to comply with the duty of disclosure is likely to have very serious consequences. In civil proceedings it is likely to lead to the expert witness being publicly criticised in a judgment, disqualified as a witness, and for his evidence to be ruled inadmissible or otherwise of no weight.

46. In regulatory proceedings the disciplinary tribunal will no doubt examine with great care what motivated the expert witness to conceal the conflict of interest. If it concludes that it was done for an improper motive, such as to obtain a financial advantage, then this may well lead to a finding of dishonesty, which in turn would inevitably lead to an order for erasure from the register.

47. This leads me to another aspect of expert evidence.

Expert evidence before the MPT

48. In this case the MPT, when reaching its decision on the facts, relied inter alia, on "expert evidence" adduced by the GMC and rejected "expert evidence" adduced by the appellant.

49. In my recent decision of *Towuaghantse v GMC* [2021] EWHC 681 (Admin) I said at [36]:

> "In regulatory proceedings of this type there are no procedural rules regulating the adducing of expert evidence. To adduce expert evidence you do not need permission. A party does not need to prove that it would "reasonably assist" the resolution of the proceedings, let alone that it is "necessary" for that purpose (as CPR 35.1 and FPR 25.4 respectively require). There is no

> limit on how many reports an expert witness may file. It seems to be an old-fashioned free-for-all."

50. In this case also the parties adduced their own expert evidence without any oversight by, let alone permission from, the court. It seems to me that an equivalent of CPR Part 35 is urgently needed to be inserted in the procedural rules governing regulatory proceedings of this nature.

51. The key issue in this case was a correct understanding of the test for (a) a conflict of interest in an expert witness and (b) the concomitant duty to disclose. The content and scope of the test is a matter of law. Whether the test is satisfied is a matter of fact. These issues are meat and drink to anybody acting in a judicial capacity. Looking at it from first principles leads me straight to the conclusion that someone acting in a judicial capacity definitely does not need the assistance of an "expert" in deciding these issues.

52. In civil proceedings expert evidence is only admissible if it would "reasonably assist" the resolution of the dispute. If the court can decide the issue without reasonable assistance from an expert, then it should do so. In *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 588 Blackmun J put it this way:

> "If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Similarly, in *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch) at [17] Hildyard J framed the key question thus:

> "…whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area."

In *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 [2016] 1 WLR 597, Lords Reed and Hodge put it pithily at [44(i)]: "would [the expert evidence] assist the court in its task?"

53. I cannot see how the MPT would be assisted by opinions from medically qualified professionals in understanding what the legal test was for a conflict of interest and the concomitant duty of disclosure, and whether that legal test was satisfied on the facts. The questions are essentially legal and factual and not medical or technical. A judge, or a person acting in a judicial capacity, should be well capable of answering these questions without any so-called expert assistance.

54. Even if the MPT felt that this evidence would assist it in its task the admissibility of these opinions is still doubtful. This is because, as was explained in *Kennedy v Cordia (Services) LLP (Scotland)* at [44(ii) and (iv)], the admissibility of expert opinions is governed further by the criteria (a) that the witness has the necessary knowledge and

experience and (b) that there is a reliable body of knowledge and experience to underpin the expert evidence.

55. Reading the reports from the so-called experts I struggled to understand what skilled knowledge and experience they brought to an understanding of the legal content of the test for conflict of interest and its concomitant duty of disclosure. So far as I could tell they were no more knowledgeable or experienced in the subject than were the MPT members (the chair being legally qualified).

56. As for the requirement that there must be a reliable body of knowledge and experience on the subject, I am not aware that one exists. I am not aware of the existence of a Society of Conflict of Interest Experts. Neither expert made any reference to a body of knowledge and experience which underpinned the opinions which they advanced.

57. In my opinion the MPT should have ruled these reports to have been inadmissible, or should have refused to have read them on the ground that they were irrelevant. I will explain below that I do not consider the admission of this evidence to have materially affected the conclusions reached by the MPT.

58. I repeat that there is an urgent need for something like CPR part 35 to be introduced into the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004 No. 2608). Had there been a requirement to seek permission to adduce expert evidence in those rules (as in CPR 35.4(1)) I am certain that it would have been refused this case.

This case

59. I return to the facts of this case.

60. One of the complaints to the GMC about the conduct of the appellant concerned Patient C. The complainants were Beachcomber Tours and their solicitors Kennedys. Patient C had instructed AMS to make a holiday sickness claim in 2017 against Beachcomber Tours. AMS instructed the appellant as a medical expert, and he wrote the standard report. This time, the defendant's insurers challenged the report and the case was defended.

61. On 2 May 2017 questions were sent by the solicitors for the defendant travel company to the appellant pursuant to CPR 35.6. The first two questions asked:

> "1. To what extent is there a connection between you, and Sehana Bux, one of the two Partners of AMS Solicitors, the firm representing the Claimant?
>
> 2. If there is a connection why haven't you mentioned it in the medico-legal report produced by you in this case?"

62. The answer dated 12 May 2017, endorsed with a statement of truth, was as follows:

> "1. Mrs. Sehana Bux is my wife of just under nineteen years.

> 2. I have been doing medico-legal work for over ten years. I receive instructions to prepare reports from various different solicitors, mainly in the North-West of England. Included in this, I receive instructions to prepare reports from MLLS. Often the instructions are to provide reports for AMS solicitors. However, to maintain my professional independence and integrity, I do not deal with any cases involving Mrs. Sehana Bux. All instructions that I receive have no involvement with her whatsoever. There is a relative (sic) Chinese wall created by her firm so that there is no discussion of cases in which I am involved. Clearly from my point of view (and from hers as well) confidentiality and our reputation is of the utmost importance. Therefore, no cases are discussed between us. My job is to produce a report following consultation with the patient. It is an independent report for the purposes of the court through which I present my professional opinion, using the sources of information made available to me by MLLS. The fees that I receive for the report are independent of the outcome of the case.
>
> To clarify matters further, as I have been asked this question before, when I originally started doing medicals many years ago, **I sought clarification from the GMC, who then referred me to my defence union (MDU) for further clarification. They advised me that I am following the GMC guidelines and also those provided by the MDU.** Also, for further clarification, as I understand it, AMS Solicitors have an inclusion in their Terms and Conditions about the relationship between myself and Mrs. Bux."

63. The passage which I have highlighted in the answer was completely untrue. As I have mentioned above, the appellant had paused his medico-legal work in 2011. This occurred following the raising of concerns about a conflict of interest deriving from his marriage. On 24 January 2011 the MDU had written to the appellant in the following terms:

> "I understand that your wife is a director of AMS solicitors, a company that provides some cases for a medical-legal agency that you work for. You have recently had a report rejected by an insurance company who apparently considered that the association between you and the firms of solicitors prevented your opinion from being independent.
>
> Whilst I appreciate that you do not feel that your wife's position in any way affects the independent nature of the work you undertake through MLLS, regardless of whether the instructing solicitor works for AMS or not, this situation has already caused one insurance company to reject a report. I believe that there will always be the risk of this happening again as there will remain differences of opinion as to whether your wife's position within AMS represents a conflict of interest. There has

> been a lot of media coverage relating to insurance fraud recently and I think that you may find that other insurers will be unwilling to accept your reports on the basis of a perceived conflict of interest.
>
> **In accordance with GMC guidance, in Good Medical Practice (2006), I think that you may wish to declare to your clients and to any insurers that your wife is employed by the company**...
>
> In light of the GMC guidance I believe that if an insurer or client had any cause for concern about a report you provided and sought to complain to the GMC, **your association with AMS solicitors might be considered by the GMC to represent a conflict of interest and therefore in breach of your obligations as a registered medical practitioner if it has not been openly declared**..."

64. This contents of this letter, and the passages I have highlighted in particular, are completely at variance with the answer that was given; it says the direct opposite of what was declared to be the truth. When the appellant was cross examined about this, his explanation was that he gave his answer from memory and had not "dug up" the letter. He said:

> "Perhaps it was a little bit of a lapse or a stupidity on my part, but I don't think I looked at that letter closely until the BLM case started to come up.
>
> I had a memory of that report - that letter, and I based my answer on that. I think if you look at my answer, had I dug up that report, perhaps my answer would have been different.
>
> Yes, perhaps, but had I looked at that letter then I would presume my response would have been different.
>
> I am so sorry, Mr Rose, but I didn't - I wasn't aware of that letter - I knew about the letter but I didn't dig up the letter to clarify, which again, naively or stupidly I wish I had."

65. Not very surprisingly, the MPT rejected this defence of stupidity, and found proved the charge of deliberately giving a false answer (which, I repeat, had been endorsed with a statement of truth). Inevitably, that was found to have been done dishonestly. Inevitably, that alone, and irrespective of the decisions on the other charges, would have led to the sanction of erasure.

The judgment of HHJ Gregory

66. The linchpin of the appellant's grounds of appeal is the preliminary-issue judgment of HHJ Gregory referred to above. This related to the claim made by the person referred to as Patient F in the charges. The appellant had written a report for Patient F. That

report was challenged by the defendant travel company. Three preliminary issues were formulated for determination by the court. They were:

> "(a) whether any conflict of interest arises from the relationships, established by the evidence, between Dr Bux, AMS solicitors and the MLLS medical reporting agency, such as would so taint the evidence of Dr Bux as to render it inadmissible;
>
> (b) whether Dr Bux has sufficient medical knowledge/ competence/expertise qualifying him to provide evidence as to diagnosis and causation in holiday illness cases; and
>
> (c) whether in fact the reports and Part 35 replies prepared by Dr Bux are Part 35 compliant and admissible."

67. HHJ Gregory tried the preliminary issues. His judgment is dated 6 August 2018. It is a full and careful document. He made the following factual findings:

i) He was not satisfied that any system of "Chinese walls" was put in place or, if it was, that it operated effectively [31].

ii) Misgivings about the conflicts or independence of the appellant were only likely to be heightened by consideration of the substance of the report which appeared to have been prepared entirely without reference to the requirements of CPR Part 35 and its accompanying Practice Direction [34]-[35].

iii) The appellant did not identify the existence of a range of opinion, still less summarise that range of opinion or give reasons for his own opinion, or even identify literature or materials relied upon [36], nor had he considered all material facts, including those which might detract from his opinion [37].

iv) The report overall was "lacking in depth, substance, or anything passing for objective expert analysis". There was "no hint or clue as to the thought process involved in arriving at the diagnosis beyond the simple and uncritical acceptance of the Claimant's narrative, the recited detail of which insofar as it related to food hygiene issues associated with the preparation and presentation of food in the hotel restaurant was hopelessly short on particulars" [43].

v) Although his answers to CPR Part 35 questions provided some more detail, the tone and substance suggested "a determined attempt to preserve and defend an opinion or position that had been earlier put forward in his substantive report, and arrived at without fair evaluation or consideration of anything approaching the full spectrum of appropriate factors relevant to the diagnosis identified in the report" [50].

68. His decision on issue (a) was very carefully formulated and was in these terms:

> "54. I do not consider that there is any direct evidence of sufficient cogency to justify an express finding of conflict in the involvement of Dr Bux, in the sense that he had any

> financial interest in the litigation process in these claims involving gastric illness, beyond a reasonable expectation that he be paid for any professionally prepared Part 35 compliant reports provided. I accept from the evidence that Dr Bux was indeed paid for every report he prepared, whether or not the claim in question succeeded.
>
> 55. I am told, and accept, the position as outlined at paragraph 12 of Mr Bloomer's closing submissions: that Sehana Bux, although nominally a director and "partner" in AMS, receives a fixed salary only, and does not enjoy any equity in the firm or receive any bonus payments relating to the firm's profitability. Whilst I accept that there may be some intangible benefit to Dr and Mrs Bux in the form of the peace of mind afforded by her security of employment, I do not consider that this could be considered a "conflict".”

69. I have set out above my view that there are two types of conflict of interest. An expert witness will be conflicted not only when a personal interest actually influences his testimony, but will also be conflicted when a personal interest is capable of influencing his evidence.

70. It seems to me that HHJ Gregory’s finding at [54] – [55] is confined to the first type. It goes no further than saying that the appellant’s report in that case was not actually influenced by his personal relationship with his wife. He does not, in these paragraphs, consider whether the appellant was under a conflict of interest of the second type.

71. Having found that there was no actual conflict of interest of the first type, the judge then went on to consider (i) whether the appellant was under a conflict of interest of the second type, (ii) if not, whether there was a potential conflict of interest and (iii) what the appellant’s obligations of disclosure were. He held:

> “56. That having been said, the network of relationships and, crucially, against the background of the letter from the MDU of 24 January 2011, the failure to disclose the relationship between Dr and Mrs Bux, is sufficient to entitle any defendant, or its insurer to query the transparency and objectivity of the process whereby the reports are produced. It raises, at the very least, a legitimate concern that the production of the reports may be driven by a less than objective and properly considered process. Any such suspicion is likely to be fortified by the formulaic nature of the reports themselves, the virtual absence of any expert analysis, and the wholesale failure to comply with Part 35 and the relevant Practice Direction.
>
> 57. The letter from the Medical Defence Union of January 2011 points clearly towards the potential for at least the perception of a conflict of interest. Dr Bux, in accordance with the advice of his professional body, should have taken steps to ensure that he declared openly his wife's status as a director of the firm of

> solicitors instructing him to prepare medico-legal reports. He could have achieved this by including an appropriately worded declaration within the body of each relevant report, rather than to trust to some vague and ill-defined process whereby AMS would discharge this responsibility.
>
> 58. In the circumstances, and having regard to the authorities referred to at paragraph 15 above, and in particular the judgement of Richards J in *Rowley v Dunlop* [2014] EWHC 1995 (Ch) at paragraphs 19 to 21 inclusive: in the event that the evidence of Dr Bux in a case of this nature involving AMS and MLLS is otherwise deemed to be admissible, a defendant would in my judgment be justified in asking the Court to attach lesser weight to such evidence, than to a comparable report prepared by a different expert at arm's length."

72. Whether this constitutes a finding that there was present an actual conflict of interest of the second type is hard to judge. However, there can be no doubt that HHJ Gregory made a finding that at the time that the report was written there were facts suggestive of a conflict of interest. Put another way, there was a real risk of a conflict of interest. Accordingly, he held that all the pertinent facts should have been disclosed by an appropriately worded declaration within the body of each report. In the absence of disclosure then, subject to the decision on the next questions, the defendant would be entitled to ask the court to attribute less weight to the evidence than it would to a comparable report prepared by a truly independent expert.

73. The decision on issue (b) was emphatic:

> "62. …whilst his clinical credentials may not be in dispute, his understanding of the duties and obligations imposed upon expert witnesses seem significantly removed from the expectations demanded by the CPR."

74. And his decision on issue (c) was equally categorical. He held (at [67]) that there were shortcomings in the appellant's approach that suggested a lack of objectivity. His conclusion was, viewed holistically, that the expert evidence of the appellant was not Part 35 compliant. It was therefore inadmissible in the proceedings.

75. Whether or not this judgment would have been inadmissible in subsequent adversarial civil proceedings is an interesting question (see *Hollington v F Hewthorn & Co* [1943] KB 587, *Hoyle v Rogers & Anor* [2014] EWCA Civ 257, [2015] 1 QB 265). But it is indisputable that it is admissible in inquisitorial regulatory proceedings. This is clear from the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004 No. 2608), r.34(1) which provides that:

> "The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law".

See also *General Medical Council v Spackman* [1943] AC 62; *R (on the application of Squier) v General Medical Council* [2015] EWHC 299 (Admin); *Towuaghantse v*

General Medical Council [2021] EWHC 681 (Admin). The judgment is admissible evidence which will be weighed with all the other evidence by the MPT.

76. It is a fallacy for it to be suggested that the judgment was binding on the MPT. There is no question of an issue estoppel arising as there is no privity. Manifestly, it is not an abuse, in the way described in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, for the question of a conflict of interest to be litigated in disciplinary proceedings.

The decisions of the MPT: analysis and conclusions

77. Having heard extensive oral evidence, and having weighed all the documentary evidence, including the judgment of HHJ Gregory, the MPT found that not only was there a potential conflict of interest at the time when the appellant wrote the reports, but there was an actual conflict of interest. There is some inconsistency in the reasons as to whether there was a conflict of interest of the first type or of the second type. The phrase "there was potential for conflict as Dr Bux's wife worked for AMS Solicitors" in para 49 of the findings suggests the latter. However, para 61 states:

> "For these reasons, namely not adhering to GMC guidance, GMP 2013; [the expert's] opinion; his role, duties and obligations as a doctor; and the personal nature of his relationship with a Partner at AMS Solicitors, the Tribunal found that this amounted to a conflict of interest."[8]

This seems to me to be a finding of a conflict of the first type. It is clear to me on a very careful reading of the lengthy reasons as a whole that the MPT was satisfied that the appellant had allowed his written reports to be influenced by his personal relationship with his wife.

78. The finding by the MPT of a conflict of the first type differed from the finding of HHJ Gregory. That was a course the MPT was fully entitled to take.

79. In making that finding the MPT did rely, among other things, on the opinion of the so-called expert witness called by the GMC. I have expressed the view above that this evidence was irrelevant and inadmissible. However, it seems to me that the reliance placed by the MPT on this evidence was slight. I am in no doubt that the decision of the MPT would have been the same absent this evidence.

80. In order to succeed on this appeal the appellant has to show either that the decision was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings. The appellant has argued that there was a serious procedural irregularity in that the MPT did not adopt the finding of HHJ Gregory concerning an actual conflict of interest. That is an untenable submission. The finding of HHJ Gregory was admissible but not binding, as I have explained.

81. In my judgment the MPT was correct to reach the conclusion that it did. I reiterate: a conflict of interest will arise when an expert witness's opinions are actually

[8] I have lightly edited the punctuation of this sentence and have omitted the name of the GMC's expert.

influenced, or are capable of being influenced, by his personal interests. HHJ Gregory answered the first part of this definition in the negative; he came close to answering the second part positively. He did not have the benefit of knowing that in another case the appellant had been shown to have given a seriously inaccurate answer to questions posed under CPR 35.6. Further, for reasons which I do not entirely understand, he did not bring into account his subsidiary finding - that the appellant failed to make the necessary disclosure in his report - when making his primary finding on issue (a) as to whether there was an actual conflict of interest. I would have thought that evidence of deliberate nondisclosure of material facts would be highly relevant when deciding whether there had been a conflict of interest of the first type.

82. In this case the MPT had abundant evidence which demonstrated the following facts:

i) As an expert witness the appellant owed to the court a duty of independence and objectivity.

ii) On the other hand, the defendant had a personal interest in keeping up to speed the lucrative throughput of medical reports the benefit from which accrued not only to himself but also to his wife. She was a co-shareholder in the company to which the proceeds of the work were paid, and was a partner in the firm of solicitors providing him with the work.

iii) In 2016 it was abundantly clear to the appellant that he had to disclose his marital relationship not only to the defendant's insurers but also to the court. This was clear to the appellant not only from the terms of the codes of guidance to which he was subject, but also as a result of the letter written in 2011 by the MDU. But he made no disclosure.

iv) The appellant had on 12 May 2017 signed replies to CPR 35.6 questions, endorsed with a statement of truth, which were completely false.

83. In such circumstances, in my judgment, it would have been perverse and wrong for the MPT to have decided anything other than that the appellant had an actual, serious, conflict of interest of the first type. I am satisfied, notwithstanding the presence of some linguistic confusion, that this is what the MPT decided.

84. Having correctly reached that decision the MPT then turned to address the question whether the reports were improperly written. For each report it found that food poisoning was diagnosed without sufficient evidence; the reports failed to comply with the requirements of CPR Part 35; and (where relevant) they failed to acknowledge and/or refer to contemporaneous records of consultations and/or alternative diagnoses. It found that the appellant (a) failed to ask for further records when it was apparent that they existed; (b) diagnosed food poisoning without providing a differential diagnosis; and (c) gave no reasoning other than reciting information provided to him by the patient. There was no critical analysis or consideration of other causes despite marked similarities between the patients' reports which should have prompted circumspection.

85. In my judgment the MPT was wholly correct to have found these facts.

86. The MPT then turned to the question whether the appellant's conduct as found (i.e. (i) undisclosed actual conflict of interest, (ii) the writing of improper medical reports, and (iii) a deliberately untruthful reply to CPR 35.6 questions) was in each case (a) misleading, (b) dishonest and/or (c) financially motivated.

87. I propose first to look at the question of dishonesty because if this was correctly found I do not need to consider whether the appellant engaged in conduct that was misleading.

88. In *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 Lord Hughes held at [74]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

89. In this case the MPT made the findings about the appellant's state of mind which I have set out above. It also found, in a throwback to the old law, that he knew that what he was doing was dishonest. Since the decision of the Supreme Court in *Ivey* this finding is not necessary. That it was made does not vitiate the exercise; it was merely a superfluous finding. The MPT then went on to consider the critical final objective question. It judged that ordinary, decent people would consider the appellant's conduct dishonest. It further judged that the appellant's conduct was plainly financially motivated. In my judgment, those findings were entirely correct.

90. The MPT undertook an equivalent exercise in relation to the matter of the improper writing of the reports. It found that the appellant deliberately decided to write formulaic reports that diagnosed food poisoning alone. It held that he did so "considering that it was the best way of continuing to provide the lucrative stream of income for his wife's firm and himself." It again made the superfluous finding that the appellant himself knew that what he was doing was dishonest. It then judged that ordinary decent people would consider his conduct dishonest, and that it was plainly financially motivated. Again, in my judgment, these findings were correct.

91. Finally, the MPT considered the matter of the untruthful replies to the Part 35.6 questions. Here it found that the appellant knew exactly what he was doing and that he had not made a stupid mistake. Again, it found superfluously that the defendant knew he was being dishonest. Again, it judged that ordinary decent people would consider his conduct dishonest and that it was financially motivated. This was a cut and dried decision. Once his defence of making a stupid mistake was rejected, as, I

would suggest, was inevitable, then the subsequent findings would follow as night follows day.

92. In my judgment it would have been permissible and logical for the MPT to have checked its findings on the first two matters by reference to its final finding. Had it done so it would surely have been reassured that its findings of dishonesty and financial motivation were surely correct in the light of the exposure of a blatant, extremely serious lie, which, incidentally, amounts to a serious contempt of court.

93. Having made the findings of dishonesty, the finding of impairment of fitness to practise and the sanction of erasure were inevitable: *Bolton v The Law Society* [1993] EWCA Civ 32 at [14] – [16]; *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34 at [13]. Mr de Mello was realistic enough to recognise this and did not argue otherwise.

94. I wish to record that Mr de Mello argued for the appellant extremely eloquently and said everything on his behalf that could properly have been said.

95. For these reasons the appeal is dismissed. I have no doubt that the MPT reached entirely the right conclusions. I repeat that I do not regard the fact that they placed reliance on expert evidence, which I have found to have been inadmissible, to undermine in the slightest the otherwise completely correct approach which was adopted for all phases of this case.
