IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 169

Originating Summons No 127 of 2022

Between

Wee Teong Boo

… *Applicant*

And

Singapore Medical Council

… *Respondent*

And

Attorney-General

… *Intervener*

JUDGMENT

[Administrative Law — Judicial review]
[Administrative Law — Disciplinary tribunals — Interpretation of s 51(4) of the Medical Registration Act]
[Evidence — Admissibility of evidence — Hearsay — Admissibility of hearsay evidence in disciplinary proceedings]

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Wee Teong Boo
v
Singapore Medical Council
(Attorney-General, intervener)

[2022] SGHC 169

General Division of the High Court — Originating Summons No 127 of 2022
Dedar Singh Gill J
13 April, 4 May 2022

19 July 2022 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 This application concerns the admissibility of evidence in the disciplinary proceedings against the Applicant, which were commenced by the Singapore Medical Council (the "SMC"). The evidence consists of (a) two statements recorded from the Applicant pursuant to s 22 of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") and (b) his testimony pertaining to the said statements at the criminal trial of *Public Prosecutor v Wee Teong Boo* (HC/CC 85/2017).

Background facts

2 The disciplinary tribunal ("DT") ruled that the Applicant's statements (the "Statements") and testimony at the criminal trial (the "Testimony", and

collectively with the Statements, the "Evidence") were admissible (the "Admissibility Decision").

3 Being dissatisfied with the DT's decision, the Applicant brought the present application for, *inter alia*:

(a) leave to seek a quashing order against the Admissibility Decision; and

(b) if leave is granted,

(i) a quashing order against the Admissibility Decision;

(ii) a declaration that the Admissibility Decision is illegal, irrational, and/or contrary to natural justice;

(iii) a declaration that the Evidence constitutes hearsay in the context of the DT proceedings and cannot be admitted by the Singapore Medical Council *qua* prosecution to discharge its preliminary burden; and

(iv) a declaration that the Statements can only be used in the criminal proceedings for which they were recorded.

4 Both the SMC and the Attorney-General ("AG") (intervening) find no fault with the Admissibility Decision. They submit that the Applicant has not met the threshold for the granting of leave to seek a quashing order against the Admissibility Decision on the grounds of illegality, irrationality or breach of natural justice.

Procedural history

5 The Applicant was charged with rape on 24 February 2017.[1] At the close of the Prosecution's case in HC/CC 85/2017, the charge was amended to sexual assault by penetration. The Applicant was convicted of the charge in the High Court. On appeal in CA/CCA 15/2019 and CA/CCA 16/2019, the Applicant was acquitted.

6 On 9 July 2021, the SMC commenced the DT proceedings against the Applicant on three charges of professional misconduct. The present application is concerned with only the first charge, which is set out below.[2]

> 1st CHARGE
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> That you, DR WEE TEONG BOO, a registered medical practitioner under the Medical Registration Act (Cap 174), are charged that sometime between 11:50pm on 30 December 2015 and 12:30am on 31 December 2015, at Wee's Clinic & Surgery (the "Clinic"), without the presence of a female chaperone, you performed an internal pelvic examination on your female patient, [NAME REDACTED] (the "Patient"), by inserting your right index and middle finger into the Patient's vagina without wearing surgical gloves and used your saliva as the lubricant which is unacceptable and a serious departure from the standards required of a medical practitioner, to wit:
>
> PARTICULARS
>
> (a) The Patient was a twenty-three-year-old student.
>
> (b) On 30 December 2015, at around 11:50pm, you saw the Patient at the Clinic.
>
> (c) You performed an internal pelvic examination of the Patient by inserting your right index finger and middle finger into the Patient's vagina.

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1 Charge dated 24 February 2017 under HC/HC 900014/2017, later transmitted to the High Court under HC/CC 85/2017.

2 Statement pursuant to Order 53 Rule 1(2) of the Rules of Court dated 9 February 2022 ("O 53 Statement") at para 16.

> (d) You did not offer a chaperone before performing the internal pelvic examination.
>
> (e) You did not wear surgical gloves and used your saliva as the lubricant for the internal pelvic examination.
>
> (f) The use of saliva as a lubricant and failure to wear surgical gloves during the internal pelvic examination of the Patient was unacceptable and unhygienic.
>
> and that in relation to the facts alleged, you have been guilty of professional misconduct under section 53(1)(*d*) of the Medical Registration Act (Cap. 174) in that your conduct demonstrated an intentional, deliberate departure from the standards observed or approved by members of the profession of good repute and competency.

7 During the inquiry, the DT decided to admit the Evidence. The DT has not reached its decision on the charges brought against the Applicant. On 9 February 2022, the Applicant brought the present application. The DT proceedings were adjourned pending the resolution of this application.

The parties' cases

The Applicant's case

8 The Applicant makes the following arguments in support of his application for leave to seek a quashing of the Admissibility Decision:

(a) the Admissibility Decision, being a decision made by the DT wielding statutorily conferred powers under the Medical Registration Act ("MRA"), is susceptible to judicial review;[3]

(b) the Applicant has sufficient interest in the matter, being the respondent in the DT proceedings;[4] and

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3 Submissions for the Applicant dated 11 March 2022 ("AWS") at paras 31–38.

4 AWS at para 39.

(c) there is a *prima facie* case of reasonable suspicion in favour of granting the remedies sought.[5]

9 In relation to the substantive merits of the Applicant's case and [8(c)] above, the Applicant submits:

(a) The Evidence is hearsay evidence which cannot be admitted. Hearsay evidence can only be admitted pursuant to one of the statutory exceptions which requires specific conditions to be fulfilled.[6] The Evidence is not admissible even under s 51(4) of the MRA.[7]

(b) Aside from being formalistically defective, the Evidence is substantively lacking as it is unreliable. The Applicant's evidence in HC/CC 85/2017 that he digitally penetrated his patient was contradicted by the patient's own testimony that there was "no finger … [or] saliva involved".[8]

(c) Even if the Evidence is admissible pursuant to s 147(3) of the Evidence Act 1893 (2020 Rev Ed) (the "EA"), the SMC cannot adduce the Evidence during the prosecution's case.[9] The SMC must first establish a *prima facie* case. If the DT finds that the SMC has established a *prima facie* case, it will call upon the Applicant to enter his defence. The Applicant may provide his testimony or elect to remain silent. The SMC would only be able to adduce the Evidence to impeach the

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5 AWS at para 40.

6 AWS at paras 46–54, 66–69.

7 AWS at paras 89–95.

8 AWS at paras 55–62.

9 AWS at paras 63–64.

Applicant's contrary testimony at this juncture, *ie*, during the Applicant's case.

(d) Based on the Court of Three Judges' ("C3J's") obiter remarks in *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 ("*Manohar*") on s 258 of the CPC, the Statements are admissible only at the Applicant's criminal trial and not in the DT proceedings.[10] Further, ss 258 and 259 of the CPC share specific statutory purposes which are consistent with the Applicant's position that s 258 of the CPC limits the admissibility of the Statements to only the Applicant's criminal trial.[11]

(e) Taken in its entirety, the DT's decision was *ultra vires* the scope of its powers under the MRA, so absurd in its disregard for the fundamental rules of criminal procedure that no reasonable body could have made such a decision, and contrary to the fundamental rules of justice.[12]

10 At the hearing on 13 April 2022, Counsel for the Applicant made oral submissions to depart from his original position on the classification of the Statements as "accused statements" under s 258 of the CPC (see [9(d)] above). The Applicant's original position was that s 258(1) of the CPC applied to the Statements and consequently precluded the admission of the Statements from the DT proceedings as they were only "admissible in evidence at the person's trial", *ie*, the Applicant's criminal trial. The Applicant took the original position in the DT proceedings below as well.[13] However, in oral submissions before me,

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10 AWS at paras 70–73.

11 AWS at paras 74–85.

12 AWS at para 96.

13 Transcript dated 20 January 2022 at 54:14–21: see O 53 Statement at p 4225.

Counsel for the Applicant submitted instead that s 259(1) of the CPC was applicable since the Applicant is not an accused person in the DT proceedings and ought to be regarded as a person "other than the accused" within the meaning of the provision. Thus, the Applicant's revised position is that the Statements are inadmissible in the DT proceedings unless any one of the exceptions listed in s 259(1) of the CPC applies. Counsel for the Applicant asserted that none of the exceptions listed in s 259(1) of the CPC operated to render the Statements admissible.

11 Given the change in the Applicant's position and the novel nature of the present application, I invited parties to make further submissions, *inter alia*, on the following areas:

(a) the Applicant's reliance on s 259(1) of the CPC; and

(b) the limits (if any) of the DT's powers under s 51(4) of the MRA.

12 On 4 May 2022, the Applicant filed further submissions on the limits of the DT's powers under s 51(4) of the MRA and the impact of these proposed limits on the Evidence. His position is outlined below:

(a) In respect of the limits to s 51(4) of the MRA, reliance is placed on an English authority, *R (on the application of Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) ("*Bonhoeffer*"). The following points arising from *Bonhoeffer* are made for the eventual submission that fairness should guide the determination of whether to admit the Evidence under s 51(4) of the MRA.

(i) Rule 34(1) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 [SI 2004/2608] ("Rule 34(1)") governs the admissibility of evidence in

disciplinary proceedings in England. Rule 34(1) confers on the Fitness to Practise Panel ("FTP Panel") the discretion to admit any evidence which it considers to be relevant to the case before it and which it considers fair to admit (*Bonhoeffer* at [35]).[14]

(ii) The issue of fairness must be considered in terms of the FTP Panel's obligations to the doctor and its duty to the public interest, which includes the protection of patients, maintenance of public confidence in the profession and declaring and upholding proper standards of behaviour (*Bonhoeffer* at [33], [50] and [51]). Whether or not it is fair to admit the hearsay evidence has to be decided on the specific facts of each case, rather than with reference to any absolute rules of universal application.[15]

(iii) The relevant factors to consider within the issue of fairness include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true (*Bonhoeffer* at [108]).[16]

(b) The Applicant considers the Evidence to be hearsay. He submits that the admission of the Evidence during the prosecution's case would be manifestly unfair. Further, the admission of the Evidence is inconsistent with the purpose of the DT, which is to protect patients and public confidence. The Applicant contends that there is no patient to be

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14 Further Submissions for the Applicant dated 4 May 2022 ("FSA") at paras 17–18.

15 FSA at para 17.

16 FSA at para 18.

protected and no public interest to be upheld. This contention is based on the patient's testimony in the DT proceedings that there was "no finger" and "no saliva" involved.[17] The Applicant posits that the patient's testimony was entirely antithetical to the charge against the Applicant (see [6] above). It would therefore be prejudicial to the Applicant if the Evidence is admitted and relied on by the SMC as the sole basis to establish its *prima facie* case against him.

The SMC's case

13 The SMC relies primarily on the overarching provision in s 51(4) of the MRA, which reads:

> (4) A Disciplinary Tribunal is not bound to act in a formal manner and is not bound by the provisions of the Evidence Act 1893 or by any other law relating to evidence but may inform itself on any matter in such manner as it thinks fit.

14 Counsel for the SMC submits that in any case, it is premature for the Applicant to seek a judicial review of the Admissibility Decision before the DT makes a determination on the charges for professional misconduct. The SMC argues that the present application is akin to an interlocutory appeal filed in the midst of a criminal trial. In its submission, this is not allowed.[18]

15 Moreover, the SMC avers that the Admissibility Decision did not suffer from any illegality, irrationality, or breach of natural justice. Therefore, leave

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17 FSA at paras 18–19.

18 Respondent's Written Submissions dated 11 March 2022 ("RWS") at paras 7–16 and 44–48.

should not be granted to the Applicant to commence judicial review of the Admissibility Decision.[19]

16 Further, the SMC argues that the Evidence is not hearsay evidence. The Evidence is admissible through the police officers, who were the recorders of the Statements.[20] Even if the court finds that the Evidence is hearsay and therefore is inadmissible under s 51(4) of the MRA, the SMC propounds that the Evidence would nevertheless be admissible pursuant to s 147(3) of the EA.[21] This is because the Evidence is contrary to the Applicant's written explanation and witness statement tendered at the DT proceedings (see [53]–[54] below).

17 Following the hearing, the SMC filed written submissions in respect of the issues canvassed above (see [11]). The SMC's main arguments are set out below:

(a) The limits to the wide-ranging powers of the DT are the rules of natural justice and the need to ensure that any evidence relied upon is reliable.[22]

(b) Under s 51(4) of the MRA, the DT has a discretionary power to admit hearsay evidence. Relying on the ruling in *BNX v BOE and another matter* [2017] SGHC 289 ("*BNX*"), a parallel can be drawn between DT proceedings and arbitration proceedings. In *BNX*, the High Court held that the arbitral tribunal is "empowered to receive all relevant evidence, with the concerns which underlie the exclusionary rules at

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19 RWS at paras 49–51.

20 RWS at paras 57–61.

21 RWS at paras 62–68.

22 Respondent's Further Written Submissions dated 4 May 2022 ("FSR") at para 15.

common law such as the hearsay rule going only to weight and not to admissibility" (at [83]). In any case, the Statements are not hearsay as the intention is to admit them through the statement recorders to prove that the Statements were made, and not to prove the truth of their contents.[23]

(c) The considerations involved in the DT's exercise of its discretion under s 51(4) of the MRA include whether the evidence is relevant,[24] the issues of fairness and reliability balanced against the prejudice to the doctor, the nature of the evidence, and the surrounding circumstances.[25] The factors going toward considering the nature of the evidence include its importance and its capability of being challenged (*eg*, by way of cross-examination). Whether there was any other evidence available on the same issue would be regarded as part of the assessment of the surrounding circumstances.

The AG's position

18 The AG's submissions are summarised as follows:

(a) Section 258 of the CPC is silent on whether statements made by an accused are admissible in DT proceedings. Therefore, s 258 of the CPC does not apply to exclude the admissibility of the Statements in such proceedings. Whether the Statements are admissible would depend

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23 FSR at paras 21–22.

24 FSR at para 24.

25 FSR at paras 25–26.

on the statutory framework governing the specific proceedings in question.[26]

(b) Section 51(4) of the MRA confers a broad discretion on the DT to admit all relevant evidence, including hearsay evidence, which might otherwise be excluded pursuant to the EA or other law relating to evidence. The concerns which underlie the exclusionary rules at common law, such as the hearsay rule, usually contribute only to weight and not to admissibility.[27]

(c) The AG makes, *inter alia*, the following further submissions on the issues raised at the 13 April 2022 hearing (see [11]):

(i) The determination of whether a statement recorded in the course of investigations is given by "a person other than the accused" within the meaning of s 259(1) of the CPC must be made with reference to the investigations, *ie*, the question is whether criminal proceedings are brought against the statement-maker arising from those investigations. Further, the Applicant's interpretation is inconsistent with the observations of the C3J in *Manohar*.[28]

(ii) There are three limits on the DT's powers under s 51(4) of the MRA. The limits are as follows:

(A) the DT can only admit relevant evidence;

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26 Attorney-General's Written Submissions dated 6 April 2022 ("AGWS") at paras 6–26.

27 AGWS at paras 27–35.

28 Attorney-General's Further Submissions dated 4 May 2022 ("FSAG") at paras 5–9.

(B) the DT does not have unfettered discretion in determining how much weight is to be accorded to the evidence; and

(C) notwithstanding s 51(4) of the MRA, the DT is required to comply with the rules of natural justice.[29]

Issues to be determined

19 Before considering the substantive merits of the application, I deal with the SMC's preliminary objection to the permissibility of this application at the present juncture (*ie*, before the DT has issued its decision on the Applicant's professional misconduct charges) (see [14] above).

20 Thereafter, I will deal with the following substantive issues in turn:

(a) the nature and character of the DT proceedings;

(b) whether the Evidence is hearsay;

(c) whether s 147(3) of the EA applies to admit the Evidence at the present juncture;

(d) the scope and application of s 51(4) of the MRA, *ie*, whether the Evidence is admissible pursuant to s 51(4) of the MRA;

(e) the ambit/influence of s 259 of the CPC, on the admissibility of the Evidence; and

(f) whether the threshold for leave to commence judicial review is met.

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[29] FSAG at paras 17–20.

21 Given that the Applicant has not pursued the argument before me, it is not necessary to consider whether s 258 of the CPC applies to the Statements and its consequent impact on the admissibility of the Statements in the proceedings before the DT. Nevertheless, I will consider the applicability of s 258 of the CPC for completeness.

My decision

Issue 1: Whether it is appropriate to deal with the application at this juncture

22 Generally, aside from appeals brought under statute, a party aggrieved by a tribunal's decision may apply to the High Court for leave to commence judicial review if the party alleges that the decision was tainted by illegality, irrationality or procedural impropriety: Bala Reddy and Jill Tan, *Law and Practice of Tribunals in Singapore* (Academy Publishing, 2019) ("*Law and Practice of Tribunals in Singapore*") at paras 1.27–1.28. If there are grounds for judicial review, such an application would be brought at the close of the DT proceedings, after the DT has made its decision on the substantive matter brought before it. The present application is brought before the DT's decision on the charges has been pronounced.

23 After pronouncing its decision on the admissibility of the Evidence, the DT presented three options to parties on how to proceed further. The options allowed the Applicant flexibility to apply to the General Division of the High Court for an order determining the applicability of s 258 of the CPC and the manner in which "admissible in evidence at the person's trial" ought to be read (the "Issues").[30] This was done in recognition of the importance of the

[30] Transcript dated 21 January 2022 at 33:10–37:9: see O 53 Statement at pp 4325–4329.

Admissibility Decision, and the divergence in parties' positions on it. It reasoned that the Issues, if decided in favour of the Applicant on appeal, may lead to a fresh DT hearing being ordered by the court, in which case the witnesses (including the patient) would have to testify again. The DT considered that such a situation would also result in a waste of its time and resources.[31]

24 Counsel for the Applicant had raised, *inter alia*, similar concerns as the DT. Counsel for the SMC broadly agreed with the reasons raised. She had, however, proposed proceeding with the DT hearing regardless. In this alternative suggestion, the Applicant could retain his right to raise the legal question as a ground of appeal if the substantive matter before the DT was decided against him.[32] However, Counsel for the SMC did not pursue this point below with the same force as she has done before me. Parties below eventually agreed that it would be expedient for the Applicant to apply for the DT's decision on admissibility to be challenged and to have the issue determined by the court before the DT continued with the rest of the proceedings.[33]

25 On 9 February 2022, the Applicant filed the present application.

26 In the proceedings before me, the SMC contested the permissibility of the present application. The SMC argues that the present application, being made prior to the DT's decision on the Applicant's professional misconduct charges, is similar to an interlocutory appeal. The SMC submits that the DT proceedings are quasi-criminal in nature.[34] Indeed, the C3J held in *Low Chai*

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31 Transcript dated 26 January 2022 at 44:17–45:3: see O 53 Statement at pp 4388–4389.

32 Transcript dated 26 January 2022 at 42:11–16: see O 53 Statement at p 4386.

33 Transcript dated 26 January 2022 at 46:2–18: see O 53 Statement at p 4390.

34 RWS at paras 11.

Ling v Singapore Medical Council [2013] 1 SLR 83 ("*Low Chai Ling*") at [29] as follows:

> As disciplinary proceedings are quasi-criminal in nature, a disciplinary tribunal has to adopt procedures and practices which ordinarily prevail in criminal trials. …

27 Counsel for the SMC postulates that the holding made by Chief Justice Sundaresh Menon ("Menon CJ") in *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 ("*Xu Yuanchen*") in relation to interlocutory appeals in criminal trials ought to apply equally to the DT proceedings. In *Xu Yuanchen*, the applicants claimed trial to criminal charges against them. During the criminal trial, the applicants made applications seeking the disclosure of statements given under s 22 of the CPC. The applications were dismissed by, *inter alia*, the District Judge ("DJ") hearing the criminal trial. The applicants then appealed to the High Court. Menon CJ held at [10]–[11] that:

> 10 … *appeals against interlocutory rulings would stifle the course of criminal trials* "on points which are in their essence procedural", and that the proper time to take those points would be upon appeal "after determination of the principal matter in the trial court". After all, in the course of a typical trial, the trial judge can be expected to make numerous interlocutory rulings and *it would pose impossible difficulties for the expeditious conduct of the trial if each and every one of these could be appealed.*
>
> 11 *This is also an expression of the law's concern with curbing unreasonably litigious behaviour.* In the criminal context, this is a serious concern, not just as a matter of practical policy but as a matter of justice as well. As Choo Han Teck J has observed, *frequent interruptions of a trial disrupt "the flow and dignity of a trial" and "[tarnish] the image of the rule of law"*: *Yap Keng Ho v Public Prosecutor* [2007] 1 SLR(R) 259 ("*Yap Keng Ho*") at [7]. In a similar vein, Chan Sek Keong CJ cautioned against "disrupted and fractured criminal trials" which create "unacceptable delays in their final disposal": *Azman bin*

> *Jamaludin v Public Prosecutor* [2012] 1 SLR 615 ("*Azman*") at [44].
>
> [emphasis added]

28 Menon CJ observed at [16] that applications "to admit or exclude evidence or to permit lines of cross-examination" will almost invariably "disrupt or interfere with the proper conduct of the trial". The SMC relies on the observations in *Xu Yuanchen* in submitting that the general prohibition against interlocutory appeals in criminal trials until after the determination of the principal matter, applies equally to the DT proceedings.[35] It argues that the present application for leave to commence judicial review of the Admissibility Decision is analogous to bringing an interlocutory appeal in the midst of a criminal trial. In written submissions, Counsel for the SMC alludes to the fact that DT proceedings would suffer the same difficulties as in criminal trials (see extract of *Xu Yuanchen* at [27]) if interlocutory rulings were subject to judicial review before the final conclusion to the matter.[36]

29 While interlocutory appeals are allowed in limited cases, Counsel for the SMC submits that the present application does not fall within any of the established exceptions to bringing the application prematurely In *Chai Chwan v Singapore Medical Council* [2009] SGHC 115 ("*Chai Chwan*"), the High Court set out the exceptions to prematurity. Ang J (as she then was) held that the evidence should show that the applicant qualifies for one of the established exceptions to a premature leave application before it is granted (at [70]):

> [The prematurity of an application] is a factor that the court is entitled to take into account in the leave to apply stage. The leave application was doomed to fail because the application was premature. *Nothing in evidence indicated that Dr Chai could*

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35 RWS at paras 7–12.

36 RWS at paras 9 and 12.

> *avail himself of* ***any of the four exceptions to the concept of prematurity*** *raised in Rayney Wong* ([34] supra). To recap, they are as follows:
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> (a) *where the decision is not about individual items of evidence but whole areas which could fundamentally affect the conduct and utility of the procedure;*
>
> (b) *where there is a real risk of irreparable damage as a result of the interlocutory decision and therefore, no real opportunity to challenge it at a later stage;*
>
> (c) *where there is a real danger supported by evidence that there would be a breach of natural justice at the hearing; and*
>
> (d) *where there is a saving in costs or a question of law.*
>
> [emphasis added]

30 The Applicant emphasises that there has been a change in position by the SMC (see [24] and [26] above).[37] He underscores the fact that the SMC's position before me is contrary to the DT's "express case management directions".[38] It is insinuated in the Applicant's Written Submissions dated 11 March 2022 that this precludes the SMC from making its objections in this application.[39] At the hearing, Counsel for the Applicant submitted that the application "cannot be considered premature[,] especially because of the manner in which [the] proceedings below were conducted". He highlighted, in particular, the lack of objection on the part of the SMC in the DT proceedings below.[40]

31 I do not consider it necessary to engage with the submissions made by the Applicant above at [30]. For the reasons I set out below at [37], I proceed to deal with the substantive issue of whether the Evidence is admissible.

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37 AWS at para 97.

38 *Ibid*.

39 *Ibid*.

40 Transcript dated 13 April 2022 at 3:3–15.

32 I agree with the SMC's characterisation of the application as similar to an interlocutory appeal which is brought in the course of a criminal trial. The application has been brought prior to the DT's pronouncement of its decision on the charges faced by the Applicant. The observations of V K Rajah J (as he then was) in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 ("*Rayney Wong*") lend support to this view. In *Rayney Wong*, the applicant, a solicitor, brought an application for leave to seek judicial review of the Disciplinary Committee's finding that there was a *prima facie* case against him. The applicant had submitted that there was no case to answer at the close of the Law Society of Singapore's case (*ie*, the close of the prosecution's case). The Disciplinary Committee found that there was a case to answer and the applicant was asked to enter his defence. Being dissatisfied with this, the applicant brought the issue to court prior to the commencement of the defence's case. This was done before the Disciplinary Committee's determination of the charges against him. The learned judge dismissed the leave application and found that it was premature. I will address the decision in greater detail below at [35]. For now, it suffices to highlight that the High Court held that "a premature application for leave to seek judicial review *in essence [is] one made before the actual decision-making process of the tribunal at first instance is completed*" [emphasis added] (at [14]). On this definition, the present application constitutes a premature application for leave to seek judicial review.

33 The SMC cites *Chai Chwan* to prop up its submission that the application should be dismissed for prematurity.[41] In *Chai Chwan*, the applicant brought an application for leave to commence judicial review of the decisions of two reviewing committees to refer two complaints against him to the

[41] RWS at para 15.

disciplinary committee. Ang J held that the application failed for, *inter alia*, prematurity. The formal inquiry before the disciplinary committee had not yet been held. The Court observed that none of the grounds raised by the applicant constituted errors that could fundamentally affect the conduct and utility of the procedure (at [73]). There was also neither irreparable damage nor a possible breach of natural justice. The applicant would be allowed to object to the charges on a point of law at the inquiry itself.

34 *Chai Chwan* may be distinguished on its facts. The applicant in *Chai Chwan* had alleged there was illegality, irrationality and / or procedural impropriety in the decisions to bring him before a disciplinary committee. The application had been made before the disciplinary hearing started. It was therefore only a challenge against the manner in which discretion was exercised by the reviewing committees to bring the applicant before a disciplinary committee. There were no novel questions of law in that case, unlike in the present case (see [23] above).

35 The better case which ought to be discussed is *Rayney Wong*. Although parties have not brought this case to my attention, I consider it necessary to deal with the analogous precedent. The salient facts of the case are set out above at [32]. The application in *Rayney Wong* was in essence an objection to the DT's finding that the Law Society of Singapore had proven a *prima facie* case against him. In *Rayney Wong*, the applicant contended that the evidence of a material prosecution witness should be excluded because it had been obtained by illegal or improper means. The DT in *Rayney Wong* admitted the evidence and ruled against the applicant's submission that there was no case to answer. Rajah J dismissed the application. One of the reasons for the dismissal was that the application was premature (*Rayney Wong* at [13]). The main reason for the finding of prematurity was that until the disciplinary committee decided that the

disciplinary charges were of sufficient gravity to be referred to the C3J, it could not be said that calling on the applicant to enter his defence would have an adverse effect on him. The High Court observed that if the applicant had elected to give evidence, he may or may not have been able to convince the disciplinary committee that the Law Society of Singapore had not proved its case against him.

36 The applicant appealed against the decision in *Rayney Wong*. He challenged the finding of prematurity on the grounds that, *inter alia*, whatever final determination the disciplinary committee made was irrelevant. It was irrelevant because the disciplinary committee's decision to call upon him to enter his defence would have been an error of law that could have a substantial effect on him. The applicant submitted that it was an error of law because it was based on the impugned evidence, which was inadmissible in law. It had a substantial effect on him because but for such evidence, the disciplinary committee had no other basis to call for his defence since there was no other evidence to support the disciplinary charges preferred against him. Further, the disciplinary committee's decision to admit the evidence had wrongly shifted the evidential burden onto him, and had deprived him, as an accused person, of the presumption of innocence (*Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 ("*Rayney Wong (CA)*" at [17]). The Court of Appeal in *Rayney Wong (CA)* upheld the decision of the High Court. It held that the impugned evidence did not constitute entrapment or illegally obtained evidence (*Rayney Wong (CA)* at [31]–[38]). However, the Court of Appeal made no ruling on whether the leave application was premature: see *Rayney Wong (CA)* at [23].

37 The facts of the current application, being one for leave to quash the Admissibility Decision, are similar to *Rayney Wong*. It is similarly an

application to exclude material evidence in the SMC's case which the Applicant deems to be inadmissible. In *Rayney Wong (CA)*, the decision of Rajah J was upheld on the basis that the evidence challenged by the applicant was not illegal. The appeal failed on that basis. However, the parties have not engaged substantially with the issue of prematurity before me. Aside from the one case cited by the SMC on prematurity (*Chai Chwan*), no other party has provided precedents on this issue. I also note the exceptional circumstances of this case. These include the earlier agreement between the parties and the DT that there were novel questions of law (*ie*, the Issues), which would materially affect the outcome of the DT proceedings. In the circumstances, I decline to pronounce whether or not the application is premature.

Issue 2: Nature and character of DT proceedings

38 I address briefly the nature and character of DT proceedings in order to inform my subsequent analysis and interpretation of s 51(4) of the MRA (see below at [62]–[70]).

39 Tribunals in Singapore span a wide spectrum in terms of the nature of parties appearing before the tribunal, the scope of review conducted and the standard of review that is used in assessing the merits of the decision: *Law and Practice of Tribunals in Singapore* at para 1.10. There are three main categories of tribunals (*ibid*):

(a) Administrative tribunals, which determine disputes between government and private persons or bodies arising under public law.

(b) Tribunals hearing civil claims, which determine disputes arising under private law in which the government is not necessarily a party,

and which were, at times, commonly heard in the civil courts prior to the establishment of the tribunal system.

(c) DTs which hear proceedings arising out of complaints made about practitioners of a particular profession.

40 I am concerned with the third category in the present case.

41 It is often said that DTs are quasi-criminal in nature. In *Law Society of Singapore v Chiong Chin May Selena* [2013] SGHC 5, the C3J held at [28]:

> ***It is a trite proposition that disciplinary proceedings are quasi-criminal in nature***: see *Law Society of Singapore v Chong Wai Yen Michael and others* [2012] 2 SLR 113 at [44]. ***Therefore, the Law Society has the burden of proving its case beyond a reasonable doubt***: see *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [6].
>
> [emphasis added]

42 Regulation 34(4) of the Medical Registration Regulations 2010 (the "MRR") sets out the procedure of the inquiry. The procedure substantially mirrors the criminal trial process. It includes the reading out of the charge(s) against the medical practitioner, the presentation of the evidence in the SMC's case, followed by the evidence in the practitioner's case and the opportunity to cross-examine or re-examine witnesses. A DT may make variations or modifications to the procedure as it thinks fit in any particular case: Regulation 34(4) of the MRR. If a DT determines that there is insufficient evidence to substantiate the charge at any point during the proceedings, it shall discontinue them: Regulation 34(5) of the MRR.

43 It is uncontroverted that the SMC *qua* prosecution has to establish the charge(s) against the medical practitioner beyond reasonable doubt. By the close

of the SMC's case, it must establish a *prima facie* case against the practitioner on each of the elements of the charge(s). The practitioner may make submissions at the close of the SMC's case that there is no case to answer. If the DT finds that there is sufficient evidence to establish a *prima facie* case, then the practitioner will be called to enter his defence. At this juncture, the practitioner may elect to remain silent or to give evidence. Where the practitioner gives evidence which is contrary to his previous statements, he may be cross-examined on them under s 147(1) of the EA. This may entail the admission of previous statements into evidence to contradict and/or substitute the practitioner's testimony. Section 147(3) of the EA provides as follows:

> Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement is by virtue of this subsection admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

44 Another important feature of DTs is the presence of strong public interest considerations which underpin their inception, processes and outcomes.

45 The C3J in *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 recognised the gravity of public interest considerations in DT proceedings against medical practitioners. The C3J reiterated the principles in *Wong Meng Hang v Singapore Medical Council and other matters* [2019] 3 SLR 526 (at [68]):

> 23 … ***Disciplinary proceedings enable the profession to enforce its standards and to underscore to its members the values and ethos which undergird its work***. In such proceedings, broader public interest considerations are paramount and will commonly be at the forefront when determining the appropriate sentence that should be imposed in each case. ***Vital public interest considerations include the need to uphold the standing and reputation of the profession, as well as to prevent an erosion of public***

> ***confidence in the trustworthiness and competence of its members.*** This is undoubtedly true for medical practitioners, in whom the public and, in particular, patients repose utmost trust and reliance in matters relating to personal health, including matters of life and death. As we observed in *Low Cze Hong* ([18] supra) at [88], the hallowed status of the medical profession is 'founded upon a bedrock of unequivocal trust and a presumption of unremitting professional competence', and failures by practitioners in the discharge of their duties must be visited with sanctions of appropriate gravity.
>
> 24 ***The primacy of these public interest considerations*** in the sentencing inquiry in disciplinary cases ***means that other considerations that might ordinarily be relevant to sentencing***, such as the offender's personal mitigating circumstances and the principle of fairness to the offender, ***do not carry as much weight as they typically would in criminal cases; and, as we later explain, these considerations might even have to give way entirely if this is necessary in order to ensure that the interests of the public are sufficiently met***: *Ang Peng Tiam v Singapore Medical Council* [2017] 5 SLR 356 ("*Ang Peng Tiam*") at [118].
>
> [emphasis added]

46 The C3J's observations pertained to the main objectives of sentencing following the affirmative finding of a DT on professional misconduct charges in the medical profession. It should logically follow that the same objectives feature in considering the nature and purpose of a DT at an earlier stage of the inquiry.

47 This view of the DT proceedings under the MRA is supported by Parliamentary intent, discerned from the Second Minister for Law's speech in the Second Reading of the Civil Law (Amendment) Bill and the Medical Registration (Amendment) Bill on 6 October 2020, where he highlighted the "three main aims of a disciplinary system that regulates the ethical and professional behaviour of the medical profession" (see *Singapore Parliamentary Debates*, *Official Report* (6 October 2020) vol 95 (Edwin Tong Chun Fai, Second Minister for Law)). The three main aims as articulated by the

Second Minister for Law are as follows. The first aim of the DT is to uphold public interest. The second aim is that the DT is intended to preserve and protect public confidence in the health system and the medical profession. The third and final aim is for the DT proceedings to achieve general deterrence through disciplinary outcomes which deter other doctors from adopting unethical practices.

Issue 3: Whether the Evidence is hearsay

48 The Evidence consists of the Statements, which were recorded from the Applicant pursuant to s 22 of the CPC, and the Testimony, which was the Applicant's evidence at his criminal trial. In bringing the application, the Applicant contends that the Evidence is hearsay evidence.[42] On the other hand, the SMC submits that the Evidence is not hearsay as the relevant statement recorders will testify to the Statements.[43]

49 The law on hearsay evidence is well-established. Where oral evidence is provided on assertions made outside of court and tendered in court as evidence as to the truth of the contents therein, but the maker of the assertion is not called as a witness, it is not admissible. Section 32 of the EA provides a list of situations where such evidence may be admissible. In this regard, the SMC submits that the Statements cannot constitute hearsay evidence as the statement recorders are being called to admit the Statements. It contends that the statement recorders are being called to establish the fact that the Statements were made by the Applicant, and not to establish the truth of the contents therein.[44]

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42 AWS at paras 46–50.

43 RWS at paras 57–61.

44 RWS at para 61.

50 The main difficulty with the SMC's position is that it does not logically accord with its case. While Counsel for the SMC argues that the Statements are being adduced for the limited purpose of establishing that the Statements were made by the Applicant, it cannot be that the SMC does not intend to rely on the contents of the Statements in establishing its *prima facie* case. The mere fact that the Applicant had given the Statements to the police will not, without more, establish the *actus reus* of the charge that the SMC seeks to prove (see [6] above).

51 The extract below from Sudipto Sarkar & V Kesava Rao, *Sarkar: Law of Evidence* vol 1 (LexisNexis, 20th Ed, 2021) at p 1530 is pertinent:

> Hearsay is therefore properly speaking secondary evidence of any oral statement, e.g., when witness *A* says that *B* told him about the happening of event X (though *B* is not before the court). *A's assertion about event X being not based on his own observation he is not qualified to speak to it, B's* assertion made out of court cannot be accepted because it cannot be subject to cross-examination and other tests. But if the *object is only to prove B's assertion of the event* (*and not to prove the event*), A is competent to speak to it and it may be received if it has any relevancy in the case.
>
> [emphasis added]

52 The Evidence, in so far as the SMC seeks to rely on it to establish the truth of its contents without calling the maker (the Applicant) as a witness, will constitute hearsay. While s 147(3) of the EA provides an avenue to cross-examine the Applicant on the Evidence, the appropriate juncture for the SMC to do so would be during the Applicant's case if his defence is called and he testifies (see [43] above). Thus, in the present proceedings and prior to the close of the Prosecution's case, the Evidence constitutes hearsay evidence.

Issue 4: Whether s 147(3) of the EA applies at the present juncture

53 Further and in the alternative to its submission that the Evidence is not hearsay, the SMC argues that the Evidence is admissible to impeach the Applicant's written explanation and witness statement under s 147(3) of the EA (see [43] above).[45] For the purpose of the DT proceedings, the written explanation and witness statement (collectively the "Inquiry Documents") were admitted into evidence as part of the agreed bundle of documents. The SMC propounds that there are only two requirements under s 147(3) of the EA: (a) there are two statements provided by the witness; and (b) the two statements are inconsistent.[46]

54 In its written submissions dated 11 March 2022, the SMC summarised the purported inconsistencies between the Evidence and the Inquiry Documents.[47] The Evidence includes the prior Statements and Testimony provided by the Applicant in relation to HC/CC 85/2017. These inconsistencies are whether the Applicant had used saliva as a lubricant, the Applicant's observations upon visual examination of the patient's vagina at the material time, and the reason that had prompted the Applicant to conduct an internal pelvic examination. While the Applicant had stated that he put his saliva on his finger as lubricant in the Evidence, he denied the use of saliva in the Inquiry Documents. He also provided an account in the Evidence that he had not seen anything on initial visual examination of the patient's private part, but the version in the Inquiry Documents is that he saw "slight redness around the vulva". The explanation provided by the Applicant for why he had conducted

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45 RWS at para 62–65.

46 RWS at para 63.

47 RWS at paras 66–67.

an internal pelvic examination was that he wanted to check for any discharge and infection in the patient's vagina in the Evidence; however, he claimed that he conducted the examination to exclude serious pelvic inflammatory disease in the Inquiry Documents. The SMC submits that it has therefore satisfied the requirements under s 147(3) of the EA. The basis for its submission lies in the inconsistencies identified by the SMC, especially when they are taken in the context that the Applicant had confirmed the contents of the Statements during the criminal trial.[48]

55 Contrastingly, the Applicant argues that the SMC's reliance on s 147(3) of the EA is misplaced.[49] He submits that it was also inappropriate for the SMC to refer to the Inquiry Documents out of turn to justify the invocation of s 147(3) of the EA.[50] The Applicant contends that this was out of turn because his affidavit of evidence-in-chief had not yet been formally admitted into evidence in the proceedings before the tribunal.[51]

56 I do not accept the SMC's characterisation of s 147(3) of the EA. The heading of s 147 of the EA is "***[c]ross-examination*** *as to previous statements in writing*" [emphasis added]. It is clear that the provision pertains to the use of prior statements in the cross-examination of witnesses during a trial.

57 In *Criminal Procedure in Singapore and Malaysia* (Tan Yock Lin & S Chandra Mohan gen eds) (LexisNexis, Looseleaf Ed, 2020), the applicability of s 147(3) of the EA is discussed under the section "*cross-examination as to*

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48 RWS at para 68.

49 AWS at para 68.

50 AWS at para 69.

51 *Ibid*.

credit" [emphasis added] (at paras 2401 and 2550). The learned authors observe that cross-examination is "not limited to the evidence of a witness and *can proceed by eliciting contradictory accounts in the witness' testimony for the purposes of showing the witness' testimony to be lacking in credibility or by showing that the witness is not worthy of credit*" [emphasis added] (at para 2401). Section 147(3) of the EA is considered to provide for an effect greater than merely the impeachment of credit based on a previous inconsistent statement (at para 2550). This further effect is that the court has the discretion to admit the previous inconsistent statement as evidence of the facts stated in it, in substitution of the witness' testimony in court (*ibid*). The crux of s 147(3) of the EA is not merely that there are two inconsistent statements provided by the same witness. The main intent behind the provision is to permit the use of prior statements made by a witness in his cross-examination during a trial.

58 It therefore cannot be the case that the Evidence is admitted pursuant to s 147(3) of the EA, ahead of the cross-examination of the Applicant. This does not comport with the textual and contextual meaning of s 147(3) of the EA. As provided by the provision, it is necessary for the previous inconsistent statement to be *proved* to invoke s 147(3) of the EA during cross-examination. Section 147(3) of the EA begins with "[w]here in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is *proved by virtue of this section*, …" [emphasis added]. This pre-requisite as to proof does not refer merely to the one-sided assertion of inconsistencies between at least two statements (as suggested by the SMC) (see [53]–[54] above). It requires the Applicant to be confronted with his previous contradictory statements. This must be the correct reading of Section 147(3) of the EA when it is read within s 147 of the EA in its entirety. I highlight that s 147(1) of the EA states that "… if it is intended to contradict [the witness] by

the [statement made in] writing, *his or her attention must*, ***before the writing can be proved****, be called to those parts of it which are to be used for the purpose of contradicting him or her*" [emphasis added]. This opportunity to confront the Applicant with his previous statements (and therefore meet the requirement of proof under s 147(3) of the EA) arises during his cross-examination.

59 Thus, s 147(3) of the EA does not allow for the admission of the Evidence in the SMC's case on the basis that it contradicts the Inquiry Documents. The SMC may only successfully rely on s 147(3) of the EA to admit the Evidence if and when it meets the requirements set out in that provision, which include challenging the Applicant with the inconsistent portions of the Evidence during his cross-examination.

Issue 5: Scope and application of s 51(4) of the MRA

60 I consider next the scope and application of s 51(4) of the MRA. In particular, whether it permits the admissibility of hearsay evidence.

61 Section 51(4) of the MRA sets out the discretionary power conferred on DTs in determining the admissibility of evidence during proceedings. The provision is set out in full below:

> (4) A Disciplinary Tribunal is not bound to act in a formal manner and is not bound by the provisions of the Evidence Act 1893 or by any other law relating to evidence but may inform itself on any matter in such manner as it thinks fit.

Interpretation of s 51(4) of the MRA

62 Section 9A(1) of the Interpretation Act 1965 (2020 Rev Ed) (the "IA") mandates a purposive approach to statutory interpretation, where an interpretation which promotes the purpose or object underlying the written law

should be preferred. The purposive interpretation of a statutory provision consists of the following three steps (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37]):

(a) First, ascertain the possible interpretations of the provision in question, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.

(b) Second, ascertain the legislative purpose or object of the statute. There are two types of sources from which a court may draw to discern the legislative purpose: *Tan Cheng Bock* at [42]. The first is the text of the relevant provision itself and its statutory context: *ibid*. The second is "any material not forming part of the written law" as set out in ss 9A(2)–9A(3) of the IA: *ibid*. In discerning the legislative purpose behind a provision, primacy should be accorded to the text of the provision and its statutory context over any extraneous material: *Tan Cheng Bock* at [43].

(c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

63 On a plain textual reading of s 51(4) of the MRA, the provision states that the DT "is *not bound to act in a formal manner* and is *not bound by the provisions of the Evidence Act 1893 or by any other law relating to evidence*" but "may inform itself on any matter in such manner as it thinks fit" [emphasis added]. It is incontrovertibly clear that s 51(4) of the MRA confers on the DT a

discretion to admit evidence in proceedings, without being confined by the usual rules of evidence. This is the only possible interpretation of the provision.

64 I consider first the internal sources to ascertain the legislative purpose of s 51(4) of the MRA (see [62(b)] above). The internal sources include the long title of a statute, the words of the legislative provision and other legislative provisions within the statute (in so far as they are relevant to ascertaining what Parliament was seeking to achieve and how): *Tan Cheng Bock* at [44]. In particular, the structure of the statute as a whole and the location of the provision in question within the statute may be relevant considerations: *ibid*. The long title of the MRA is "[a]n Act to provide for the registration of medical practitioners and for matters connected therewith". Owing to the generality of the long title of the MRA, the legislative purpose behind s 51(4) of the MRA is not readily discernible from the long title. The object of the MRA as codified in s 2A of the MRA provides more assistance. Section 2A of the MRA states as follows:

> The object of this Act is to *protect the health and safety of the public* by providing for mechanisms to —
>
> (*a*) ensure that registered medical practitioners are competent and fit to practise medicine;
>
> (*b*) *uphold standards of practice* within the medical profession; and
>
> (*c*) *maintain public confidence* in the medical profession.
>
> [emphasis added]

65 Aside from the general object of the MRA, the words of the provision clarify the legislative purpose behind it. The plain words used are that the DT is "not bound by the provisions of the [EA] or by any other law relating to evidence". This can only mean that the DT is at liberty to consider evidence which would otherwise be excluded pursuant to the EA or any other law on

evidence. This is precisely the occasion envisaged by the Court of Appeal in *Tan Cheng Bock* (at [44]) in its observation that "if a provision is well-drafted, *its purpose will emanate from its words*" [emphasis added]. Consequently, there is no further need to consider the other provisions in the MRA.

66 The ordinary meaning of s 51(4) of the MRA is unambiguous (see [63] above). The legislative purpose as discerned from the plain wording of the provision is similarly abundantly clear (see [64] above). The extraneous materials examined under s 9A(2)(a) of the IA are therefore only used to confirm the ordinary meaning of s 51(4) of the MRA (*Tan Cheng Bock* at [54(c)(iii)(A)]). Section 9A(3) of the IA sets out material that may be considered. This includes "*the speech made in Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in Parliament*" and "*any relevant material in any official record of debates in Parliament*" [emphasis added].

67 There is no explicit reference to s 51 of the MRA in Hansard. In accordance with s 9A(3) of the IA, I consider the statements made in Parliament in relation to the MRA generally. It is well-settled that extraneous material that is "capable of assisting in ascertaining the meaning of the provision(s) by shedding light on the purpose of [the] statue as a whole, or where applicable, on the purpose of particular provision(s) in question, should be referred to": *Tan Cheng Bock* at [51]; see also *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [63].

68 In the Second Reading of the Medical Registration (Amendment) Bill on 11 January 2010 (see *Singapore Parliamentary Debates, Official Report*

(11 January 2010) vol 86 at cols 1895–1896 (Khaw Boon Wan, Minister for Health)), then-Minister for Health stated as follows:

> The Medical Registration Act (MRA) ***seeks to protect the health and safety of the public by creating mechanisms to ensure that medical practitioners are competent and fit to practise medicine***. In this way, we ***uphold the standards of medical practice in Singapore***, and [in] so doing, ***maintain public confidence in the medical profession***.
>
> The MRA was last amended in 2003. Since then, new issues in professional conduct and standards have arisen due to changing demands and expectations of patients and the public. This Bill seeks Members' support for several amendments to the MRA. The amendments will address four key objectives:
>
> (a) ***To strengthen and streamline the Singapore Medical Council (SMC)'s existing disciplinary processes to cope with the increase in the number and complexity of complaints and disciplinary proceedings****;*
>
> …
>
> [emphasis added]

69 The extract above at [68] contains material which sets out the legislative intention of the MRA. Indeed, the Parliamentary intention of strengthening and streamlining the disciplinary process is coherent with the ordinary meaning of s 51(4) of the MRA, which facilitates the expeditious resolution of DT proceedings by conferring a broad discretion to admit all relevant evidence without impediment by traditional rules of evidence. This shows that the ordinary meaning deduced from s 51(4) of the MRA (see [63] above) comports with the policy imperatives for which the MRA was enacted: see *Tan Cheng Bock* at [49]. Similarly, the legislative purpose inferred from the words of s 51(4) of the MRA, which is to provide a DT with a wide-ranging discretion to

admit all relevant evidence, is consistent with Parliament's intentions as deduced from the extraneous material.

70 Ultimately, the purposive interpretation of s 51(4) of the MRA must be done with a view towards determining its purpose and object "as reflected by and in harmony with the express wording of the legislation": *Tan Cheng Bock* at [50]; *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [50]. The correct interpretation of s 51(4) of the MRA is that the DT is granted decisional autonomy to admit evidence in proceedings, even when the evidence may be excluded by the rules of evidence. That said, it is not the case that the rules of evidence are immaterial to the application of s 51(4) of the MRA (see [115] and [120] below), nor that there is no further consideration of the weight to be accorded to the evidence (see [73] and [74] below).

Limits to the discretion in s 51(4) of the MRA

71 The Applicant's main contention against s 51(4) of the MRA is that there are limits to the discretion accorded to the DT. These limits include the rules of natural justice and constitutionality.[52] I do not understand the SMC or the AG to be adopting positions contrary to the Applicant's perspective.

72 However, parties differ on the extent of the limits to the DT's discretion under s 51(4) of the MRA. The Applicant further suggests that fairness (in the substantive sense) acts as a limit to the discretion under s 51(4) of the MRA. I proceed to consider the restrictions to the powers conferred by s 51(4) of the MRA and the relevant case law (where available). There does not appear to be any local case law on the ambit of s 51(4) of the MRA. In view of the novel

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52 AWS at paras 90–94.

nature of this inquiry, I consider also the treatment of similar provisions governing the admissibility of evidence in tribunal proceedings in other jurisdictions.

(1) Relevance

(A) LOCAL AUTHORITY

73 The first limit to s 51(4) of the MRA is that the evidence the DT admits must be relevant to the proceedings. In *BNX* at [83], the High Court held:

> [T]here is an almost insurmountable argument to be made that in all arbitrations conducted with Singapore as the seat, ***the tribunal is empowered to receive all relevant evidence, with the concerns which underlie the exclusionary rules at common law such as the hearsay rule going only to weight and not to admissibility***.
>
> [emphasis added]

74 While the High Court's ruling in *BNX* was in the context of arbitration tribunals, it is reasonable to import the same observations to the context of medical DTs. This is especially so when s 51(4) of the MRA confers a broad discretion on a DT to admit evidence in its inquiry. The learned authors in *Law and Practice of Tribunals in Singapore* propose that "the [aforesaid] position should be the same in respect of tribunal hearings" and that "it is unlikely that the exclusionary rules operate to prevent certain types of evidence from being considered by a tribunal": at paras 5.76–5.77. Indeed, "a tribunal may admit evidence but accord differing weight to it as necessary": see *Law and Practice of Tribunals in Singapore* at para 6.18.

(B) FOREIGN AUTHORITIES

(I) AUSTRALIA

75 Such a reading of the ambit of the powers conferred by s 51(4) of the MRA finds support in Australian legislation and case law.

76 Section 51(4) of the MRA is substantially similar to s 33(1)(*c*) of the Australian Administrative Appeals Tribunal Act 1975 (Cth) (the "AAT"). The AAT governs the establishment and structure of the Administrative Appeals Tribunal, which deals with reviews of decisions relating to, *inter alia*, child support, migration and taxation. Section 33(1)(*c*) of the AAT reads as follows:

> **33 Procedure of Tribunal**
>
> (1) In a proceeding before the Tribunal:
>
> …
>
> (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
>
> [emphasis in original]

77 In *Casey v Repatriation Commission* (1995) 39 ALD 3428 ("*Casey*"), the applicant, a war veteran, applied for pension in relation to hypertension, atherosclerotic ischaemic heart disease and osteoarthritis. Before the Administrative Appeals Tribunal, he was successful with only the claim for osteoarthritis. He appealed against the tribunal's decision to the Federal Court of Australia. On appeal, the applicant argued that there was an error of law due to the admission by the tribunal of a statement of principles relating to hypertension and atherosclerotic ischaemic heart disease. The statement of principles had been prepared by the Repatriation Medical Authority and contained the opinion of specialists as to the causes of specific medical

conditions. The applicant challenged the admission of the statement of principles on the basis that it should not have been admitted into evidence unless the authors of the statement were present and available for cross-examination. The Court noted that a statement of the state of medical knowledge at a particular time would be inadmissible in a court. However, s 33 of the AAT states that "the tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate". The main consideration for the tribunal in determining the admissibility of evidence would therefore be relevance. Hill J in the Federal Court of Australia held at 38:

> … s 33 of the AAT Act [*ie*, Australian Administrative Appeals Tribunal Act 1975] means what it says. *The fact that material may be inadmissible in accordance with the law of evidence does not mean that it can not be admitted into evidence by the tribunal or taken into account by it.* The ***criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance***.
>
> [emphasis added]

78 A decision-maker who is freed from the rules of evidence must still consider whether the material he can consider should in fact be considered: see Mark Aronson & Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th Ed, 2013) ("*Aronson & Groves*") at para 8.360. The threshold is whether the material is rationally probative, per Hodgson J in the Supreme Court of the New South Wales in *Roberts v Balancio* (1987) 8 NSWLR 436; (1987) 11 Fam LR 669 ("*Roberts*") at 672. In *Roberts*, the Court found that it was not bound by the strict rules of evidence in exercising its inherent jurisdiction in relation to child custody matters in family law (at 672). However, the Court confined its discretion to only acting on material which was rationally probative (*ibid*).

79 In *Sammut v AVM Holdings Pty Ltd (No 2)* [2012] WASC 27 ("*Sammut*"), Commissioner Sleight in the Supreme Court of Western Australia held that even where traditional rules of evidence did not apply, it would be important for the court to consider the probative value of the evidence before taking it into account (at [54]). In *Sammut*, the appellants, who were lessors of retail shop premises, alleged that the first-named respondent, the lessee, used the premises for non-permitted and illegal purposes. The appellants contested the use of opinion evidence by the respondent in the proceedings below (*ie*, before the State Administrative Tribunal). The opinion evidence was from the officers of the City of Stirling who had inspected the retail premises. This was relied on by the respondent before the tribunal to show that the use of the premises was consistent with prescribed use and no illegal activities had occurred on the premises. The appellants argued before the court that the opinion evidence ought to have been excluded in making the assessment of whether the respondent's use of the retail shop premises was for non-permitted and illegal purposes. The court held that the opinion evidence was not necessarily excluded because the normal rules of evidence did not apply (at [54]). Section 32(2) of the State Administrative Tribunal Act 2004 (WA) provides that "[t]he Evidence Act 1906 does not apply to the Tribunal's proceedings and the Tribunal – (a) is *not bound by the rules of evidence* … except to the extent that it adopts those rules …" [emphasis in original omitted, emphasis added]. Even so, the court observed that "*if the [opinion] evidence had no probative value it [would] be wrong to take it into account*" [emphasis added] (at [54]).

80 For completeness, I did not consider Australian cases in the context of medical disciplinary proceedings in my analysis of the requirement of relevance for the admissibility of evidence. The Australian provision which governs the

procedure in disciplinary proceedings against registered health practitioners is s 185 of the Health Practitioner Regulation National Law Act 2009, which is enacted and implemented by each state and territory in Australia in accordance with its own laws. Section 185 of the Act is set out below:

> 185 **Procedure of panel**
>
> (1) Subject to this Division, a panel may decide its own procedures.
>
> (2) *A panel is required to observe the principles of natural justice but is not bound by the rules of evidence.*
>
> (3) *A panel may have regard to*—
>
> (a) a report prepared by an assessor about the registered health practitioner or student; and
>
> (b) *any other information the panel considers relevant to the hearing of the matter.*
>
> [emphasis in original reflected in bold; emphasis added in italics]

It suffices to observe that s 185 of the Act provides that a medical disciplinary panel determining a complaint is "*not bound by the rules of evidence*" and may have regard to "*any other information* [it] considers *relevant to the hearing of the matter*" [emphasis added]. The provision, which is similar to the other Australian provisions discussed in this judgment (see [76], [79], [112] and [116]), accords the panel a broad discretion to admit evidence in its proceedings (*ie*, it is not bound by the rules of evidence). I consider only the cases which illustrate the limits to the exercise of such a discretion conferred by the analogous provisions (at [76], [79], [112] and [116]) to be of assistance. I further note that parties have not brought to my attention any Australian cases in the specific context of medical disciplinary proceedings which are to the point. My

observation here applies equally to the discussion of Australian cases on the limit of natural justice in the later section (see [111]–[120]).

(II) UNITED KINGDOM

81 The approach in the United Kingdom also endorses the limitation of relevance. Rule 34(1) (see [12(a)(i)] above) codifies relevance as one of the requirements for the admission of evidence by a medical tribunal. I set out the relevant parts of Rule 34 of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 below:

> **Evidence**
>
> 34.—(1) Subject to paragraph (2), the Committee or a Panel *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.*
>
> (2) Where evidence would not be admissible in criminal proceedings in England, the Committee or Panel shall not admit such evidence unless, on the advice of the Legal Assessor, they are satisfied that their duty of making due inquiry into the case before them makes its admission desirable.
>
> …
>
> [emphasis in original reflected in bold; emphasis added in italics]

82 The Applicant relies on *Bonhoeffer* (see [12] above) for his proposition that the Evidence ought to be excluded. He contends that the application for leave to seek a quashing order against the Admissibility Decision ought to be granted. I refer to *Bonhoeffer* only in relation to the requirement of relevance at this juncture. The issue of relevance was not in contention in the *Bonhoeffer* case. There was no dispute that the statements of a Kenyan witness, who was allegedly sexually assaulted by the applicant, were relevant to the professional misconduct proceedings.

83 The parties here have not provided any other English legal authorities for the requirement of relevance. In my view, *R (on the application of Squier) v General Medical Council* [2015] EWHC 299 (Admin) ("*Squier*") is pertinent. In *Squier*, the applicant, a medical practitioner, faced allegations that she had deliberately misled the courts and acted dishonestly as an expert witness. She had given evidence as an expert consultant in the field of paediatric neuropathology on six different occasions before the United Kingdom High Court and the Court of Appeal. The evidence given related to non-accidental head injuries suffered by infants. The issue before the FTP Panel, *ie*, the tribunal, was whether the evidence was relevant and if it was fair to admit the judgments (for the cases in which she had testified) as evidence. The FTP Panel had admitted the judgments as they provided context to each of the cases and allowed the evidence given by the applicant to be understood in its context. That said, the FTP Panel noted that the General Medical Council still had to prove the underlying facts of the charges and some redaction of the judgments would be fair. On appeal, the applicant argued that the judgments were irrelevant because the General Medical Council had to prove its case by providing factual evidence of what had happened. The applicant submitted that the judgments were being used as a shortcut to "the proper proving of what needed to be proved". Ouseley J dismissed the application and held that the FTP Panel did not act unreasonably in admitting the judgments (at [39]). The court held that the judgments provided relevant context to the professional misconduct charges against the applicant, which formed the subject of the FTP Panel's inquiry. The role of the FTP Panel is in examining the basis of the applicant's evidence in the previous proceedings, not whether the applicant's evidence was right (which was the issue before the courts in the proceedings in which she had given evidence) (at [40]). Ouseley J held at [25]:

> The language of the Fitness to Practise Rules [*ie*, the General Medical Council (Fitness to Practise) Rules Order of Council 2004] which focuses on the FTPP's judgment as to relevance should be fully recognised. The ***rationality of the connection between a piece of evidence and the resolution of the issue to which it relates may permit greater scope for a tribunal view, differing from the court, to be respected and upheld***. Certainly, that should be recognised at this stage of proceedings before the use made of the evidence is seen and its relevance tested with precision against the use made of it. ***The question, at this stage at least, in my view, is whether evidence is reasonably seen to be relevant***; and at this stage the FTPP's judgment is inevitably looking at the potential for evidence to be relevant, even if in its decision nothing is made of it and it falls into irrelevance. If it is capable of relevant use, the possibility that it may be put to irrelevant use should not lead to interference by a reviewing court at this stage.
>
> [emphasis added]

84 The take on the issue of admissibility in medical DTs in the United Kingdom is not dissimilar from that of the approaches in Singapore and Australia. Although the manner in which Rule 34(1) is drafted differs from the broad and discretionary language in s 51(4) of the MRA and the Australian provisions, it imports the same flexibility for decision-makers to admit evidence which may not be admissible under the usual rules of evidence. Rule 34(1) permits the admissibility of "any evidence they (*ie*, the disciplinary committee or panel) consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law". Section 51(4) of the MRA and the Australian provisions state, *inter alia*, that a disciplinary tribunal is "not bound" by the rules of evidence. The requirement of relevance to the admissibility of evidence is consistent throughout the three jurisdictions, whether or not it is expressly articulated in the governing provisions.

(2) Natural justice

85 The second limit to the discretion afforded to a DT under s 51(4) of the MRA is that its exercise must comply with the rules of natural justice. Parties have unanimously agreed that the rules of natural justice qualify the wide discretion accorded to the DT under s 51(4) of the MRA.[53] Where parties differ is what the recognition of the rules of natural justice entails – whilst the Applicant contends that natural justice would necessarily require adherence to rules of evidence and substantive fairness,[54] the AG has submitted that a narrower view of the rules of natural justice, which excludes rules of evidence, ought to be taken.[55] The SMC has not expressly stated what it contemplates the rules of natural justice to encompass.

(A) LOCAL AUTHORITIES

86 In *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 ("*Susan Lim*") at [61] and [80]–[81], Pillai J held that the exercise of powers conferred by various provisions in the Medical Registration Act (Cap 174, 2004 Rev Ed) (the "2004 MRA") was subject to requirements of natural justice. This is consistent with the broader duty of tribunals to act in accordance with the rules of natural justice: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 at [6]–[8].

87 There have been few statements on the content of the fundamental rules of natural justice in the context of disciplinary proceedings. The courts have

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53 AWS at para 91, FSR at para 15, AGWS at para 30 and FSAG at para 20.

54 AWS at paras 91–95.

55 FSAG at paras 20–21.

recognised that the precise scope of the rules of natural justice is challenging to pin down: *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [31]–[33].

88 I highlight *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar*"), which helpfully summarises the "irreducible core" of the rules of natural justice in the context of disciplinary proceedings against a lawyer. Menon JC (as he then was) held at [42]:

> There was no dispute that the DC [*ie*, Disciplinary Committee] was bound to observe the rules of natural justice. The courts have developed numerous principles that govern the application of these rules but at their irreducible core it comes down to two essential requirements:
>
> (a) *every party to a dispute shall be entitled to a fair hearing*; and
>
> (b) *the tribunal tasked with determining the dispute shall be disinterested and independent.*
>
> [emphasis added]

89 The rules of natural justice as summarised in *Re Shankar* are (a) the rule on fair hearing, which includes having the opportunity to be heard; and (b) the rule against apparent bias by the decision-maker. There is no doubt that the two rules form part of the rules of natural justice. The trickier question is: what is the delineated scope of the rules of natural justice in the context of DT proceedings? The Applicant appears to suggest that a broader view of the content of the rules of natural justice ought to be taken. I confine the ambit of my discussion only to how the rules of evidence (focusing on the hearsay rule) should interact with the rules of natural justice in the context of DT proceedings. This analysis is relevant only to the fair hearing rule.

(B) FOREIGN AUTHORITIES

90 I now consider relevant cases in foreign jurisdictions on the relationship between the rules of evidence and the rules of natural justice in the context of tribunal inquiries and proceedings.

(I) UNITED KINGDOM

91 Natural justice has traditionally been encapsulated by two ideas in the United Kingdom: that the individual be given adequate notice of the charge and an adequate hearing (*audi alteram partem*), and that the adjudicator be unbiased (*nemo judex in causa sua*): Paul Craig, *Administrative Law* (Sweet & Maxwell, 9th Ed, 2021) ("*Craig's Administrative Law*") at para 12-001.

92 The content of the rules of natural justice is context specific. In *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118, Tucker LJ recognised that what is required by natural justice would depend on the circumstances. The learned judge deemed that, in all the circumstances, it is an essential requirement that the person concerned has a reasonable opportunity of presenting his case. Tucker LJ held as follows (at 118):

> Domestic tribunals of this kind [*ie*, domestic tribunals which proceed in a somewhat informal manner] are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law. … There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. *The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.* Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, ***whatever standard is adopted, one essential is that the person***

> ***concerned should have a reasonable opportunity of presenting his case.***
>
> [emphasis added]

In the following discussion, I consider only the rules of natural justice at their irreducible minimum (see [91] above).

93 In the United Kingdom, the judicial treatment of the concepts of natural justice and fairness varies. Natural justice has been seen as a manifestation of fairness or technically equivalent to fairness: see *Craig's Administrative Law* at para 12-009; Sir William Wade and Christopher Forsyth, Administrative Law (Oxford University Press, 11th Ed, 2014) ("*Wade & Forsyth's Administrative Law*") at p 374. However, none of the conceptions of natural justice lends support to the view that strict compliance with the rules of evidence is necessary to avoid a breach of the rules of natural justice.

94 The procedure at an inquiry is left to the discretion of the decision-maker, subject to the rules of natural justice: *Craig's Administrative Law* at para 9-045. The proposition that the rules of natural justice do not necessarily require strict compliance with the rules of evidence finds support in *R v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456 ("*Moore*"). In *Moore*, the applicant sought industrial injury benefits for an alleged work-induced back injury. This claim was initially dismissed by the insurance officer. Subsequently, the applicant appealed to the deputy industrial injuries commissioner. The insurance officer relied on, *inter alia*, medical opinions made by experts in two other workplace injury cases at the hearing before the commissioner. The commissioner admitted and relied on the medical opinions before arriving at the decision to dismiss the applicant's claim. The experts who provided the medical opinions in the other two cases were not called as witnesses. The applicant challenged the commissioner's admission of the

medical opinions on the basis that they were hearsay and sought a quashing order from the High Court. The High Court dismissed the application. The applicant then appealed to the Court of Appeal, which noted that the commissioner had not acted contrary to natural justice as he had heard comments on these medical opinions from the medical experts who were called by parties when they had taken the stand: *Moore* at 489. It also agreed that there was no bar to the commissioner taking into consideration hearsay evidence which was not admissible in a court of law. Diplock LJ (as he then was) at 488 held as follows:

> *…the rules of natural justice which he* [*ie*, the deputy commissioner in *Moore*] *must observe can, in my view, be reduced to two.* First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing. In the context of the first rule, "evidence" is not restricted to evidence which would be admissible in a court of law. For historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion …
>
> ***These technical rules of evidence, however, form no part of the rules of natural justice.*** *The requirement that a person exercising quasi-judicial functions must base his decision on evidence* ***means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.*** It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. ***If it is capable of having any probative value, the weight to be attached to it is a matter***

> ***for the person to whom Parliament has entrusted the responsibility of deciding the issue.***
>
> [emphasis added]

95 I agree with the observations of Lord Justice Diplock in *Moore*. As I found above (at [70]), s 51(4) of the MRA confers a wide discretion on the DT to admit evidence that is relevant and probative to the inquiry. The "probative value" of any evidence refers to its ability to prove a fact in issue or a relevant fact: *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 ("*Sulaiman*") at [47]. It follows that any evidence which is capable of showing the existence or non-existence of facts relevant to the issue is generally admissible, even if it does not conform to the usual rules of evidence. This is unless the evidence falls foul of the rules of natural justice.

96 There is no support for the Applicant's submission that the admission of hearsay evidence would in itself constitute a breach of natural justice. In respect of hearsay evidence, the relevant English authority (see [97] below) appears to suggest that it would be a sufficient safeguard to ensure that the other party is given a fair opportunity of commenting on the evidence and contradicting it. What a fair opportunity entails would depend on the facts (see [99]–[107] below).

97 In *T.A. Miller Ltd v Minister of Housing and Local Government and Another* [1968] 1 WLR 992 ("*Miller*"), the owners of a nursery (who were disallowed by the planning authority to use their land for a specific purpose) appealed to the Minister. At an inquiry by an inspector on behalf of the Minister, the owners objected to the admission of a letter from the previous owner on the ground that "it was not on oath, no opportunity was given to test it by cross-examination, and it was objected to" (at 995). At the inquiry, the inspector admitted the letter as evidence and accepted the statements therein in his

findings of fact (at 992). The owners applied to the Divisional Court for a review of the inspector's decision on the ground that the admission of the letter was in conflict with the rules of natural justice. The Divisional Court dismissed their application. The owners then appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and held that a tribunal such as the inspector's inquiry was master of its own procedure, subject to the application of the rules of natural justice. It was not contrary to natural justice to admit hearsay evidence. This was because the owners had a fair opportunity of commenting on and contradicting the contents of the letter. Lord Denning M.R. rejected the owners' arguments and held as follows (at 995):

> A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied … *Tribunals are entitled to rely on any material which is logically probative, even though it is not evidence in a court of law* … ***Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it …*** The inspector here did that. [The letter] was put to the witnesses and they contradicted it.
>
> [emphasis added]

98 The English position as stated in *Moore* and *Miller* appears to accord tribunals considerable scope for the admissibility of hearsay evidence. Hearsay evidence would therefore be admissible if it was relevant and probative. The presentation of an opportunity to cross-examine the maker of the hearsay evidence is not necessary to avoid a breach of natural justice, as long as the other side is given a fair opportunity to contradict it. Any other considerations as to the reliability of its content would go towards the weight accorded to the evidence in the determination of the issue (see the extract from *Miller* at [94] above). However, this later developed into a more nuanced approach. It may be

that cross-examination is necessary to safeguard the applicant's right to a fair hearing. This depends on all the circumstances (see [99] below).

99 In *Bushell and another v Secretary of State for the Environment* [1981] AC 75 ("*Bushell*"), an inquiry was held to consider objections to a road building scheme. Pursuant to s 11 and Schedule 1 of the Highways Act 1959 (UK), the minister "shall cause a local inquiry to be held" by an inspector if affected persons lodged objections against such construction schemes. The minister then considers, *inter alia*, the report prepared by the inspector at the close of the inquiry to reach his decision on whether to make the scheme, and if so, either with or without modifications. Counsel for the Secretary of State informed the inspector of a report which was prepared by and relied on by the Department of the Environment for the road building scheme. The report projected future traffic growth and it formed the main impetus for the new roads. The applicants challenged the report, and applied to cross-examine the witnesses who gave evidence on the Department's behalf to test the accuracy of the traffic predictions. The inspector dismissed the application to cross-examine the Department's representatives on the reliability of the predictive statistics, but allowed the applicants to call their own evidence to refute the report. At the material time, there was no express provision in the authorising statute about the scope of the inquiry and the procedure to be followed, beyond what is stated above: *Bushell* at 92–93. The applicants sought the quashing of the minister's decision to proceed with the scheme on the basis that the inquiry was in breach of their right to a fair hearing. The High Court dismissed their application. On appeal, the Court of Appeal ruled that the inquiry had been conducted in a manner in breach of the applicants' right to a fair hearing. The House of Lords overturned the Court of Appeal's decision on further appeal. Lord Diplock, on behalf of the majority, held as follows (at 97–98):

> To "over-judicialise" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. *It would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination* on behalf of parties who disagree with what they have said … So *refusal by an inspector to allow a party to cross-examine orally at a local inquiry a person who has made statements of facts or has expressed expert opinions is not unfair per se.*
>
> ***Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion***, whether expert or otherwise, ***to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances.*** …
>
> [emphasis added]

100 In considering all the facts, the majority in *Bushell* found that it was not unfair for the inspector to have refused to allow the cross-examination of the Department's witnesses (at 109). The validity of the report, which the applicants were seeking to undermine, was treated as akin to a matter of government policy: *Craig's Administrative Law* at para 9-046. Thus, it was not an issue suitable for cross-examination. While *Bushell* was ultimately decided based on the nature of the issues that cross-examination was sought for, Lord Diplock's observation in *Moore* (at [94] above) remains pertinent. The question of whether fairness requires cross-examination by a party challenging the evidence in an inquiry depends on all the circumstances.

101 I next discuss the English cases which excluded hearsay evidence when there was no opportunity to cross-examine the maker of the hearsay evidence. In the two cases below at [102]–[105], the opportunity for cross-examination was a necessary safeguard to the practitioner's right to a fair hearing.

102 In *Nursing and Midwifery Council v Ogbonna* [2010] EWCA Civ 1216 ("*Ogbonna*"), the respondent, a registered midwife, faced charges of professional misconduct. One of the charges against the midwife was dependent on the evidence of a sole witness, her former supervisor. The evidence was adduced before the Nursing and Midwifery Council's Conduct and Competence Committee in a written statement. The midwife alleged that it was unfair for the statement to be admitted as she had no opportunity to cross-examine the witness. The Committee had decided against the midwife, and convicted her of all the charges. The High Court found for the midwife on appeal. The applicant, the Nursing and Midwifery Council, appealed to the Court of Appeal. The issue before the court was whether it was right of the Committee to admit a written statement by a witness, notwithstanding objections on the ground that the midwife had no opportunity to cross-examine the witness. The English Court of Appeal agreed that the statement should not have been admitted, given that no efforts were made to secure the attendance of the witness (at [24]):

> If the pursuit of Charge 1…was regarded as important, ***it should have been obvious to the NMC*** **[*ie*, the Nursing and Midwifery Council]** ***that it could and should have sought to make arrangements to enable such cross-examination to take place*** – either by flying Ms Pilgrim [*ie*, the witness] to the UK at its expense, or else by setting up a video link … ***If, of course, despite reasonable efforts, the NMC could not have arranged for*** *Ms Pilgrim to be available for* ***cross examination, then the case for admitting her hearsay statement might well have been strong.*** But the ***NMC made no such efforts at all***.
>
> [emphasis added]

103 The decision in *Ogbonna* did not approve or lay down a general rule that fairness requires that a practitioner facing disciplinary proceedings is entitled in every case to test the evidence of his accuser(s) by way of cross-examination unless good and cogent reasons can be given for the non-attendance of the witness: *Bonhoeffer* at [78]. Rather, the Court of Appeal held that the resolution

of what is required by "fairness" would necessarily be fact-sensitive: *ibid*. The holding in *Ogbonna* confirmed that the court below was correct to conclude that "on the facts of that case, fairness required that the appellant was entitled to test the evidence of the witness by way of cross-examination unless good and cogent reason could be given for non-attendance": *Bonhoeffer* at [79]. The holding of the Court of Appeal in *Ogbonna* (as set out above at [102]) was considered by Justice Stadlen in *Bonhoeffer* (at [84]). The learned judge held that *Ogbonna* supported the proposition that "in the absence of a problem in the witness giving evidence in person or by video link, or some other exceptional circumstance, fairness requires that in disciplinary proceedings a person facing serious charges, especially if they amount to criminal offences which if proved are likely to have grave adverse effects on his or her reputation and career, should in principle be entitled by cross-examination to test the evidence of his accuser(s) where that evidence is the sole or decisive evidence relied on against him" (*ibid*).

104 In *Bonhoeffer*, the applicant's fitness to practise as a doctor was challenged in disciplinary proceedings (*ie*, the FTP Panel) due to allegations of serious sexual misconduct against young boys and men (see [12(a)] above). Rule 34 governed the admissibility of evidence in medical disciplinary proceedings in the United Kingdom. The provision has been set out in full above at [81]. In the proceedings below, counsel for the General Medical Council sought to rely on the transcripts of interviews with a witness who was based in Kenya. These formed the sole source of evidence against the applicant for the majority of the charges he faced. The Kenyan witness repeatedly indicated that he was willing and able to travel to the United Kingdom to give evidence in person to the FTP Panel in support of the allegations he made against the applicant. The General Medical Council elected to adduce, *inter alia*, the

transcripts of the video-taped interviews of the Kenyan witness without requiring him to give oral testimony because it held the view that he would be exposed to a significantly increased risk of harm in Kenya if he were to give oral testimony, whether in person or via video-link. The High Court held that, *inter alia*, the FTP Panel was irrational in admitting the hearsay evidence of the Kenyan witness (at [130]). Justice Stadlen found that there was no absolute rule that the FTP Panel ought to automatically refuse to admit hearsay evidence without considering all the relevant circumstances (at [126]). Further, the Court observed that there was no requirement that fairness could only be satisfied where a doctor facing serious charges of professional misconduct was offered a right to cross-examine his accusers (at [72]). However, in *Bonhoeffer*, there were powerful factors going against the admissibility of the hearsay evidence, such as the seriousness of the allegations levied against the practitioner, and the fact that the alleged threats to the Kenyan witness were unsubstantiated. The means by which the applicant could challenge the hearsay evidence were not capable of outweighing those factors (at [129]).

105 The Court in *Bonhoeffer* found that the FTP Panel's conclusion that it was fair to admit the hearsay evidence of the Kenyan witness, and its decision to admit it, were irrational and in breach of the practitioner's right to a fair hearing. The Court therefore quashed the FTP Panel's decision. It held (at [108(viii)]) as follows:

> ***In disciplinary proceedings which raise serious charges amounting in effect to criminal offences*** which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, ***if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence*** *as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party* ***and if there were no problems associated with securing the attendance of the accuser****,*

> ***need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.***
>
> [emphasis added]

106 The hearsay evidence in *Bonhoeffer* and *Ogbonna* was not admitted because of their unique facts. In both cases, the practitioners were denied the opportunity to cross-examine the makers of the evidence. This was found to be contrary to the fair hearing rule in natural justice. Whether the admission of hearsay evidence without the opportunity to cross-examine its maker constitutes a breach of the practitioner's right to a fair hearing depends on the circumstances of each case. It has been observed that where hearsay evidence was the sole evidence of many serious allegations made, the arguments in favour of requiring cross-examination were "formidable" and cross-examination had to be allowed to secure fairness: *Wade & Forsyth's Administrative Law* at p 439, commenting on *Bonhoeffer*. The AG suggests that whether the absence of the opportunity to cross-examine the maker of the evidence contravenes the practitioner's right to a fair hearing may depend on the specific reasons for failing to secure the attendance of the maker.[56] In *Bonhoeffer*, the maker of the statement containing allegations against the practitioner was willing and able to attend the trial. The situation in *Ogbonna* was that the Nursing and Midwifery Council had not even attempted to procure the attendance of the maker of the statement at trial. In their contexts, it was necessary as a matter of fairness to offer the practitioners the chance to cross-examine the witnesses whose statements formed the main evidence in the charges brought against them.

107 In sum, the position in the United Kingdom is that there is generally no bar to the admissibility of hearsay evidence in disciplinary hearings against

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[56] FSAG at para 24(b).

medical practitioners if the evidence conforms with the requirements under Rule 34 (*ie,* relevance and fairness). However, the hearsay evidence would be inadmissible if there was a breach of natural justice. To ensure that there is no breach of his right to a fair hearing, it usually suffices that the practitioner has an opportunity to comment on and contradict the hearsay evidence. Cross-examination is not the only way to challenge the hearsay evidence. The right to a fair hearing includes the right to submit evidence in support of his own case and the right to comment on and contradict evidence which forms the basis of his opponent's case: see Geoffrey A Flick, *Natural Justice: Principles and Practical Application* (Butterworths, 1979) at p 41. In some circumstances, however, there may be no compelling substitute for the opportunity to cross-examine the maker of the hearsay evidence. The reasons for the unavailability of the maker for cross-examination on the hearsay material may then have a bearing on whether it ought to be excluded from evidence.

108 The AG substantially agrees with the nuanced approach in the English line of cases (as summarised at [107] above). The AG submits that there could be situations where the facts, taken as a whole, are such that a tribunal may be inclined not to admit the hearsay material as evidence.[57] The AG suggests that the absence of cross-examination itself does not necessarily constitute a violation of natural justice. The AG posits, particularly in the context of serious disciplinary charges, that the reasons for failing to secure the relevant witness for cross-examination on the hearsay evidence may be pertinent in determining if natural justice is breached.[58] The Applicant's position is in broad alignment with the approach in the United Kingdom. He relies on *Bonhoeffer* for the submission that it was unfair for the Evidence to have been admitted by the

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57 FSAG at para 24.

58 *Ibid*.

DT.[59] The Applicant highlights that the patient's own testimony that there was "no finger involved … no saliva involved" undermined certain elements of the first charge. The Applicant contends that the SMC should not be permitted to rely on the Evidence, being hearsay, to "bootstrap its case" and relieve itself of its burden to prove a *prima facie* case before the defence may be called.[60] The SMC urges the court to adopt a slightly different approach: the DT may admit hearsay evidence where it is relevant, and adjust the weight to be accorded to the evidence based on its reliability.[61] The SMC submits that it remains open to parties to argue on the weight to be attributed to the evidence, and there is no prejudice to parties that the hearsay evidence is admitted.[62]

109 I consider the English position as set out at [107] above to be a reasonable one. Even if hearsay evidence meets the threshold of relevance, it may not be admissible when it is in breach of the right to a fair hearing. The content of the right to a fair hearing (see [107] above) is premised on procedural fairness. It is not always necessary that the practitioner is accorded an opportunity for cross-examination to protect his right to a fair hearing, but there may exist situations where the absence of such an opportunity would deprive him of his right to a fair hearing. This is necessarily a fact-specific inquiry.

110 The SMC's position is that hearsay evidence ought to be admissible where it is relevant, with issues on its reliability going to its weight. It does not expressly consider how natural justice rules should operate to exclude hearsay evidence in the local context. The preliminary question is whether the hearsay

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59 FSA at para 18.

60 *Ibid*.

61 FSR at para 24.

62 FSR at para 27.

evidence is properly admissible. In this initial inquiry, the admissibility of hearsay evidence also turns on whether any breach of natural justice is occasioned. If there is a breach, the assessment of the weight to accord to the hearsay evidence only mitigates the consequential prejudice to the practitioner as a result of that breach. The SMC's proposal therefore conflates the anterior evaluation of the procedural propriety in the admission of the hearsay evidence with the subsequent analysis of the substantive merits of the hearsay evidence itself. As Lord Wright held in *General Medical Council v Spackman* [1943] AC 627 at 644–645, "[i]f the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice". The fact that the hearsay evidence may thereafter be accorded its requisite weight is a separate point from its admissibility, and cannot remedy the initial breach of natural justice caused by the admission of the hearsay evidence.

(II) AUSTRALIA

111 The rules of natural justice in Australia have their grounding in the same rules of fair hearing and fair adjudication. The rules of evidence influence, but do not determine, the content of procedural fairness: *Aronson & Groves* at para 8.360. The underlying policy rationale behind the exclusion of the usual rules of evidence is to preserve the tribunal model as an efficient and informal forum. *Aronson & Groves* cites Professor E Campbell, "Principles of Evidence and Administrative Tribunals" in E Campbell and L Waller (eds), *Well and Truly Tried* (Law Book Co, 1982), at p 86:

> *To import too freely and uncritically into administrative fact-finding processes … rules of evidence which were evolved for truly judicial agencies* of the government … would not only necessitate a much higher degree of participation of

> professional lawyers in those processes than has hitherto been customary, but *would also tend to defeat the very purposes of establishing many of the extra-curial tribunals which have been established*.
>
> [emphasis added]

112 In *CFJ v Office of the Children's Guardian* [2016] NSWSC 1625 ("*CFJ*"), the applicant was a teacher who was dismissed by a school after investigations into his use of the school's computers to access pornography. He argued that the tribunal had erred in relying on a report prepared by the school. The applicant contended that there was no basis for the tribunal's reliance, given that the doctor who had given opinions in that report was unidentified. The doctor had not been called to give evidence nor had he been cross-examined. The tribunal had admitted the school's report pursuant to s 38(1) of the Civil and Administrative Tribunal Act 2013 (NSW). Section 38(1) states that the tribunal "is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice".

113 The Supreme Court of New South Wales rejected the applicant's argument and held that the applicant was not denied procedural fairness as he was "not deprived of an opportunity to put any information or argument, on which he wished to rely, to the Tribunal in relation to the matters dealt with in the School's report" (at [110]). The Court further held that the Tribunal "had to ensure that [the applicant] had the opportunity to put before it his case in relation to [the school's report]" but this did not mean that the applicant "also had the right to require any of those who had expressed the opinions appearing in the School's report to attend to be cross-examined before the Tribunal" (at [116]).

114 In *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530 ("*Ingot Capital*"), the applicant sought an order for access to certain documents that had been prepared on behalf of the respondent for the purpose of proceedings in the Administrative Appeals Tribunal. The respondent resisted the production of the documents on the basis that the documents were protected because they were brought into existence for the purposes of use in or in relation to litigation (*ie*, litigation privilege). Litigation privilege safeguards communications between the client and the lawyer made for the dominant purpose of providing the client with legal services in connection with pending or anticipated legal proceedings (at [18]). However, the respondent did not object on the basis of legal advice privilege, which protects communications between the client and the lawyer that are made for the dominant purpose of providing legal advice to the client (*ibid*). The claim was disputed by the applicant on the basis that litigation privilege did not apply to evidence in proceedings before the tribunal. The applicant submitted that this was by virtue of s 33(1)(*c*) of the AAT (see above at [76]).

115 The Supreme Court of New South Wales held at [55] that, *inter alia*, the availability of common law litigation privilege did not apply to evidence in proceedings before the tribunal. It granted the applicant an order for access to the documents, subject to any claim for legal advice privilege by the respondents (at [56]). Bergin J (as she then was) held at [13]:

> In proceedings in which a decision is reviewed the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision (s 43(1)). In *Re Pochi v Minister for Immigration & Ethnic Affairs* (1979) 26 ALR 247, Brennan J, as President of the AAT, said (at ALR 256; ALD 40–1):
>
> > How are facts to be proved, and how is the sufficiency of proof to be determined when there are no rules of evidence binding upon either the Minister or the Tribunal? Section 33(1)(c) of the Administrative Appeals

> Tribunal Act provides that "the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate".
>
> …
>
> ***The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that "this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force"***, as Hughes CJ said in *Consolidated Edison Co v National Labour Relations Board* 305 US 197 at 229. ***To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force***, as Evatt J pointed out, though in a dissenting judgment, in *R v War Pensions Entitlement Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 : "Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But ***this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth.*** No Tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'." ***That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence.***
>
> [emphasis added]

116 It has been contemplated that some circumstances may cause hearsay evidence to be excluded from admissibility. In *Victorian Bar Inc v Perkins Ruling No 4 (Legal Practice)* [2006] VCAT 460, the issue before the Victorian Civil and Administrative Tribunal was whether various hearsay materials, including certain file notes of conversations between the Bar Association and

the complainant, were admissible. The provision governing the admissibility of evidence in proceedings before the tribunal is s 98(1) of the Victorian Civil and Administrative Tribunal Act 1998 ("VCATA"). Section 98(1) of the VCATA is set out as follows:

> **General procedure**
>
> (1) The Tribunal—
>
> (a) *is bound by the rules of natural justice*;
>
> (b) *is not bound by the rules of evidence* or any practices or procedures applicable to courts of record, *except to the extent that it adopts those rules, practices or procedures*;
>
> (c) *may inform itself on any matter as it sees fit*;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.
>
> [original emphasis in bold; emphasis added in italics]

The tribunal took the view that the fact *per se* that a statement is unsworn and made by a person who will not be tested in cross-examination does not constitute "unfairness of such a magnitude" as to render the statement inadmissible (at [7]). However, the tribunal ruled that one specific file note was not admissible because there were other concerns over its contents, namely that the note "contain[ed] florid language", "refer[red] in part to matters otherwise unsubstantiated and, in some instances, irrelevant to the issues", and contained "remarks made in anger or outrage" (at [10]).

117 In *Chan v Kostakis* [2003] VCAT 951 ("*Chan*"), the applicants, who were landlords, sought *inter alia* possession of the property they leased to the respondents and the outstanding arrears of rent. The first respondent brought an application for a summary dismissal of the claims against him on the basis that

they were frivolous, vexatious, misconceived, lacking in substance and/or otherwise an abuse of process, pursuant to s 75 of the VCATA (at [8]). In support of his position, the first respondent exhibited a letter addressed to his solicitors. The letter was purportedly written and sent by a director of a company which managed the property. The contents of the letter informed that there were changes to the locks of the property on two occasions due to breaches of the lease (at [22]). The first respondent submitted that on either or both occasions, the lock-outs were effective to terminate the lease and therefore absolved him of liability for the arrears (at [23]). He claimed that he was unable to provide any further information about the letter as he was not in physical possession of the property (*ibid*). The tribunal acknowledged that it was able to receive and consider hearsay material, and inform itself in such manner as it saw fit by virtue of s 98(1) of the VCATA (at [26]) (see [116] above). Yet the tribunal found that it would be contrary to the rules of natural justice to allow the letter to be the basis of a crucial finding of fact (*ie*, that the first respondent was in fact locked out of the property) without opposing parties having the opportunity to cross-examine the maker of the statement or to clarify the situation (at [26]). It therefore dismissed the first respondent's application for summary dismissal of the claims against him.

118 In *Re Kais Jewellery (Syd) Pty Ltd v Commissioner of Taxation* [2021] AATA 16, the applicants applied to the Administrative Appeals Tribunal for a review of the decision of the Commissioner of Taxation. In the proceedings below, the commissioner refused to admit a witness statement made by a person who died before the applications were heard. The basis for this refusal was that the hearsay statement could not be tested by cross-examination and its admission would be unfairly prejudicial. On review, the tribunal found that the witness statement ought to be admitted. It held that the

witness statement had direct relevance to the central issue, and it was not possible to obtain the evidence to which the witness deposed from the other witnesses (at [24]). The tribunal considered that while there was potential for unfair prejudice to the commissioner in admitting the evidence, there might be similar prejudice to the applicants if the statement was excluded (at [23]). The objections raised by the commissioner on the potential unfair prejudice related to the lack of insight to the circumstances in which the statement was made (at [22]). The tribunal observed that it was possible for the commissioner to seek further information regarding the circumstances in which the witness statement was made from the interpreter and/or the applicants' solicitor who witnessed the statement (*ibid*). It noted that this was ultimately a consideration which could go to the weight placed on the statement (at [22]–[23]). Although the tribunal allowed the statement to be admitted, it made two salient observations. First, "that a statutory provision [*ie*, s 33(1)(*c*) of the AATA (see [76] above)] … provides *that an administrative tribunal is not bound by the rules of evidence* '*does not signify that the tribunal must*, *over objection*, s*upinely receive any evidence that is tendered before it*' [emphasis added]" (at [11]). Second, the fact that tribunals had "for the most part" admitted the evidence where the deponent was not available for cross-examination "[did] not suggest automatic admission of such evidence without a proper weighing of the potential for unfair prejudice against its probative value" (at [19]).

119 The Australian provisions on the admissibility of evidence in proceedings before a tribunal are very similar to s 51(4) of the MRA (see [76], [79], [80], [112] and [116] above). The position adopted in *CFJ* assists with conceptualising the limits on the admissibility of hearsay evidence under s 51(4) of the MRA (see [113] above). The Australian approach coheres with the English approach in so far as it acknowledges that hearsay evidence is not

always admissible (see [116]–[118] above). There is no hurdle to the admission of hearsay evidence in hearings before a tribunal which is not bound by the usual rules of evidence. The only caveat to that is when the applicant is deprived of the opportunity to respond or rebut the hearsay evidence presented against him. In such a scenario, the applicant's right to a fair hearing may be compromised. The analysis will inevitably turn on the context.

120 Another pertinent observation is that the rules of evidence are not entirely disregarded by a tribunal. In *Ingot Capital*, the court granted the order for accessing documents in the possession of another party to the proceedings before the tribunal. This was in recognition of, *inter alia*, the exclusion of the usual rules of evidence (specifically common law litigation privilege) by s 33(1)(*c*) of the AAT. Even so, Bergin J noted the continued relevance of the rules of evidence in proceedings before a tribunal (see above at [115]). This may arise in determining whether the evidence itself held rational probative force (*ibid*).

(C) CONCLUSION ON THE AUTHORITIES

121 The discretion to admit evidence under s 51(4) of the MRA must be limited by the rules of natural justice. I refer to the conception of natural justice as being the two limbs of procedural fairness as set out above at [88]–[89].

122 I distil the following observations from the Australian and English case authorities, as applied to the context of s 51(4) of the MRA. Hearsay evidence is admissible under s 51(4) of the MRA as the provision confers a broad discretion on the DT. That said, in admitting hearsay evidence, the DT should exercise due caution in ensuring that the right to a fair hearing is not breached. To satisfy this requirement, the respondent must be given the opportunity to

comment and contradict the hearsay evidence. The content of this opportunity is fact dependent (see [124] below). The DT should maintain the distinction between the question as to admissibility of the evidence and the decision as to the weight to accord to it. The assessment as to the weight placed on the evidence may incorporate guidance from the time-tested rules of evidence (see [115] above). The holding in *Ingot Capital* is that the wide discretion conferred on tribunals in admitting evidence should not be seen as equivalent to disregarding all rules of evidence as of no account (see [115] above). I find this to be a sound observation. Indeed, this manifests in the standard of proof required to establish a professional misconduct charge against a medical practitioner (see [123]).

123 The MRA and the MRR are silent on the requisite standard of proof to establish a professional misconduct charge pursuant to the MRA. This is not to say that the DT does away with any standard of proof. At the close of the SMC's case, *ie*, the prosecution's case, it must show that there is a *prima facie* case against the medical practitioner based on the charge(s) brought against him. It is trite that this is the standard to meet, and parties expressed the same view in proceedings below. Chan Sek Keong CJ's comments on the *prima facie* standard in *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 ("*Re Nalpon Zero*"), which were in the context of legal disciplinary proceedings before a tribunal, are equally applicable. The concept of a "*prima facie* case" is also characterised as the appropriate threshold that had to be met before the DT would call upon the defence at the close of the prosecution's case: *Re Nalpon Zero* at [17]. In *Re Nalpon* Zero at [14], the court endorsed Lord Diplock's holding in *Haw Tua Tau v PP* [1981–1982] SLR(R) 133 at [17] that the *prima facie* standard is met if "there is *some evidence (not inherently incredible)* which, *if [the judge] were to accept it as accurate, would establish each*

essential element in the alleged offence" [emphasis added]. Crucially, by the end of the proceedings, the legal burden is on the SMC to prove, beyond a reasonable doubt, that the charge against the medical practitioner is made out: *Gobinathan Devathasan v Singapore Medical Council* [2010] 2 SLR 926 at [62]. That these standards of proof are enshrined in medical disciplinary proceedings before a tribunal only shows that the rules of evidence are not entirely abandoned by virtue of s 51(4) of the MRA.

124 I consider it necessary to set out how the opportunity to comment and controvert the evidence may present itself in the context of DT proceedings. What would suffice to comport with the practitioner's right to a fair hearing turns on the particular circumstances of the case. Cross-examination is one of the ways in which the practitioner can deal with the adverse evidence. The practitioner also has an opportunity to comment on or contradict the evidence at the close of the prosecution's case. He may do so by submitting that there is no case to answer, *ie*, that the SMC has failed to adduce evidence that there is a *prima facie* case. The DT would then rule on whether the prosecution has discharged its burden of proof at that juncture and determine if the defence should be called. If the defence is called, the practitioner may choose to respond to the contents of the evidence by electing to give evidence.

125 The Applicant submits that the Evidence is hearsay as it was adduced before the DT as "indirect evidence"[63] of the events which are alleged to have occurred in his clinic. These events are the subject-matter of the charge (see above at [6]). The Applicant contends that it is entirely possible for him to accept the authenticity of the Evidence but dispute its contents, and accordingly that it is irrelevant that the Applicant had signed the Statements

63 AWS at para 50.

contemporaneously.[64] He appears to argue that the reliance on the Evidence in the prosecution's case is not permitted as it was hearsay at that juncture. The Applicant concedes that the Evidence would be admissible during his case *if* he elects to give evidence, and his testimony is contradictory to the Evidence (pursuant to s 147(3) of the EA).

126 I discuss first the implications of the Applicant contesting the admissibility of the Evidence in the SMC's case. The Applicant appears to make this submission for the reason that the Evidence comprised the Statements provided by him in the course of criminal investigations and the Testimony he provided at his trial, *ie*, the Applicant himself was the maker of the Evidence. Taken with the Applicant's reliance on *Bonhoeffer*, this would mean that the Applicant needed to be cross-examined on the Evidence for it to be tested, and such an opportunity could only arise during the presentation of his case. This would be after the close of the SMC's case, if the DT calls on the defence's case and the Applicant elects to take the stand. The Applicant therefore argues that the Evidence is hearsay at the present juncture, where the maker of the Statements and Testimony is not available to testify to it.[65] Thus, he contends that the SMC cannot seek to pre-emptively adduce the Evidence as part of its case, against the rules of criminal procedure.[66] He acknowledges that the Evidence may be admissible in the defence's case (see [125]).

127 I do not consider the present situation to be similar to *Ogbonna* and *Bonhoeffer* such as to cause the exclusion of the Evidence from the proceedings before the DT. In *Ogbonna* and *Bonhoeffer*, the challenges made by the

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64 AWS at paras 51 and 54.

65 AWS at para 95.

66 *Ibid*.

respondents against hearsay evidence were due to the prosecution's failure to produce the makers of the evidence. The curious situation in the present case is that the respondent (*ie*, the Applicant) himself is the maker. This is precisely the reason why the Applicant has couched the hearsay objection in these terms. It cannot be said that the admission of the Evidence in the DT proceedings would cause any breach of natural justice when the Applicant himself may properly challenge the substance of the Evidence. After all, only the Applicant is capable of responding to the allegations contained within the Evidence as its contents originated from him. I understand the Applicant's contention on the hearsay nature of the Evidence to be narrowly confined to the situation where the Evidence is admitted during the SMC's case. It suffices that he has an opportunity to comment and/or contradict the Evidence at the close of the prosecution's case by submitting that there is no case to answer (see [124] above). It is open to the Applicant to submit that the contradiction between the patient's testimony and the Evidence cannot sustain a *prima facie* case. It is then for the DT to consider whether there is a *prima facie* case made out against the Applicant before deciding if the defence should be called (see [123] above). Moreover, on the unique facts of this case, the Applicant's narrow objection to the admissibility of the Evidence in the prosecution's case faces another hurdle. The right to a fair hearing, in general, relates to procedural fairness in the *entire* proceedings. In *Regina v Secretary of State for Transport, Ex parte Gwent County Council* [1988] QB 429 ("*Gwent County Council*") at 446–447, the English Court of Appeal held that the court's function was to consider whether the procedure *as a whole*, being the proceedings before the inspector and the Secretary of State, was fair to the objecting party. The Secretary of State had allegedly failed to consider the objections to a proposed order before making it. While the basis of the challenge in *Gwent County Council* was that the Secretary of State had acted *ultra vires*, rather than the breach of a right to fair hearing,

the principle pronounced is equally applicable to the assessment of whether there is a breach of a right to fair hearing. If the DT assesses that there is a *prima facie* case against the Applicant, it calls for the defence's case. The Applicant may then elect to respond to the Evidence and, in so doing, raise his own evidence to comment on or challenge it. Thus, the Applicant's right to a fair hearing is not abrogated by the admission of the Evidence.

128 I consider a related contention that the Applicant makes on the admissibility of the Evidence. The Applicant contests the use of the Evidence in the SMC's case because it allows the SMC to be "relieve[d] … of the prosecution's burden to lead sufficient *prima facie* evidence to justify the calling of the defence".[67] There is no merit to this argument. The effect of adducing the Evidence does not shift or alleviate the burden of proof. The SMC retains the duty of establishing a *prima facie* case at the close of its case. It bears the burden of proving beyond reasonable doubt the charges against the Applicant at the close of the proceedings.

129 On the facts of this case, the DT should be allowed to perform its function to achieve the aims as stated above at [44]–[46]. In *Bonhoeffer*, the High Court regarded the preservation of procedural propriety in the proceedings before the FTP Panel as being consistent with the aims of the FTP Panel in, *inter alia*, upholding the public interest in protecting patients and maintaining public confidence in the medical profession. It held as follows (at [129]):

> … The reality would appear to be that the factor which the FTPP considered decisive in favour of admitting the hearsay evidence was the serious nature of the allegations against the Claimant coupled with the public interest in investigating such allegations and the FTPP's duty to protect the public interest in protecting patients, maintaining public confidence in the

67 AWS at para 64.

> profession and declaring and upholding proper standards of behaviour. In oral argument Mr Warby QC on behalf of the FTPP submitted that the gravity of the allegations is a factor arguing in favour of admissibility of the hearsay evidence. In my judgment that submission is misconceived. It is of course self-evidently correct that the greater is the gravity of allegations, the greater is the risk to the public if there is no or no effective investigation by a professional body such as the FTPP into them. However, that factor on its own does not in my view diminish the weight which must be attached to the procedural safeguards to which a person accused of such allegations is entitled both at common law and under Article 6 [*ie*, the right to a fair hearing]. To the contrary, the authorities to which I have referred suggest the reverse to be the case. ***The more serious the allegation, the greater the importance of ensuring that the accused doctor is afforded fair and proper procedural safeguards. There is no public interest in a wrong result.***
>
> [emphasis added]

There is no issue of a wrong result in the present case. The Applicant is the maker of the Evidence. It does not lie in his mouth to say that the Evidence is hearsay. When the matter is considered in the round, there is simply no unfairness caused to the Applicant by the admission of the Evidence. It is therefore well within the public interest for the DT to have admitted the Evidence.

130 I am aware that "fairness" is often used in the discussion of natural justice as being procedural fairness. The Applicant has alluded to the assessment of "fairness" as being a substantive inquiry, which includes querying whether the prejudice caused to the medical practitioner outweighs the probative value of the evidence in determining its admissibility. For avoidance of doubt, I do not accept fairness, in so far as it refers to non-procedural fairness, as a relevant factor in the DT's determination of the admissibility of evidence.

(3) Summary

131 In sum, the main considerations limiting the DT's discretion under s 51(4) of the MRA include:

(a) Relevance of the evidence: The pre-requisite to the admissibility of the evidence is whether it is logically probative or relevant to the proceedings (see [73], [79] and [84] above).

(b) Natural justice: Notwithstanding s 51(4) of the MRA, the DT is required to comply with the rules of natural justice (see [88]–[89] above).

132 Generally, any evidence is admissible if relevant to the DT proceedings, including hearsay evidence. This is contingent on its compliance with the rules of natural justice. In particular, the right to a fair hearing. The right to a fair hearing is usually secured by offering the respondent an opportunity to comment on and contradict the evidence. In limited circumstances akin to the facts of *Bonhoeffer* or *Ogbonna*, it may be that fairness requires that the opportunity to cross-examine the maker of the hearsay evidence be made available to the respondent to test the evidence, unless good and cogent reasons can be given for the witness's non-attendance.

(4) Conclusion

133 The Evidence is admissible pursuant to s 51(4) of the MRA. That it is hearsay is no bar to its admission. The Evidence does not fall afoul of any of the recognised limits summarised above at [131]. Thus, it is admissible under s 51(4) of the MRA.

Issue 6: Whether the CPC applies to exclude the Statements from admission

134 I turn to the issue of whether ss 258(1) or 259(1) of the CPC applies to exclude the Statements from admission.

135 Notwithstanding the admissibility of the Evidence under s 51(4) of the MRA, I consider whether the provisions in the CPC operate to shut out the Evidence.

136 At the hearing, Counsel for the Applicant submitted that the Statements fell within the ambit of s 259(1) of the CPC rather than s 258(1) of the CPC as the Applicant was not an accused person within the DT proceedings.

Are the Statements inadmissible pursuant to s 259(1) of the CPC?

137 Section 259(1) of the CPC reads as follows:

> **Witness's statement inadmissible except in certain circumstances**
>
> 259.—(1) *Any statement* made *by a person other than the accused in the course of any investigation* by any law enforcement agency *is inadmissible in evidence*, except where the statement —
>
> (*a*) is admitted under section 147 of the Evidence Act 1893;
>
> (*b*) is used for the purpose of impeaching his credit in the manner provided in section 157 of the Evidence Act 1893;
>
> (*c*) is made admissible as evidence in any criminal proceeding by virtue of any other provisions in this Code or the Evidence Act 1893 or any other written law;
>
> (*d*) is made in the course of an identification parade; or
>
> (*e*) falls within section 32(1)(*a*) of the Evidence Act 1893.
>
> [original emphasis in bold; emphasis added in italics]

138 I accept the AG's submission that the determination of whether a statement recorded in the course of investigations is given by "a person other

than the accused" must be made with reference to the investigations, *ie*, the question is whether criminal proceedings are brought against the statement-maker arising from those investigations.[68] This is consistent with the plain words of s 259(1) of the CPC, which reads "[a]ny statement made by a person other than the accused *in the course of any investigation* … is inadmissible …" [emphasis added]. It is clear that the relevant time period is during the course of the investigations, not any time after that. The AG's reading of s 259(1) of the CPC is consistent with the C3J's findings in *Manohar* on the same provision.

139 In *Manohar*, the C3J held as follows at [122]–[123]:

> On the other hand, *s 259 of the CPC is best understood as being concerned with the admissibility of police statements given by a person other than the person referred to in s 258*. Hence, ***when s 259(1) of the CPC refers to any statement given by "a person other than the accused"***, this simply refers to ***a person: (a) from whom a statement has been recorded in the course of investigations (this is expressly provided); and (b) against whom no criminal proceedings are brought arising from that investigation*** (in contradistinction with a person who is the subject of s 258).
>
> In that light, we turn to the present disciplinary proceedings. The respondent's Statement and Krishna's Statement clearly fall within the scope of s 259(1) of the CPC. ***Their statements were recorded in the course of police investigations, but no criminal proceedings were ever brought against either of them. Their police statements are therefore made by "a person other than the accused" and are generally inadmissible in the present case.*** There are, of course, five statutory exceptions to this general rule. The applicant did not attempt to rely on any of them even though we had specifically drawn the attention of the applicant's counsel to these exceptions at the hearing of this OS. In the circumstances, we proceed on the basis that none of the exceptions apply. The

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68 FSAG at paras 5–9.

> respondent's Statement and Krishna's Statement are accordingly inadmissible in evidence.
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> [emphasis added]

140 The holding of the C3J in *Manohar* is that "a person other than the accused" in s 259(1) of the CPC refers to a person from whom a statement had been recorded in the course of investigations, and against whom no criminal proceedings had been brought arising from that investigation. The Applicant's position on what constitutes statements recorded from "a person other than the accused" under s 259(1) of the CPC is entirely contradicted by the C3J's express holding. The Applicant's position is that whether a statement is considered to be made by a person other than the accused (*ie*, within the ambit of s 259(1) of the CPC) is determined based on the standing of the person in the relevant proceedings. He argues that his present capacity is that of "a person other than the accused" because he is not an accused person in a criminal trial for the present DT proceedings.[69] Counsel for the Applicant submitted at the hearing that the reference to any statement made by a person "*other than the accused*" [emphasis added], must necessarily mean the accused in a criminal trial. It was conceded at the hearing that the Applicant relies only on *Manohar* for this proposed interpretation. As set out above at [139], the court in *Manohar* held in unambiguous terms that the question of whether statements were made by the "accused" must be considered in relation to whether criminal proceedings were brought against him in connection with the recording of the statements. There is no basis which underpins the Applicant's interpretation.

141 In the present case, criminal proceedings were brought against the Applicant following the recording of the Statements in the course of

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[69] Transcript, p 3:10–12.

investigations. Thus, the Statements cannot be said to fall within the ambit of s 259(1) of the CPC. The inadmissibility of all witness statements in evidence (save for limited statutory exceptions) pursuant to s 259(1) of the CPC does not apply to the Statements. Section 259(1) of the CPC does not render the Statements inadmissible in the DT proceedings.

Are the Statements inadmissible under s 258(1) of the CPC?

142 It is not necessary to consider the effect of s 258(1) of the CPC on the admissibility of the Statements in the proceedings below. The Applicant's initial position was that the Statements were governed by s 258(1) of the CPC (see above at [9(d)]). However, Counsel for the Applicant clarified at the hearing that s 258(1) of the CPC did not apply to the Statements (see [10] above). For completeness, however, I address the Applicant's arguments on s 258(1) of the CPC.

143 Section 258(1) of the CPC is set out below:

> **Admissibility of accused's statements**
>
> 258.—(1) Subject to subsections (2) and (3), *where any person is charged with an offence*, *any statement* made by the person, whether it is oral or in writing, *made at any time*, whether before or after the person is charged and whether or not in the course of any investigation carried out by any law enforcement agency, *is admissible in evidence at the person's trial*; and if that person tenders himself or herself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching that person's credit.
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> [original emphasis in bold; emphasis added in italics]

144 The Applicant submitted that s 258(1) of the CPC permits the admission of an accused person's statements "at his trial" regardless of whether he has

taken the stand.[70] He contended that this would only be in the specific and limited context of a criminal trial.[71] In support of his position, the Applicant emphasised that s 259(1) of the CPC is worded in an exclusionary manner (*ie*, "*[a]ny statement* made *by a person other than the accused in the course of any investigation … is inadmissible in evidence*, except …" [emphasis added]) whereas s 258(1) of the CPC is drafted permissively (*ie*, "… *where any person is charged with an offence*, *any statement … made at any time … is admissible in evidence at the person's trial*" [emphasis added]).[72] Therefore, he asserted that s 258(1) of the CPC should be read restrictively to apply only to criminal proceedings and to regulate the use of police statements taken under the CPC, but not the DT proceedings. Accordingly, the Applicant argued that s 258(1) of the CPC "does not apply to allow the admission" of the Statements in the DT proceedings.[73]

145 The SMC's position was that the principles of s 258 CPC should serve as guidance to admit the Evidence.[74] It cited *Sulaiman* (at [37]) for the proposition that the rationale underpinning the admissibility regime in s 258(3) of the CPC is reliability.[75] The SMC maintained that there are "compelling policy reasons which militate in favour of admitting [the Evidence]" as, *inter alia*, the Applicant confirmed that the Statements were true,[76] and the Testimony

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70 AWS at para 70.

71 *Ibid*.

72 AWS at para 83.

73 AWS at para 84.

74 RWS at para 52.

75 RWS at para 53.

76 *Ibid*.

was provided under oath during the proceedings.[77] Although it cited "compelling policy reasons", the SMC did not explicitly outline these reasons. It alluded to the fact that the Evidence had satisfied s 258(3) of the CPC and therefore was considered reliable evidence.[78] However, this bypasses the question of whether s 258(1) of the CPC operates on statements made by an accused person in proceedings other than his criminal trial.

146 The AG's position was that s 258 of the CPC is inapplicable to non-criminal proceedings (including the ongoing proceedings before the DT). The AG argued that this meant s 258 of the CPC *did not apply to exclude the admissibility of the Statements* in such proceedings.[79] Whether the Statements were admissible in these proceedings would depend on the statutory framework governing the specific proceedings in question.[80] In the present case, that provision would be s 51(4) of the MRA (discussed above at [60]–[133]).

147 The arguments presented by the AG were as follows:

(a) Applying the *Tan Cheng Bock* framework for statutory interpretation, it is not possible to interpret s 258 of the CPC as excluding or otherwise regulating the admissibility of statements made by accused persons in non-criminal proceedings.[81] The C3J observed in *obiter dicta* that the words "the person's trial" in s 258(1) of the CPC referred to the person's criminal trial: *Manohar* at [93]. The AG emphasised that s 258 of the CPC does not make any mention of non-

77 RWS at para 54.

78 RWS at para 56.

79 AGWS at para 26.

80 *Ibid*.

81 AGWS at para 9.

criminal proceedings – it is silent on the use or admissibility of the Statements in non-criminal proceedings.[82] Further, permitting the Statements to be admitted in evidence in the accused's criminal trial (which is what section 258 provides for) is conceptually distinct from prohibiting the admission of such statements in evidence in all other proceedings (of which s 258 makes no mention).[83]

(b) Even if it was assumed that s 258 of the CPC excludes the admissibility of statements made by accused persons in non-criminal proceedings, this interpretation did not further the legislative purpose of s 258 of the CPC.[84] The Court of Appeal in *Sulaiman* noted that with s 258(1) of the CPC, the starting point is that any statement given by an accused person in the course of investigations is admissible in evidence at his trial (at [36]). This is subject to the requirement of voluntariness expressed in s 258(3) of the CPC (*ibid*). The rationale underpinning the admissibility regime in s 258(3) of the CPC is reliability (at [37]). Thus, excluding the admissibility of the Statements in non-criminal proceedings was not in any way related to, and therefore did not further, the legislative purpose of ensuring the use of only reliable statements from accused persons in criminal proceedings.[85]

(c) Finally, contrary to the Applicant's submissions, the legislative purpose of s 259 of the CPC did not apply equally to s 258 of the CPC.[86] The C3J in *Manohar* identified two of several legislative purposes of

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82 AGWS at para 11(a).

83 AGWS at para 11(b).

84 AGWS at paras 16–18.

85 AGWS at para 18.

86 AGWS at para 20.

s 259 of the CPC as being the disclosure purpose and the limitation purpose (at [92] and [97]). The disclosure purpose was "the promotion of the public interest in encouraging the free and candid disclosure of information by witnesses to law enforcement agencies": *Manohar* at [92]. The limitation purpose was "to place limits on the use of information obtained from witnesses pursuant to the exercise of coercive police powers": *Manohar* at [97]. The C3J expressly found that the disclosure purpose did not apply to s 258 of the CPC (at [93]).[87] Further, the limitation purpose did not apply to s 258 of the CPC because s 258 of the CPC did not contemplate how statements recorded from accused persons can be used in subsequent proceedings.[88] It would have far-reaching consequences to impute the limitation purpose to s 258 of the CPC in interpreting the provision, which would essentially exclude the use of statements recorded from accused persons from any other proceedings.[89] This would render provisions such as s 147(3) of the EA nugatory.[90]

148 I agree with the AG's reading of s 258 of the CPC (see [146] above). The provision is silent on whether statements recorded from an accused person pursuant to the CPC are admissible in proceedings other than his own criminal trial. It is outside of the ambit of the plain wording of s 258 of the CPC to interpret the provision as excluding the admissibility of statements made by an accused person from all other proceedings. Section 258 of the CPC only provides for the admissibility of statements given by an accused person in his

87 AGWS at para 21.

88 AGWS at para 24.

89 AGWS at para 25(a).

90 AGWS at para 25(b).

criminal trial. It is otherwise silent on their admissibility (or exclusion) in other non-criminal proceedings. The legislative purpose of s 258 of the CPC (as set out in [147(b)] above) is not furthered by the prohibition on the use of statements by an accused person outside of his criminal trial. Section 258 of the CPC facilitates the admission of statements from an accused person as *reliable* evidence in the course of criminal proceedings. This is distinct from the aims of s 259 of the CPC (as set out in [147(c)] above), which relate to statements recorded from persons other than accused persons.

149 Thus, the Applicant's original position on the inapplicability of s 258(1) of the CPC to the Statements in the proceedings before the DT does not assist him. The Statements are not excluded by virtue of s 258(1) of the CPC.

Issue 7: Whether the Applicant has met the threshold for leave to commence judicial review

150 It follows from my decision on the substantive merits of the Admissibility Decision that the Applicant has failed to meet the requirement of establishing a *prima facie* case of reasonable suspicion in favour of granting the remedies sought. The Applicant has therefore not met the threshold to obtain leave to commence judicial review.

Conclusion

151 I find that the DT had not erred in exercising its discretion pursuant to s 51(4) of the MRA to admit the Evidence at the present stage of the DT proceedings. That said, I make no pronouncement on the weight that attaches to the Evidence. The assessment of the Evidence is an independent exercise for the DT.

152 Accordingly, I dismiss the application. I will hear parties on costs separately.

Dedar Singh Gill
Judge of the High Court

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