

Appeals Circular A06/21

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Bux v The General Medical Council [2021] EWHC 762 (Admin)

Learning points

- ▶ Judgments of a previous Court are admissible before a tribunal and they should be weighed with all the other evidence. However, such judgments are not binding on a tribunal.
- ▶ Following the test for dishonesty in *Ivey v Genting Casinos*, it is unnecessary to make findings that a registrant knew that what they were doing was dishonest. However, such a finding does not vitiate the exercise; it is merely a superfluous finding.
- ▶ When considering a conflict of interest in relation to experts:
 - ▶ an actual conflict of interest will arise when an expert witness's opinions are actually influenced, or are capable of being influenced, by his personal interests
 - ▶ a potential conflict of interest will arise where the facts are reasonably suggestive of such a conflict
 - ▶ an expert witness has a duty to disclose to those instructing him, and to the court, a potential conflict of interest, that is, all facts and matters which might reasonably suggest a conflict of interest
 - ▶ the duty of disclosure as provided for in the GMC Codes of Guidance does not differ from the legal duty of disclosure.
- ▶ Understanding what the legal test for a conflict of interest is and the concomitant duty of disclosure, and whether that legal test was satisfied on the facts are questions which are essentially legal and factual and not medical or technical. Tribunals will not be assisted by opinions from medically qualified professionals on these issues.

Background

This was an appeal made by Dr Zuber Bux ('B'), pursuant to section 40 of the Medical Act 1983, against the findings of a Medical Practitioners Tribunal ('the Tribunal') on 9 and 14 October 2019 and the Tribunal's decision dated 16 October 2019 erasing his name from the Medical Register.

The background to the allegations against B were that in around 2008 he had started undertaking medico-legal work. He was instructed, through an agent, Medico Legal and Litigation Services Ltd ('MLLS'), by a variety of solicitors, including AMS Solicitors Limited ('AMS'), in which his wife was a salaried partner. In 2011, B paused his medico-legal work, following concerns being raised about a conflict of interest deriving from his marriage. However, he resumed this work in 2016, accepting instructions from that point solely from AMS via MLLS.

Thereafter, he produced expert medical reports on an industrial scale. In 2018, the GMC received complaints about B's conduct. The complaints raised allegations about the independence of B's reports; his failure to disclose his personal connection with AMS solicitors who instructed him; and the lack of any evidential base or reasoning in his reports.

At the hearing, the Tribunal made findings of fact that B had acted in a state of conflict of interest, dishonestly and for financial gain. The facts found proved fell into four categories, which were:

- ▶ that B acted in a state of conflict of interest by accepting instructions (through MLLS) to prepare medico-legal reports in respect of holiday sickness claims, from AMS, in which his wife was a salaried partner;
- ▶ that in one case B gave a deliberately false answer (in a reply endorsed with a statement of truth) to questions posed to him as an expert under CPR 35.6;
- ▶ that B made diagnoses without proper evidence, without identifying the existence of a range of opinions, and had in his reports failed to follow the requirements of CPR Part 35; and
- ▶ that B improperly performed a circumcision procedure in the community and in so doing failed to recognise or advise in terms of the risk of doing so.

Based on those findings, the Tribunal found that B's fitness to practise was impaired by reason of misconduct and directed that his name be erased from the Medical Register, with an immediate order for his suspension.

Grounds

B appealed on the following grounds:

- ▶ there was no conflict of interest, that issue having been decided in B's favour by a preliminary-issue judgment given by HHJ Gregory in the County Court at Liverpool, in one of the claims where B was acting as an expert witness;
- ▶ as there was no conflict of interest, there was no duty on B as expert to disclose anything;

- ▶ the flawed finding by the Tribunal that there was a conflict of interest, and a breach of the duty to disclose it, contaminated the findings on improper diagnoses, dishonesty and financial motive;
- ▶ the Tribunal applied an incorrect legal test to the question of dishonesty, and its finding in that regard was thereby vitiated; and
- ▶ the sanction of erasure was disproportionate, unduly harsh and unreasonable.

B's counsel accepted that if the first four grounds were dismissed, then as there would still be findings of dishonesty, the sanction of erasure could not be challenged.

Judgment

The appeal was heard by Mr Justice Mostyn.

▶ Expert evidence and conflict of interest

Mostyn, J stated that **the duties of an expert witness in civil proceedings** are prescribed by the Civil Procedure Rules ('CPR') Part 35 and that "[I]t is the duty of an expert to help the Court on matters within his or her expertise; and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid (CPR 35.3)...It is axiomatic that the evidence of an expert should be independent, unbiased and objective" [16 and 17]. He said that "[T]he obligation to give an unbiased opinion plainly carries with it the obligation to disclose any actual or potential conflicts of interest" [21].

In paragraph 44, Mostyn J summarised his findings on **conflict of interest** and **the duty of disclosure** of such conflicts and said:

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

Mostyn, J referred to these as the first and second types of conflict of interest and said the latter state is more common and involves no wrongdoing [23].

- ii. A potential conflict of interest will arise where the facts are reasonably suggestive of such a conflict [also 25 and 26].

He said that conflict of interest can come in different forms and that the three common forms identified¹ were where the expert has, or may have, a financial interest in the outcome of the litigation, where the expert has, or may have, a conflicting duty and where the expert has, or may have, a personal or other connection with a party which might consciously or subconsciously influence, or bias, his evidence" [30].

He referred to the GMC's guidance relevant to conflict of interest² [31] and said that in regulatory proceedings "the issue is normally whether the

¹ in *Rowley v Dunlop* [2014] EWHC 1995 (Ch) David Richards J at [21]

² GMC Guidance on Acting as a Witness in Legal Proceedings and GMC Guidance on Financial and Commercial Arrangements and Conflicts of Interest

registrant should be sanctioned for having given expert evidence without having declared a conflict of interest" [32] and that the existence of a conflict of interest by an expert "does not necessarily disqualify him, or render his evidence inadmissible, or of no weight" [33].

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

He said that an expert "must disclose details of a potential conflict of interest at as early a stage in the proceedings as possible. He must disclose any associations or loyalties which might give rise to a conflict. He must disclose any material that is suggestive of a conflict of interests, and will not be pardoned, if he fails to do so, by a later finding that there is no conflict of interest" [38]. He said the reason that "such a high duty is imposed is to reflect the principle that justice must not only be done but be seen to be done" [39].

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

He said that in regulatory proceedings, the disciplinary tribunal would examine what motivated the expert witness to conceal the conflict of interest and "if it concluded that it was done for an improper motive, such as to obtain a financial advantage, then this may well lead to a finding of dishonesty" [46].

► The expert evidence before the Tribunal

Mostyn, J said that in this case, when reaching its decision on the facts, the Tribunal relied on "expert evidence" adduced by the GMC and rejected "expert evidence" adduced by B [48].

Mostyn, J said that "the parties adduced their own expert evidence without any oversight by, let alone permission from, the court. It seems to me that an equivalent of CPR Part 35 is urgently needed to be inserted in the procedural rules governing regulatory proceedings of this nature" [50 and 58].

He said the key issue in this case "was a correct understanding of the test for (a) a conflict of interest in an expert witness and (b) the concomitant duty to disclose. The content and scope of the test is a matter of law. Whether the test is satisfied is a matter of fact" [51]. Therefore, he could not see how the Tribunal would be assisted by opinions from the experts [53] and that it was questionable as to whether the opinions of the experts were in fact admissible as "the admissibility of expert opinions is governed further by the criteria (a) that the witness has the necessary knowledge and experience and (b) that there is a reliable body of knowledge and experience to underpin the expert evidence." [54]. Mostyn J said he struggled to understand what skilled knowledge and experience on the subject the experts brought to the understanding of a legal content of the test and the duty of disclosure [55].

He said that, whilst in his opinion, the Tribunal should have ruled the experts' reports inadmissible, or that they were irrelevant, he did not consider the admission of that evidence to have materially affected the conclusions reached by the Tribunal [57] and that its decision would have been the same absent this evidence [79].

► Dr B as an expert

- The Tribunal found proved that in 2017, in response to a query about the connection between B and his wife at AMS, B deliberately gave a false answer (endorsed with a statement of truth) and that it had been done dishonestly. B wrote that the MDU advised him that he was "*following the GMC guidelines and also those provided by the MDU*" which was completely the opposite of what B had been advised by the MDU in 2011 [62-64]. Mostyn, J said that "[I]nvariably, that alone, and irrespective of the decisions on the other charges, would have led to the sanction of erasure" [65].
- Mostyn, J then considered the preliminary-issue judgment of HHJ Gregory dated 6 August 2018. This was in relation to a claim in respect of holiday illness against a travel company and one of the preliminary issues being considered was whether any conflict of interest arose from the relationship between B, AMS and MLLS. Mostyn J said that HHJ Gregory had found that there was no actual conflict of interest of the first type [70-71] but that it was hard to judge whether he had also made a finding that there was present an actual conflict of interest of the second type [72]. He went on to say "[H]owever, there can be no doubt that HHJ Gregory made a finding that at the time that the report was written there were facts suggestive of a conflict of interest. Put another way, there was a real risk of a conflict of interest. Accordingly, he held that all the pertinent facts should have been disclosed by an appropriately worded declaration within the body of each report. In the absence of disclosure then, subject to the decision on the next questions [to be considered by HHJ Gregory], the defendant would be entitled to ask the court to attribute less weight to the evidence than it would to a comparable report prepared by a truly independent expert" [72]. The reports of B were ultimately ruled inadmissible in those proceedings.

Mostyn, J said the preliminary-issue judgment was admissible evidence in the regulatory proceedings to be weighed with all the other evidence by the Tribunal [75] but that it was not binding on the Tribunal [76 and 80].

- Mostyn, J said that the Tribunal found "that not only was there a potential conflict of interest at the time when [B] wrote the reports, but there was an actual conflict of interest. There is some inconsistency in the reasons as to whether there was a conflict of interest of the first type or of the second type..." but that "on a very careful reading of the lengthy reasons as a whole that the [Tribunal] was satisfied that [B] had allowed his written reports to be influenced by his personal relationship with his wife." [77] He said that whilst the Tribunal's finding of a conflict of the first type differed from the finding of HHJ Gregory "[T]hat was a course the [Tribunal] was fully entitled to take" [78]

and that in his judgment the Tribunal was correct to reach the conclusion that it did [81].

Mostyn, J said that in this case the Tribunal had abundant evidence which demonstrated the following facts:

- ▶ as an expert witness B owed to the court a duty of independence and objectivity
- ▶ on the other hand, B had a personal interest in keeping up to speed the lucrative throughput of medical reports the benefit from which accrued not only to himself but also to his wife. She was a co-shareholder in the company to which the proceeds of the work were paid, and was a partner in the firm of solicitors providing him with the work
- ▶ in 2016 it was abundantly clear to B that he had to disclose his marital relationship not only to the defendant travel company's insurers but also to the court. This was clear to B not only from the terms of the codes of guidance to which he was subject, but also as a result of the letter written in 2011 by the MDU. But he made no disclosure
- ▶ B had on 12 May 2017 signed replies to CPR 35.6 questions, endorsed with a statement of truth, which were completely false. [82]

Therefore, he said that it would have been perverse and wrong for the Tribunal to have decided anything other than that B had an actual, serious, conflict of interest of the first type and that he was satisfied, notwithstanding some linguistic confusion, that this is what the Tribunal decided.

The Tribunal then addressed the question of whether the reports were improperly written. The Tribunal found that they had been for a number of reasons [84] in respect of which Mostyn, J said were "wholly correct" [85].

▶ Dishonesty

Mostyn, J then considered the Tribunal's findings that B's conduct as found proved (in relation to the undisclosed actual conflict of interest, the writing of improper medical reports, and a deliberately untruthful reply to CPR 35.6 questions) was in each case dishonest and financially motivated. The Judge said that the Tribunal's findings that ordinary, decent people would consider B's conduct dishonest and it further that B's conduct was plainly financially motivated were entirely correct [89-91]. He went on to say that whilst the Tribunal went on to find that B knew that what he was doing was dishonest in each case, "[S]ince the decision of the Supreme Court in *Ivey* this finding is not necessary. That it was made does not vitiate the exercise; it was merely a superfluous finding" [89].

Mostyn, J said that as the Tribunal had made the findings of dishonesty, the finding of impairment of fitness to practise and the sanction of erasure were inevitable [93] and dismissed the appeal [95].

Kind regards
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