PUBLIC RECORD

Dates: 18/03/2021 & 26/03/2021

Medical Practitioner's name: Dr George TADROS

GMC reference number: 4455628

Primary medical qualification: MB ChB 1986 University of Alexandria

Type of case MPT - Preliminary

Tribunal:

Legally Qualified Chair	Mr Ian Comfort
Lay Tribunal Member:	Mrs Valerie Blessington
Medical Tribunal Member:	Dr Paolo De Marco

Tribunal Clerk:	Mr Laurence Millea

Attendance and Representation:

Medical Practitioner:	Not present and represented
Medical Practitioner's Representative:	Mr Andrew Hockton, Counsel, instructed by Medical Protection Society
GMC Representative:	Mr Tim Grey, Counsel

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Preliminary Matters - 26/03/2021

Application on the admissibility of evidence

1. This Tribunal convened to consider the preliminary issue of the admissibility of evidence following a disputed application ('the Application') to redact sections of the proposed substantive hearing bundle ('the Bundle'), made on behalf of Dr Tadros.

2. The Tribunal received a draft version of the proposed substantive hearing bundle, together with a skeleton argument dated 8 March 2021 from Mr Andrew Hockton, counsel on behalf of Dr Tadros, and a skeleton argument dated 10 March 2021 from Mr Tim Grey, counsel on behalf of the General Medical Council ('GMC').

Background

3. Dr Tadros was a witness for his employer, the Birmingham and Solihull Mental Health NHS Foundation Trust ('the Trust'), in a trademark case ('the Trial') that was heard at the High Court (Intellectual Property Enterprise Court) before her Honour Judge Melissa Clarke ('the Judge') on 8 October 2018. The case involved trademark infringement and passing off by the Trust in the area of the provision of psychiatry and mental health training courses to those caring for people with mental health and behavioural issues. The case related to the use of the wordmark "RAID" in relation to the training courses.

4. Judge Clarke provided her written judgment ('the Judgment') on 9 January 2019. In her Judgment, she was critical of the evidence given by Dr Tadros and concluded that he had not been honest.

5. In an email dated 25 February 2019, Dr Tadros self-referred to the GMC stating:

> *"Please find enclosed a judgment in a civil claim where I am criticised as a witness. I take this matter seriously and will be [sic] ensure my full understanding of the criticism and engage in remediation as required."*

6. The GMC has subsequently alleged that Dr Tadros was dishonest when providing his evidence before Judge Clarke and the matter will be heard at a substantive hearing.

7. At the substantive hearing, the GMC wishes to rely on the Judgment and also a paper co-written by Dr Tadros which refers to the work of the training provided by the Trust as its RAID model ('the Paper'). The Paper was not considered at the Trial.

The Application

8. This is an application made on behalf of Dr Tadros that the Tribunal determine that i) the Paper is inadmissible as evidence; and ii) redactions should be made to the Bundle.

9. The Application proposes the following redactions to the Bundle:

- The Paper entitled *"Impact of an integrated rapid response psychiatric liaison team on quality improvement and cost savings: the Birmingham RAID model"*, published 2013, at pages 8 – 14 of the Bundle.
- Reference to the above paper at paragraph 3, page 6 of the Bundle.
- The following paragraphs of the Judgment of Her Honour Judge Melissa Clarke, beginning at p734 of the Bundle:
    - 16, 18-20, 44-91 (Evidence and Findings)
    - 92-143 (Analysis)

The Relevant Case Law

10. The Tribunal received a bundle of relevant authorities, agreed by both parties, which included the following:

- *Hollington v Hewthorn [1943] K.B 587;*
- *Squier v GMC [2015] EWHC 299;*
- *Rogers v Hoyle [2014] EWCA Civ 257;*
- *Vogon International Ltd v SFO [2004] EWCA Civ 104;*
- *GMC v Spackman [1943] AC 627;*
- *Chaudhari v The General Pharmaceutical Council [2011] EWHC 3433 (Admin);*
- *Hollis v The Association of Chartered Certified Accountants [2014] EWHC 2572;*
- *Georgieva v Nursing & Midwifery Council [2017] SC EDIN 12;*

- *Constantinides v Law Society [2006] EWHC 725 (Admin);*
- *Enemuwe v NMC [2013] EWHC 2081 (Admin), and;*
- *Mahon v Air New Zealand [1984] A.C. 808 (1983).*

Submissions

11. Both counsel provided written submissions to the Tribunal, and also made oral submissions.

Submissions on behalf of Dr Tadros

12. Mr Hockton, on behalf of Dr Tadros made submissions in relation to the Paper and the Judgment.

13. Mr Hockton submitted that the case relates purely to the evidence given at the Trial and that the GMC relies upon the Paper, which was not part of the Trial bundle and which Dr Tadros was not asked about during his evidence. He submitted that given that the case arises from criticisms made by the Judge of the evidence Dr Tadros gave at the Trial, the Paper is irrelevant and it would be unfair to introduce a document which Dr Tadros had not been asked to comment upon in evidence.

14. In respect of the proposed redactions to the Judgment, Mr Hockton submitted that these paragraphs are either not relevant to the issues that fall to be decided in this case, or are prejudicial to Dr Tadros. In particular, the Judge's opinions, findings and analysis are not relevant to a Fitness to Practise ('FtP') tribunal, which will have to make its own findings on the facts. He submitted that a tribunal must come to its own conclusions, uninfluenced by the Judge's views and that there is an obvious risk of prejudice if the Judge's analysis is placed before the tribunal in evidence.

15. Mr Hockton submitted that Dr Tadros was not a party to the intellectual property proceedings, the subject matter of which were entirely different from the subject matter of this case. He submitted that the admission of the Judge's analysis offends the general rule in *Hollington v Hewthorn* concerning the admissibility of findings made by another body, and that it is also unfair given that Dr Tadros was not a defendant in the proceedings, did not have his own representation and that no allegation of dishonesty was put to him during those proceedings.

16. Mr Hockton submitted that the GMC relies upon the transcript of evidence given at trial and that a tribunal can be made aware of the context of the evidence in this case without reference to the findings and analysis, as set out in *Squier v GMC.* He submitted that the *Hollington v Hewthorn* principle is, as stated in *Squier* at paragraph 42, expressed in *Hoyle v Rogers at* paragraph 39 in the judgment of Clarke LJJ:

> *"As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ["the trial judge"], and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law irrelevant and not one to which he ought to have regard."*

17. Mr Hockton submitted that there is added concern about reliance on the Judgment in this case as the Judge's adverse criticism of Dr Tadros came out of the blue, there was no allegation of dishonesty put to Dr Tadros during the Trial, and that counsel for the claimant specifically stated that dishonesty was not alleged. He referred the Tribunal to the case of *Mahon v Air New Zealand [1984] A.C. 808 (1983)*, and submitted that natural justice required the Judge to have ensured that Dr Tadros had been given the opportunity to address any allegation of dishonesty before coming to any conclusion.

18. He submitted that the situation in this case mirrors that in *Vogon International Ltd v SFO* and that there is strong judicial support from the Court of Appeal to indicate that the Judge was wrong to express her criticism of the Respondent in the way she did and that moreover, as set out in *Vogon,* it was unfair to do so.

<u>Submissions on behalf of the GMC</u>

19. Mr Grey, counsel on behalf of the GMC, submitted that it is not accepted that the case relates purely to the evidence given at trial, that the subject of the Allegation is the evidence given at the Trial and its veracity, and that whether the evidence was or was not true is a matter that a tribunal is entitled to consider in the context of the evidence taken as a whole. In respect of the Paper, he submitted that it is not accepted that the Paper is irrelevant by reason of Dr Tadros not being asked about it during the Trial and that its purpose is as background information for a tribunal, which will be exercising its own judgement and conducting "due inquiry" into whether the evidence given by Dr Tadros to the Court was true or not.

20. Mr Grey submitted that Dr Tadros' genuine belief is relevant and is informed by his knowledge at the time, and that the Paper is therefore highly relevant. He submitted that no basis for demonstrating its admission would be prejudicial has been offered, such that any prejudice could be said to outweigh its probative value, and that in the absence of any such prejudice being identified the material is relevant and, pursuant to Rule 34, admissible.

21. In respect of the proposed redaction of the Judgment, Mr Grey submitted that the case law relied upon by Mr Hockton is based largely on admissibility in Court proceedings. In particular reliance is placed upon the cases of *Hollington v Hewthorn* and *Rogers v Hoyle* for the principle that the judgment of a trial judge cannot be admissible in the proceedings, and by parenthesis in GMC proceedings. He submitted that the former was impliedly rejected later the same year by the House of Lords in relation to professional disciplinary proceedings in *GMC v Spackman* and that the latter was subject to significant judicial criticism and amendment in the case of *R (on the application of Squier) v GMC [2015] EWHC 299 (Admin).*

22. Mr Grey submitted that there is therefore no basis in law for the Application made for two primary reasons. Firstly, the Application is based largely on law relating to Court proceedings as distinct from professional disciplinary proceedings, and secondly the law relied upon either does not apply at all in the context of professional disciplinary proceedings, or has been distinguished to such a degree by subsequent judgments that it no longer represents the true and accurate position.

23. Mr Grey submitted that neither the MPTS nor the GMC is entitled to abrogate their respective statutory duties to undertake a thorough investigation simply because the complaint is reflected in a judgment before a Court. FtP tribunals are well used to

appropriately considering evidence in numerous different ways and will be able to consider the opinions and the analysis of the Court and pay it such weight as is appropriate. He submitted that an independent fact-finding tribunal, appraised of the facts, can make its own due inquiry into the matter and determine if there is sufficient evidence upon the balance of probabilities to satisfy it that the Allegation is made out.

24. Mr Grey submitted that it is wholly wrong to seek to limit the extent of an expert tribunal's knowledge of the evidence and specifically to seek to hide the opinion of the fact-finder in the case, which itself is central to the issues before it.

25. Mr Grey submitted that it remains open to Dr Tadros to identify any specific paragraphs within the Judgment that give rise to prejudice over and above the blanket approach taken thus far, but that in the absence of the doctor taking the opportunity to identify any such prejudice, the evidence is clearly relevant and its admission satisfies the law such that it should properly be admitted pursuant to Rule 34 of the Rules.

Prima Facia or Background Evidence

26. Both parties submitted that should the Tribunal determine that the unredacted Judgment is admissible, parties would be assisted by the Tribunal also determining in what context it should be considered by a substantive tribunal, namely as background or prima facia evidence.

Legal Advice

27. The Tribunal took account of the requirements of Rule 34(1) that evidence adduced before a Tribunal must be both fair and relevant, which states:

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

28. The Legally Qualified Chair gave legal advice to the Tribunal where necessary during the Tribunal's deliberations. However, given the particular circumstances of this case such advice was limited, and did not involve any matters which had not already been canvassed

during the hearing, due to the substantial common ground between the parties on the relevant authorities, albeit with disagreement over their applicability in this case.

29. In the circumstances the Legally Qualified Chair did not consider it necessary to give further legal advice in the presence of the parties, as this would have involved repeating that which had already been canvassed earlier in the hearing.

30. The Tribunal was satisfied in the circumstances that this approach was fair and it considered merits of the admissibility application in light of the legal framework applicable and the submissions made by both parties.

The Tribunal's Decision

31. The Tribunal noted that this case has arisen following civil proceedings in relation to intellectual property rights where Dr Tadros was a witness, and not a party to the proceedings.

The Paper

32. The Tribunal first considered the admissibility of the Paper, co-authored by Dr Tadros.

33. The Paper, which did not form part of the Trial bundle but which was disclosed prior to the Trial, was referenced by Judge Clarke at paragraph 74 of her Approved Judgment (the Judgment), dated 9 January 2019, where she stated:

> *"It is convenient to note at this point that after the trial, an application was made by the Claimants who sought permission to admit evidence in the form of a paper written by Professor Tadros which had been disclosed to it by the Defendant, but which they had not put in the trial bundle, which they said called into question the veracity of certain elements of his evidence. The Claimants asked the court to reopen the trial, allow Professor Tadros to file a witness statement dealing with the issue if so advised, and then be recalled for cross-examination. The application was listed before me on 8 November 2018 and after hearing from counsel for both parties, I dismissed it. I then put it out of my mind. I record here that the Claimant's application and the allegations made against Professor Tadros formed no part of my consideration in reaching*

my findings set out in the paragraph above, which are based solely on the evidence before me at the trial."

34. The Tribunal was of the view that whilst the Paper was not included in the Trial bundle, it was referenced by the Judge in her summary. Dr Tadros was one of seven co-authors of the Paper. The Paper is an evaluation of the Rapid Assessment Interface and Discharge (RAID) integrated model at the Trust. The Paper was published in The Psychiatrist in 2013 and is therefore in the public domain. As such, it does form part of the background and context of the Trial and subsequent Allegations about Dr Tadros' honesty during his evidence.

35. In any circumstance, the Tribunal did not accept the submission of Mr Hockton that this case relates purely to the evidence given at the Trial and that as Dr Tadros was not asked about the Paper in evidence, it is irrelevant. The basis of the Allegation against Dr Tadros is the evidence he gave at the Trial, but this does not preclude any relevant information or evidence in relation to the Allegation being presented simply because it was not included within the Trial bundle or discussed during Dr Tadros' evidence. The key consideration for the Tribunal is whether the evidence is fair and relevant.

36. The Tribunal was of the opinion that the Paper clearly relates to RAID activity and refers to training and courses in respect of RAID, and could be considered as indicative of the level of organisation involved in this regard. Given that the Allegation against Dr Tadros will require the Tribunal hearing the substantive matters to determine whether Dr Tadros' evidence at the Trial was honest and what his state of knowledge was at the time of the Trial, such material may have significant probative value.

37. The Tribunal, having concluded that the Paper is relevant to the case, considered whether it would be fair to admit the Paper as evidence. The sole argument put forward by Mr Hockton as to why it would be unfair to admit it as evidence is that Dr Tadros was not asked to comment upon it during the evidence he gave to the Trial. However, Dr Tadros would be able to give evidence and his representatives would be able to make submissions in respect of the applicability and relevance of the information contained within the Paper were it to be admitted.

38. Having concluded that the Paper is relevant and may be of assistance to a Tribunal considering the Allegation, and that the admission of the Paper would not be unfair to Dr Tadros, the Tribunal determined to allow the admission of the Paper as evidence in this case.

The Judgment

39. In reaching its determination on the Judgment, the Tribunal first considered whether it is relevant to the GMC case and the Allegation against Dr Tadros.

40. The Tribunal was mindful of the submission of Mr Hockton that the Tribunal considering the Allegation will have the full transcript of the Trial along with all the documents that Dr Tadros was asked about during his evidence, and that therefore further background by way of the unredacted Judgment is entirely unnecessary. However, the Tribunal was of the opinion that the transcript and evidence from the Trial will be considered accordingly in any circumstance and concluded the Judgment and Judge Clarke's comments, which are the starting point of these proceedings, are relevant and assist in understanding the context of the Allegation.

41. The Tribunal noted that the Allegation stems entirely from Judge Clarke's comments in the Judgment, as referenced by Dr Tadros in his self-referral to the GMC, and that no other party has alleged dishonesty or misconduct in this case. The Tribunal concluded that the Judgment is therefore highly relevant to the case, and is in essence the document on which the case is predicated.

42. Given that the GMC's case is centred around the Judgment, the Tribunal was of the view that were a Tribunal considering the Allegation to be provided a redacted Judgment, as per the Application, it would not have all the relevant and causal information that has led to this case. Without this, going through the transcript of the Trial exhaustively and trying to come to a decision as to whether Dr Tadros was dishonest would be a more difficult exercise as the unredacted Judgment would be the logical starting point to assess the Allegation.

43. The Tribunal then went on to consider the fairness of the proposed bundle and whether there would be any injustice to Dr Tadros in allowing the disputed paragraphs to be admitted.

44. The Tribunal reiterated its earlier finding that the Judgment has significant probative value in this case and concluded, in light of the relevant case law, that it could only be considered prejudicial if Dr Tadros is unable to rebut Judge Clarke's conclusions. However, Dr Tadros will have the opportunity to counter any potentially prejudicial matters at the substantive hearing by way of evidence and submissions. That hearing would necessarily need to consider the appropriate weight of any evidence, balance the differing views on the matter, and consider all applicable evidence, rather than simply adopt the Judgment. It would analyse Judge Clarke's conclusion and consider its potential subjectivity in light of all the facts.

45. The Tribunal considered *Georgieva v The Nursing and Midwifery Council,* where Sheriff Welsh QC paraphrased the case of *Constantinides v Law Society*:

> *"In that case the court considered an appeal from The Solicitors Disciplinary Tribunal which had struck off a solicitor for dishonesty. The court held the Tribunal had been entitled to read a decision of a High Court judge which made a finding of dishonesty against a solicitor and rely on the judgment as admissible to prove background facts in the context of the misconduct alleged. The court held the disciplinary tribunal was a skilled and expert body well able to reach its own conclusions, and its finding that the solicitor had acted dishonestly was justified. In my view the same can be said of the present case. The Investigating Committee was a skilled and expert body that reached its own conclusions in my opinion."*

46. The Tribunal was of the view that this case law indicates that a disciplinary tribunal is entitled to read and rely on "background facts" in considering an allegation, and can reach its own conclusions as to the weight, if any, to attribute to evidence and such background information.

47. In *GMC v Spackman,* Viscount Simon LC states:

> *"It is worth observing that this problem does not arise only in connexion with conclusions reached in the Divorce Court. A jury's verdict of justification in proceedings for slander, judgment for the plaintiff in an action for seduction, a bastardy order made by a bench of magistrates - all these, and many other, instances of adverse conclusions reached in a court of law might conceivably in*

certain circumstances lead to a charge against a medical man of infamous conduct in a professional respect. It seems obvious, in these other instances, that, while the council might well treat the conclusion reached in the courts as prima facie proof of the matter alleged, it must, when making "due inquiry" permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention. The previous decision is not between the same parties. There is no question of estoppel or of res judicata. In such cases the decision of the courts may provide the council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the council should hear the challenge and give such weight to it as the council thinks fit."

48. The Tribunal interpreted the case law as indicating that a disciplinary tribunal can admit the findings or judgment of another body or proceedings, but that as part of "due enquiry", the doctor must be allowed to challenge the correctness of such conclusions and call evidence accordingly.

49. This principle is reiterated in *Chaudhari v The General Pharmaceutical Council,* where Mr Justice King stated:

"71. I turn to the evidential status of the court findings and orders. The Committee, at paragraphs 8.3 and 8.4, demonstrated that the Committee were alive to the correct evidential status of court findings, namely "they were strong prima facie evidence of their contents, but were not conclusive of the matter". This was in accordance with the decision of the House of Lords in Spackman v GMC [1943] AC 627 which is to the effect that a finding in civil proceedings is not conclusive evidence in subsequent disciplinary proceedings but does provide prima facie evidence of the facts found; that the practitioner should be given a fair chance to explain himself, but a disciplinary tribunal is not required to conduct itself as a court of law rehearing all the evidence underlying those findings. Thus the Committee said at paragraph 8.4:

> *"We therefore accepted that the court records and orders specified in the amended notice of enquiry [sic] and in the Society's bundle of evidence put before us, were strong prima facie evidence of their contents, but were not conclusive of the matter. We must and did*

consider Ms Chaudhari's evidence in respect of each of the allegations before making any findings of fact on the balance of probabilities, bearing in mind the burden of proof remains on the Society."

72. I am satisfied that the Committee did in this respect properly apply the law as set out in Spackman.
…"

50. The Tribunal was satisfied that a professional and skilled Tribunal could appropriately assign proportionate weight to the evidence put before it and reach an independent determination, in line with FtP rules.

51. Mr Hockton had referred the Tribunal to the case of *Enemuwe v NMC [2013] EWHC 2081 (Admin).* The Tribunal concluded that this was not applicable to this application as it related to the admissibility of a report on a supervisory investigation and had been distinguished from *Squier v GMC*, which was more closely related to the substance of this application.

52. In Squier the key points identified by Ousley J in relation to admissibility of evidence were:

i) The starting point was the regulators rules regarding admissibility of evidence. Rule 34(1) of the GMC Fitness to Practise Rules 2004 (as amended) provides that the panel may admit evidence considered to be fair and relevant, whether or not such evidence would be admissible in a court of law. It was unhelpful, therefore, to use *Hollington v Hewthorn* concerning admissibility of judgments in subsequent court proceedings save to the extent that it goes to the question of what is fair and relevant.

ii) Where there has been a trial at least before a High Court Judge, the notes of evidence and judgment might afford prima facia evidence, but not conclusive evidence, in support of disciplinary charges.

iii) The registrant may call evidence to rebut the findings in a court judgment.

53. The Tribunal also considered the case law in *Mahon* and *Vogon.* It determined that when the credibility of a witness is challenged, this is not always put to them as part of the

proceedings, particularly where they are not party to said proceedings, and that as long as they are given the opportunity to rebut any criticisms, such judgments can be considered in disciplinary proceedings. This was the situation in the case of *Squier*, although the Tribunal notes that in that case some matters in a judgment had been redacted.

54. The relevant authorities indicate that a panel or tribunal should be very careful when considering any such judgments or findings of another body, and that a 'fact' that has been found by another party should not be taken as proof in and of itself. However, with those cautions in mind and exercising care, the unredacted Judgment is admissible and should be included in the Bundle.

55. The Tribunal did not support the submission of Mr Grey that there is no legal basis for the Application, but rather concluded, upon considering the case law, that such an application can be made and considered by a tribunal on its specific merits and circumstances.

56. In respect of whether the FtP tribunal hearing the substantive matters of the case should be provided with the unredacted Judgment as background or prima facia evidence, the Tribunal determined that this would be a matter for said tribunal exercising its expert judgement and weighing the evidence in light of all the information put before it. The Tribunal was of the view that it would not be appropriate for it to predetermine how such a tribunal should assess this evidence, and that were it to make such a prescription, this could potentially bind and impede the tribunal considering the Allegation in due course.

57. In summary, the Tribunal determined that both the Paper and the unredacted Judgment are both relevant and fair and refused the Application, determining that the tribunal considering the substantive matters will be best placed to comment on the manner in which this evidence will be treated.

58. That concludes this preliminary hearing.

Confirmed
Date 26 March 2021 Mr Ian Comfort, Chair