PUBLIC RECORD

Dates: 15/03/2021 - 26/03/2021

Medical Practitioner's name:	Dr Lopa PATEL
GMC reference number:	7081384
Primary medical qualification:	MB ChB 2010 University of Leicester

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Not Impaired

Summary of outcome

No warning

Tribunal:

Legally Qualified Chair	Mr Jetinder Shergill
Medical Tribunal Members:	Dr Mahesh Nagar, Dr Jill Edwards

Tribunal Clerk:	Ms Hollie Middleton

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Stephen McCaffrey, Counsel, directly instructed
GMC Representative:	Ms Susie Kitzing, 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 Facts and Impairment - 26/03/2021

Background

1. Dr Patel qualified with an MB ChB from the University of Leicester in 2010. Dr Patel commenced her Plastic Surgery training with Health Education England in the West Midlands on 4 February 2015. In 2016, when the chronology of events began, Dr Patel was practising as an ST4 Plastic Surgery Registrar.

2. Dr Patel engaged Artizan Medical Prosthetics Limited ('Artizan') to make a prototype prosthetic breast simulator model ('the Model') for training purposes. The allegation that led to Dr Patel's hearing can be summarised as concerns relating to her communications with Artizan. It was alleged that she knew the content of some of her communications to be untrue and that her actions in this regard were dishonest. It was further alleged that in some instances, Dr Patel sought to threaten or dissuade Artizan from protecting their intellectual property rights over the Model.

3. The initial concerns were raised with the GMC on 11 February 2019 by Ms B, who works for Artizan with the Director, Mr A. Artizan is a company that provides specialist prosthetic services to both the NHS and the private sector.

4. Dr Patel stated that the aim was to use the Model to teach surgeons and other juniors to mark breasts pre-operatively before breast reduction surgery. She stated that she was successful in securing funding from Health Education England ('HEE') and the British Association of Aesthetic Plastic Surgeons ('BAAPS'). She stated that in seeking assistance in the development of the concept she was directed to Mr A and that, on 13 September 2016, Dr Patel wrote to him advising of the initial specifications that she had in relation to the Model.

5. In her complaint, Ms B stated that Artisan designed, created and manufactured the silicone model based upon Dr Patel's idea along with a customised mannequin and stand. Ms B stated that Dr Patel did not purchase the design or the moulds used for the Model and

there was an understanding that Artizan would be manufacturing the subsequent models that Dr Patel would be selling. Both Dr Patel in her written statement and Mr A in his evidence conceded that they had approached this arrangement in a casual manner and the Tribunal was not presented with evidence of a formal agreement drawn up between the two parties.

6. On 5 May 2018, Dr Patel messaged Mr A to say that she was liaising with a company in China to organise the manufacturing of the Model which she would retail. Mr A informed Dr Patel that he was under the impression that he would be manufacturing the Model. Dr Patel and Mr A subsequently agreed a 70/30 split from the proceeds of sale of the Model in Dr Patel's favour. On 9 July 2018, Dr Patel collected the Model from Mr A. There were other interactions between the parties leading up to relevant events for this determination.

7. On 20 October 2018 Mr A sent Dr Patel a text message asking whether she was still 'on board' with the Model and that he would have no choice but to market the Model himself as he was banking on it progressing. Dr Patel stated in response that Mr A would not able to market the Model as it belonged to her both 'legally and intellectually' and that she had a contract of sales and marketing between her and BAAPS, meaning that if Artisan were to market the Model then they would '*be legally chased by them for sure*'.

8. On 25 October 2018, Mr A sent Dr Patel a letter stating that he was the owner of the copyright of the Model and asked her to provide him with £15,000 for the use of his work to date. On 5 November 2018, Dr Patel sent an email to Ms B stating that there was no signed contract regarding the Model and that she had not relinquished the intellectual property rights of the Model over to Artizan. On 11 November 2018, Dr Patel registered the Model as her intellectual property with the Intellectual Property Office.

The Admitted Facts

9. At the outset of these proceedings, through her counsel, Mr McCaffrey, Dr Patel made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules'). In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

Application under Rule 17(2)(g)

10. At the end of the GMC case Mr McCaffrey, on Dr Patel's behalf, made an application under Rule 17(2)(g) of the Rules, that there was no case to answer in respect of all the remaining paragraphs of the Allegation where no admissions had been made by Dr Patel. The Tribunal determined that there was no case to answer in those respects. The Tribunal's full decision is included at Annex A. The Tribunal noted that the only matters left after the application was successful, were the admitted facts.

The Allegation and the Doctor's Response

11. The Allegation made against Dr Patel is as follows:

That being registered under the Medical Act 1983 (as amended):

1. ~~On 28 September 2018, when asked for feedback about a national cosmetic expo show taking place in London in October 2018 ('the Show'), which you had previously indicated you could get a show casing stand for, you sent a text message to Mr A stating 'The show's not going ahead so dont worry', which was untrue.~~ Deleted after a successful Rule 17(2)(g) application

2. ~~You knew that the information you provided to Mr A as set out in paragraph 1 was untrue, in that you knew you were intending to attend the Show to market your breast model ('the Model').~~ Deleted after a successful Rule 17(2)(g) application

3. ~~Your actions as described at paragraph 1 were dishonest by reason of paragraph 2.~~ Deleted after a successful Rule 17(2)(g) application

4. ~~On 10 October 2018, you sent a text message to Mr A, which stated 'Everything is on the backburner with model, my other business has taken off….so atm there's no update about the breast model', which was untrue.~~ Deleted after a successful Rule 17(2)(g) application

5. ~~You knew that the information you provided to Mr A as set out in paragraph 4 was untrue because you were intending to register your intellectual property rights in the Model.~~ Deleted after a successful Rule 17(2)(g) application

6. ~~Your actions as described at paragraph 4 were dishonest by reason of paragraph 5.~~ Deleted after a successful Rule 17(2)(g) application

7. On 20 October 2018 you sent text messages to Mr A which stated:

    a. ~~'You wont be able to market my model as its legally and intellectually mine and protected as such';~~ Deleted after a successful Rule 17(2)(g) application

    b. 'There is now also a legal contract of sales and marketing drawn up between myself and the British Aesthetics Surgeon's Association ('BAAPS')….so if you go ahead and market this model you are going to be chased by them for sure'; Admitted and found proved

    which was untrue.

8. ~~You knew that the information you provided as outlined at paragraph 7a was untrue because you had not filed an application to register the model as a registered design with the Intellectual Property Office.~~ Deleted after a successful Rule 17(2)(g) application

9. ~~Your actions as described at paragraph 7a were dishonest by reason of paragraph 8.~~ Deleted after a successful Rule 17(2)(g) application

10. You knew the information you provided as outlined at paragraph 7b was untrue because there was no legal contract between you and BAAPS. Admitted and found proved.

11. Your actions as described at paragraph 7b were dishonest by reason of paragraph 10. Admitted and found proved.

12. On 5 November 2018, you sent an email to Ms B which stated:

    a. ~~'I have a copy right [sic] in process already with the NHS I developed this with…', which was untrue;~~ Deleted after a successful Rule 17(2)(g) application

    b. '…unless you can provide me with documents to show that you have obtained this [copyright] already, you will be hearing from my solicitors in due course'. Admitted and found proved

13. ~~You submitted a letter dated 4 March 2019 with your counter DF19B form which stated~~:

    a. ~~you had filed for design registration after receiving acknowledgment that the design rights were yours from Health Education England and BAAPS, or words to that effect~~; Deleted after a successful Rule 17(2)(g) application

    b. ~~'the design…was soon after registered at the suggestion of the current Head of School of Surgery, [Dr C]'.~~ Deleted after a successful Rule 17(2)(g) application

    ~~which was untrue.~~

14. ~~You knew the information you provided as set out in paragraphs 12a and 13 was untrue.~~ Deleted after a successful Rule 17(2)(g) application

15. ~~Your actions as described at paragraphs 12a and 13 were dishonest by reason of paragraph 14.~~ Deleted after a successful Rule 17(2)(g) application

~~16. One or more of your remarks as set out in paragraphs 7b and 12 were intended to:~~

~~a. intimidate and/or threaten the recipient(s);~~ Deleted after a successful Rule 17(2)(g) application

~~b. dissuade the recipient(s) from protecting their intellectual property rights in the Model.~~ Deleted after a successful Rule 17(2)(g) application

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. To be determined

The Evidence

12. The Tribunal took account of all the evidence it received throughout the hearing, both oral and documentary.

13. The Tribunal received evidence on behalf of the GMC from Mr A who provided oral evidence in addition to his written witness statement. Mr A was the Director of Artizan who created the Model.

14. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Ms B, who worked for Artizan at the relevant time of events;
- Mr D, Director of Corporate Affairs at the University Hospitals Coventry and Warwickshire NHS Trust; and
- Ms E, Faculty Support Manager at HEE.

15. Dr Patel provided her own witness statement, dated 15 February 2021.

Documentary Evidence

16. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to:

- Initial email correspondence between Dr Patel and Mr A, dated 13 September 2016;
- Screenshots of text messages between Dr Patel and Mr A, various dates from June 2017 – October 2018;
- Email correspondence between Ms B, HEE and BAAPS, various dates from October 2018 and July 2019;
- Email correspondence between Dr Patel and Ms B discussing intellectual property rights, dated 5 November 2018;

- Assignment document between Dr Patel and University Hospitals Coventry and Warwickshire NHS Trust, dated 17 January 2019;
- Ms B's online complaint form to the GMC, dated 11 February 2019;
- DF19B Form submitted to the Intellectual Property Office ('IPO') by Dr Patel, dated 4 March 2019; and
- DF19A Form submitted to the IPO by Mr A, dated 18 March 2019.
- GMC Chronology (adduced during the Application under Rule 17(2)(g))

Impairment

17. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether the remaining paragraphs of the Allegation (paragraphs 7b, 10 and 11 which were admitted and found proved) lead to Dr Patel's fitness to practise being impaired by reason of misconduct.

Submissions

18. On behalf of the GMC, Ms Kitzing, Counsel submitted that Dr Patel's actions constituted misconduct and that her fitness to practise is impaired. She submitted that Dr Patel's dishonesty in stating that she had a legal contract with BAAPS when she did not, amounted to serious misconduct. She stated that although Dr Patel's dishonesty was not within her daily medical duties, it occurred in a related field and was linked by financial funding from HEE and BAAPS. She submitted that Dr Patel had relied on the BAAPS name which added to the seriousness of her dishonesty. She further submitted that Dr Patel's actions amounted to serious departure from Good Medical Practice (2013 Edition) ('GMP') and amounted to misconduct.

19. When considering impairment, Mr Kitzing stated that the Tribunal should have regard to *Grant* and submitted that Dr Patel's fitness to practise is impaired in relation to paragraphs b, c and d. She acknowledged that Dr Patel had made admissions at an early stage in proceedings which demonstrated some insight. However, she reminded the Tribunal that in being dishonest, Dr Patel had breached a fundamental tenet of the profession and that matters of dishonesty are harder to remediate than clinical failings. She submitted that a finding of impaired fitness to practise was required in order to maintain public confidence in the profession.

20. On behalf of Dr Patel, Mr McCaffrey, Counsel, submitted that at the time of the communication, Dr Patel and the NHS had a legal interest in the Model. He acknowledged that it did not excuse the assertion that Dr Patel made about BAAPS but invited the Tribunal to consider whether her fitness to practise is impaired in the whole context and framework of the circumstances in this case. He invited the Tribunal to consider that Dr Patel's dishonesty occurred during a heated exchange and that she had reacted in panic to Mr A's assertion that he was going to market the Model himself. He stated that Dr Patel's 'impulsive response was sent in blind panic' and was utterly out of character.

21. Mr McCaffrey submitted that Dr Patel made the single admission of dishonesty two years ago and it was in the absence of any other fitness to practise issues. He reminded the Tribunal of Mr A's evidence in that it was his assumption that BAAPS was likely to be involved in this commission and the NHS had funded it. He reminded the Tribunal that BAAPS was not an organisation that Dr Patel had no association with as they had been involved during the course of Dr Patel's correspondence with Mr A. He submitted that Dr Patel has always accepted that text message went 'too far'.

The Relevant Legal Principles

22. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal's judgement alone. The Tribunal accepted the LQC advice which amongst other things advised that the decision on impairment is a matter for the Tribunal's professional judgment taking account of all of the relevant circumstances, and bearing in mind the statutory overarching objective.

23. In approaching the decision, the Tribunal was mindful of the two stage process to be adopted: first whether the facts as found proved amounted to misconduct and that the misconduct was serious and then whether the finding of that misconduct which was serious could lead to a finding of impairment.

24. The Tribunal was assisted by the guidance provided by Dame Janet Smith in the Fifth Shipman Report, as adopted by the High Court in the case of *Council for Healthcare Regulatory Excellence v NMC and Grant [2011] EWHC 927*. In particular the Tribunal considered whether its findings of fact show that Dr Patel's fitness to practise is impaired in the sense that she:

> *'a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
>
> *b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
>
> *c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
>
> *d. has in the past acted dishonestly and/or liable to act dishonestly in the future.'*

25. In approaching the decision, the Tribunal adopted the two-stage process when considering whether a doctor's fitness to practise is impaired on the ground of misconduct: first whether the facts found proved amount to misconduct which was serious; and, if so, secondly, whether the doctor's fitness to practise is currently impaired as a result.

26. The Tribunal must determine whether Dr Patel's fitness to practise is impaired today, taking into account Dr Patel's conduct at the time of the events and any relevant factors since

then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

The Tribunal's Determination on Impairment

Misconduct

27. The Tribunal first considered whether Dr Patel's actions amounted to misconduct which was serious before it could then consider current impairment. It noted that paragraphs 7b, 10 and 11 of the Allegation referred to a text message sent by Dr Patel on 20 October 2018. That text was sent to Mr A who had been commissioned to produce the model. Dr Patel accepts the text was sent, that the content was known to be untrue and was therefore dishonest.

28. The Tribunal has already set out in detail a number of concerns in relation to the factual and evidential matrix of this case as it was presented to the Tribunal when dealing with Mr McCaffrey's R17(2)(g) application. At paragraph 24 of Annex A the Tribunal has already stated:

> *"…It noted that there was a paucity of evidence going to key aspects of the case and that some of the GMC's evidence required interpretation as to what it might or might not mean. It was satisfied this was a qualitative defect in the evidence (i.e. inherent weakness etc rather than issues of assessing reliability or preferring some evidence over other evidence). That was a consistent theme throughout."*

29. From the entirety of a case that involved a number of serious allegations including dishonesty, intimidation and threats, the Tribunal is left with a discrete group of charges to consider at this stage of proceedings. Those charges all relate to this one text message. It noted that these charges were admitted to by Dr Patel at an early stage.

30. The Tribunal noted that Dr Patel's 20 October 2018 text message was sent at a time when the relationship between the parties was beginning to deteriorate. It considered that paragraph 7b of the Allegation is a short extract of a very long text message. The Tribunal took the view that the tone of Dr Patel's response to Mr A is clearly one of frustration and asserting what she felt had gone wrong. The Tribunal concluded that it was probably ill advised to send such a lengthy and detailed message by text and that it was probably ill advised to respond to Mr A's message sent to her less than 5 hours earlier without thinking about its content. Mr A's earlier message said amongst other things he was considering marketing the models himself. The Tribunal considered this was likely to have been a 'red rag to a bull' to Dr Patel given the context of unclear rights over the intellectual property of the Model, a confused picture of whatever contractual or business relationship each considered existed between them, and an increasingly fractious relationship. The Tribunal noted Dr Patel's accounts in her witness statement:

"17 I accept sending the text messages referred to on 20th October 2018. I accept that this was all done in haste and was not the proper way to handle the situation. It was a reaction without thought. I had received the text message from Mr A stating that he would be marketing the model himself and I frankly panicked. This model had been made and paid for by the NHS and I saw this as an attempt to take my concept, paid for by someone else and treat it as his own without authority or basis.

18 Regrettably I did not take the time to compose a proper message in response and reacted in panic. My sole purpose was not to get into trouble and was the first time it really dawned on me that I was genuinely out of my depth. There had been no proper agreement between us and the entirely casual nature of the approach to this made me realise I had exposed myself and the NHS. I was genuinely afraid of repercussions. It is in this light I received the 9th November correspondence from the NHS."

31. The Tribunal was mindful that it has not had the benefit of hearing live evidence and that Dr Patel's statement has not been tested in cross examination. However, aside from her admitted dishonesty in the matters now before the tribunal, Dr Patel is someone in good standing with the GMC. The account put forward has the ring of truth to it. Despite the ill-considered manner in which she responded, the Tribunal accepted that the text was sent in a panic state. The Tribunal was satisfied things were beginning to unravel very quickly for Dr Patel in terms of 'her' project that she claimed such a fundamental stake in from inception to getting intellectual property rights assigned to her from the hospital (something the Tribunal has referred to in Annex A at paragraph 47 when dealing with other parts of the same text message). That is the context in which this admitted dishonesty took place. The reference to 'BAAPS' was cited by the GMC as an aggravating feature but the Tribunal did not consider this added anything of substance to its assessment.

32. The Tribunal was advised as to the law in this area by the LQC who amongst other things stated:

"An assessment of professional misconduct has been described as the falling short by omission or commission of the standards of conduct expected among medical practitioners. Such falling short must be serious and the adjective 'serious' must be given its proper weight. In assessing that, it may assist to note that case law has referred to such conduct as that which would be regarded as deplorable by fellow practitioners."

33. The Tribunal decided being dishonest was clearly a falling short of professional standards; and on the bare charges admitted to, it might lead an outside observer to conclude that. However, the Tribunal has borne in mind the full context of how that text message was sent and the salient points as to that background have been set out above. When looking at the proper context and the surrounding circumstances of sending that text message which was untrue, and dishonest, the Tribunal concludes that Dr Patel's would not be considered 'deplorable' by fellow practitioners. The behaviour fell below the standards expected but it can properly be characterised as an ill-considered and heated response to

something not reflected on properly before commenting further. That did not reach the requisite threshold of seriousness in the Tribunal's view when looking at all of the circumstances to amount to 'serious misconduct'.

36. The Tribunal has borne in mind the statutory overarching objective in reaching its decision that Dr Patel's actions did not amount to misconduct which was serious. This was an isolated matter in a peculiar set of circumstances and as such unlikely to be repeated. Dr Patel is in good standing with the GMC aside from these charges and she accepted she had been wrong and made early admissions to the GMC. Public confidence in the medical profession would not be undermined by our conclusions because of the peculiar circumstances of the case and the isolated nature of this lapse in professional judgment. The declaring and upholding of proper professional standards and conduct for the members of the profession is likewise maintained. That is because a properly informed observer would conclude the actions which led to the admitted charges were ill-considered but not sufficiently serious to bring into question fitness to practise. There has also likely been a salutary effect on Dr Patel of these matters having been ventilated in a formal Tribunal process, and a signal to the wider profession that lapses in professional judgment in business dealings may lead to the instigation of the disciplinary process.

34. Matters of impairment do not arise because the admitted paragraphs 7b, 10 and 11 (found proved) do not amount to misconduct which was serious. The Tribunal could not proceed to consider impairment and therefore, Dr Patel's fitness to practise is not impaired.

35. No submissions were raised by the parties in terms of a warning. Given the Tribunal's findings on misconduct, it determined that there were no factors which indicated that a warning was appropriate in this case.

36. XXX.

37. That concludes this case.

Confirmed
Date 26 March 2021 Mr Jetinder Shergill, Chair

ANNEX A – 25/03/2021

Rule 17(2)(g) Application

38. At the closure of the GMC case on facts, on behalf of Dr Patel, Mr McCaffrey made an application of 'no case to answer' under Rule 17(2)(g) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules').

39. Rule 17(2)(g) states that:

> *'The practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld'*

40. Mr McCaffrey submitted that the application was in relation to the following paragraphs of the Allegation:

1. On 28 September 2018, when asked for feedback about a national cosmetic expo show taking place in London in October 2018 ('the Show'), which you had previously indicated you could get a show casing stand for, you sent a text message to Mr A stating 'The show's not going ahead so dont worry', which was untrue.

2. You knew that the information you provided to Mr A as set out in paragraph 1 was untrue, in that you knew you were intending to attend the Show to market your breast model ('the Model').

3. Your actions as described at paragraph 1 were dishonest by reason of paragraph 2.

4. On 10 October 2018, you sent a text message to Mr A, which stated 'Everything is on the backburner with model, my other business has taken off….so atm there's no update about the breast model', which was untrue.

5. You knew that the information you provided to Mr A as set out in paragraph 4 was untrue because you were intending to register your intellectual property rights in the Model.

6. Your actions as described at paragraph 4 were dishonest by reason of paragraph 5.

7. On 20 October 2018 you sent text messages to Mr A which stated:

   a. 'You wont be able to market my model as its legally and intellectually mine and protected as such';

   …

   which was untrue.

8. You knew that the information you provided as outlined at paragraph 7a was untrue because you had not filed an application to register the model as a registered design with the Intellectual Property Office.

9. Your actions as described at paragraph 7a were dishonest by reason of paragraph 8.

…

12. On 5 November 2018, you sent an email to Ms B which stated:

   a. 'I have a copy right [sic] in process already with the NHS I developed this with…', which was untrue;

   …

13. You submitted a letter dated 4 March 2019 with your counter DF19B form which stated:

   a. you had filed for design registration after receiving acknowledgment that the design rights were yours from Health Education England and BAAPS, or words to that effect;

   b. 'the design…was soon after registered at the suggestion of the current Head of School of Surgery, [Dr C]'.

which was untrue.

14. You knew the information you provided as set out in paragraphs 12a and 13 was untrue.

15. Your actions as described at paragraphs 12a and 13 were dishonest by reason of paragraph 14.

16. One or more of your remarks as set out in paragraphs 7b and 12 were intended to:

a. intimidate and/or threaten the recipient(s);

b. dissuade the recipient(s) from protecting their intellectual property rights in the Model.

Submissions on behalf of Dr Patel

41. Mr McCaffrey, Counsel, provided both written and oral submissions. He submitted that the GMC have sought to enter into a civil dispute and have made their case in the context of an absence of evidence on intellectual property and contract law which is the central issue in this case. He stated that the GMC noted within its opening that this case was a matter of witness credibility and Tribunal assessment.

42. When considering this application, Mr McCaffrey invited the Tribunal to be mindful as to the narrative of the case when assessing the allegations and submitted that considering them in factual isolation could lead to a distorted narrative. He referred to Mr A's oral evidence in that he had accepted that: both sides were too casual; nothing was ever formally agreed in contract; he was commissioned to make the Model and was paid in full for it; he was paid the fee he had quoted and invoiced for; and that he made the Model and handed it to Dr Patel.

43. Mr McCaffrey stated that the correspondence between Mr A and Dr Patel does not support a contention that any agreement between them was in place and that Mr A's attempts to explain it in his evidence were disingenuous. He reminded the Tribunal that the GMC bear the burden of proof throughout this stage of proceedings and that it is incumbent on them to identify why the relationship between Dr Patel and Mr A is one that falls to be regulated.

44. Mr McCaffrey made further reference to Mr A's evidence in that he has now accepted that his view of the situation was based upon the incorrect notions that Dr Patel was 'off making a fortune' and had 'stitched him up'. Mr McCaffrey reminded the Tribunal that not a single Model has been sold and that this would not have been possible without Mr A as he has retained the moulds.

45. Mr McCaffrey invited the Tribunal to consider that Dr Patel collected the Model from Mr A in July 2018 but the allegations date from September 2018 when the relationship had broken down and that bad feeling was evident on both sides. He submitted that if Dr Patel had a genuine desire to do wrong or be dishonest she would have registered her intellectual property rights in July 2018.

46. Mr McCaffrey submitted that Mr A was evasive, inconsistent and contradictory in his evidence. He stated that Mr A was disingenuous when seeking to explain the value of the 'additional ideas' that he made to the Model which he did without notification to or authorisation by Dr Patel. Mr McCaffrey reminded the Tribunal that Mr A then sought to advance his additional ideas as the reason that he has an intellectual property interest on the Model. He submitted that Mr A held the balance of power in the relationship as he was the one who knew how to make sure he was awarded the project by 'playing the NHS £5,000 cap system'. Mr McCaffrey submitted that Mr A's motive makes his evidence unreliable.

Dishonesty

47. In relation to the paragraphs of the Allegation that refer to Dr Patel's alleged dishonesty, Mr McCaffrey referred the Tribunal to the test as set out in *Ivey* and that the GMC must have made a determination that Dr Patel's thought process in dealing with Mr A was wrong and betrayed a duty that she owed him. He stated that in assessing whether something is untrue and dishonest requires an outline of the duty owed. In relation to the consideration of the objective element of the test, he submitted that the background and relationship between Dr Patel and Mr A is necessary in order to assess what was said and the circumstances in which it was said by the standards of ordinary and decent people.

48. Mr McCaffrey stated that the GMC has not provided any of the context required in order to be able to undertake an assessment of honesty at any stage. He submitted that the case must therefore fail at this point.

Submissions on behalf of the GMC

49. Ms Kitzing, Counsel, provided both written and oral submissions. She stated that a number of matters in dispute are factual, for example, paragraph 1, whether a text was untrue or not. She reminded the Tribunal that if it forms the view that on one possible view of the facts and the text message set out at paragraph 1 of the Allegation, they could properly come to the conclusion that the text message was untrue on the balance of probabilities, the application would fail and the Tribunal would then refer to paragraph 2 of the Allegation, applying the same test.

50. Ms Kitzing accepted that there was no written contractual relationship between Mr A and Dr Patel, although she highlighted that the agreement between them was reflected in the text messages within the evidence before the Tribunal.

Dishonesty

51. In relation to the consideration of dishonesty, Ms Kitzing stated that the Tribunal has only heard the GMC's case. She submitted that although Dr Patel's witness statement forms part of the evidence before the Tribunal, her case has not yet commenced and therefore this application should only be determined on the basis of the GMC's evidence. She submitted that the test in relation to dishonesty therefore has to be adapted and only the test in relation to the objective standards of ordinary decent people should be applied.

52. Ms Kitzing submitted that if the Tribunal forms the view on the balance of probabilities that on one possible view of the facts and the text message set out at charge 1, they could come to the conclusion that the Doctor's conduct was dishonest by the standards of ordinary, decent people, the application should fail. She submitted that this approach should be replicated during all of the subsequent paragraphs of the Allegation referred to in this application.

Relevant Legal Principles

53. The Tribunal reminded itself that, at this stage, its purpose was not to make findings of fact but to determine whether sufficient evidence, taken at its highest, had been presented by the GMC such that a Tribunal, correctly advised as to the law, could properly find the relevant paragraphs proved to the civil standard. The Tribunal considered Mr McCaffrey's submissions and those of Ms Kitzing. It also took account of the evidence presented to date, both oral and documentary, in reaching its decision.

54. The LQC provided substantial written legal advice which was the product of various iterations between him and both counsel. The non-legal members of the Tribunal only saw the finalised version which had been commented upon by both counsel. The GMC maintained their own position as to the law on certain matters and a supplemental written submission was provided in response to the LQC advice. At the close of submissions the LQC reminded the Tribunal to read the formulation set out in his advice as to 'prima facie case' and that there must be 'sufficiently cogent evidence' as these were serious charges. He also put on record a matter relating to 'inferences' that the GMC had made submissions about and made it clear to the Tribunal that: "we are entitled to draw reasonable inferences from the evidence before us but we must not speculate about matters". Both counsel accepted that was correct. It was also put on record at an earlier stage that the GMC was not making submissions on 'public interest' matters (i.e. in terms of amending charges or adjourning); which was in response to the LQC seeking the GMC position on it as to any further advice required.

55. Amongst a significant amount of other matters, the LQC's advice covered key aspects that the burden of proof is on the GMC to prove their case and that the Tribunal must decide matters on the balance of probabilities, namely that it needs to be satisfied that something is more likely than not. The LQC reminded the Tribunal that the Allegation includes charges of dishonesty and 'intimidating and threatening' behaviour which can be considered as serious charges against the doctor. Although the seriousness of the consequences does not require a different standard of proof, the Tribunal should be minded that its application should be flexible depending on the strength and cogency of the evidence. The more serious the consequence, the evidence adduced must be stronger for the necessary standard to be reached. The Tribunal must determine strength and cogency by looking at all of the circumstances of the charge and the evidence that goes to prove it. The LQC advice also synthesised a number of key concepts:

> *"14. Prima facie case: At this stage we are in essence looking at whether there is a 'prima facie' case. That is a useful shorthand for what underpins Galbraith (my reformulation) taking the "[GMC] evidence…at its highest … such that a [tribunal] properly directed [could] properly [find a charge proved]". I use that shorthand of 'prima facie case' below.*
>
> …
>
> *40. Consider the submissions made on the doctor's behalf and by the GMC in rebuttal. The challenges made are predominantly to the evidence relied on by the GMC as per the Galbraith formula…. My advice to you is all of the charges are serious, requiring sufficiently cogent evidence for a prima facie case to be shown at this stage. If you are satisfied that there is a prima facie case with sufficiently cogent evidence, the*

charge should proceed. If that has not been shown by the GMC at the end of their case (now), the charge should fall. That would be the approach to take to all charges including … We will need to give brief reasons for each charge as to why it should or should not proceed."

56. The Tribunal had particular regard to the case of *R v Galbraith [1981] 2 All ER 1060* which sets out a two part test to follow in order to ascertain the strength of the GMC's evidence. It states:

'How then should the judge approach a submission of 'no case'?

(1) If there is no evidence that the crime alleged has been committed by the defendant, then there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

57. The Tribunal also had regard to *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67,* paragraph 74 (amongst others) which sets out the test for dishonesty:

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

58. In relation to expert evidence, the Tribunal was advised that the GMC would have to provide their own expert opinion to prove their case if they relied on matters outside the Tribunal's experience and knowledge.

59. When making its determination, the Tribunal found it helpful to consider Mr McCaffrey's and Ms Kitzing's written and oral submissions on each individual paragraph which were made in addition to those outlined above. As such, the Tribunal have presented its determination below in this manner.

The Tribunal's decision

60. The Tribunal had regard to the relevant legal principles and LQC advice in its deliberations; and considered all of the evidence that had been presented by the GMC at the close of its case.

61. The Tribunal first considered the quality of the evidence that the GMC had adduced to evaluate whether, on the balance of probability, it could find the facts proved. It noted that there was a paucity of evidence going to key aspects of the case and that some of the GMC's evidence required interpretation as to what it might or might not mean. It was satisfied this was a qualitative defect in the evidence (i.e. inherent weakness etc rather than issues of assessing reliability or preferring some evidence over other evidence). That was a consistent theme throughout.

62. The Tribunal considered that the contractual and intellectual property issues had not been established by the GMC at the outset of this case. The GMC has not established who had the intellectual property rights at the time that the dispute between Dr Patel and Mr A occurred. Various assertions were made by Mr A about these matters but it was insufficiently cogent evidence. The Tribunal took the view that these issues were central to the case because without establishing those key aspects of the case the other factual findings were adrift from their proper context of what had gone on between the protagonists in the case.

63. The Tribunal kept foremost in mind that, at this stage, it was required to assess the sufficiency of the evidence taken at its highest and not to make any determination as to the facts. It therefore considered whether there was sufficiently cogent evidence before it in relation to the paragraphs of the Allegation that remain to be determined.

<u>Paragraphs 1, 2 and 3</u>

1. On 28 September 2018, when asked for feedback about a national cosmetic expo show taking place in London in October 2018 ('the Show'), which you had previously indicated you could get a show casing stand for, you sent a text message to Mr A stating 'The show's not going ahead so dont worry', which was untrue.

2. You knew that the information you provided to Mr A as set out in paragraph 1 was untrue, in that you knew you were intending to attend the Show to market your breast model ('the Model').

3. Your actions as described at paragraph 1 were dishonest by reason of paragraph 2.

64. Mr McCaffrey submitted that the premise of these paragraphs of the Allegation are 'highly concerning' and that the GMC have failed to make out the case that they seek. He stated that Mr A had accepted in his evidence that he believed this to only be referring to the showcase stand part of the show and not the entire 'Expo'. Mr A d did not believe that the whole Expo Show was cancelled. Mr McCaffrey reminded the Tribunal that the showcase stand did not go ahead. He submitted that paragraph 1 of the Allegation is a selective extract from the text message because there is further context in it and that the GMC had sought to define the Expo Show as 'the Show' in order to assist in the GMC's interpretation of the text message.

65. Mr McCaffrey stated that Dr Patel was always booked to speak about her surgical training at the Expo Show. It was part sponsored by BAAPS who part-funded the Model and that this arrangement pre-dated Dr Patel's proposal to Mr A. He submitted that paragraph 2 of the Allegation makes no sense and is incapable of proof in terms of evidencing Dr Patel's intent to market the Model.

66. Ms Kitzing submitted that the contents of the text message set out in paragraph 1 of the Allegation were untrue as Dr Patel knew that the Expo Show was going ahead and was intending to attend it. She stated an inference can be drawn that Dr Patel was planning to market the Model at the Expo Show as Dr Patel was talking about the Model in a 10 minute podium slot and that it was inherently unlikely that Dr Patel had not planned to do this prior to attending it. Ms Kitzing submitted that these are all points that contradict the information that Dr Patel provided in the text message, dated 28 September 2018.

67. Ms Kitzing referred the Tribunal to Mr A's evidence that he did not know that Dr Patel was going to do the 10 minute podium talk and that he had assumed that she wasn't taking the Model along in order to promote or sell it. Mr A stated that if Dr Patel wanted to take the Model then it meant that they still had an agreement trying to get sales.

68. The Tribunal first considered paragraph 1 of the Allegation. It had regard to the full text message sent by Dr Patel to Dr A on 28 September 2018 which stated:

> *'…Yes I'll try calling you today. The show's not going ahead so dont* [sic] *worry. I'll explain all.'*

The Tribunal noted that the charge recites a selective aspect which puts the matter out of context. It also concluded that the reference to the Expo Show not going ahead is not clearly

identifiable in paragraph 1 of the Allegation because it does not provide the full context of what was going on between Dr Patel and Mr A, and what Dr Patel had been entitled to arrange herself in attending the 'Show'.

69. The Tribunal had regard to Mr A's oral evidence in which he stated that he had not taken the message to mean that the whole Expo Show was cancelled but had taken it to mean that Dr Patel would not attend with the showcase stand and did not need his help. That would therefore mean the content of the text was true.

70. The Tribunal noted Ms Kitzing's submissions that the inference of Dr Patel planning to attend the Expo Show can be drawn from Dr Patel's subsequent attendance. However, it took the view that reasonable inferences cannot be drawn from the evidence before it as to what Dr Patel's intention was in attending the Expo Show because preparations for going to the Expo Show were likely to have been made well in advance. The Tribunal concluded that in order draw any inferences regarding Dr Patel's attendance at the Expo Show it would have speculate as to her intention. That speculation would also be on the back of a fundamental failure to set out why Mr A had any interest or 'say so' over Dr Patel's attendance or not.

71. The Tribunal therefore determined that, taken at its highest, there was insufficient cogent evidence adduced by the GMC to draw reasonable inferences from it to find paragraph 1 proved to the civil standard. The evidence was of a tenuous character.

72. The Tribunal next considered paragraph 2 of the Allegation. It considered that to determine this issue, the agreement between the parties would need to be properly identified and established. It concluded that the GMC has not provided sufficient evidence to demonstrate what the agreement was, either orally or contractually, between Dr Patel and Mr A. That agreement would have to have been clearly established as who was doing what, what consideration (i.e. profits) were due to each party and any ongoing intellectual property (IP) interest. The earlier texts and oral evidence failed to provide sufficiently cogent evidence on this.

73. The Tribunal looked at events further down the timeline and had regard to the text message sent by Dr Patel to Mr A on 20 October 2018 in which she stated:

> *'…(I got some sales at the aesthetic conference just gone in Oct just from talking about it in a 10min slot on podium and if you had helped me get a booth we would have had a lot more I'm sure).'*

The Tribunal noted that this indicated that there was some interest shown in the Model from Dr Patel's attendance at the Expo Show. However, it concluded that this does not equate to Dr Patel having an intention to market the Model when the text message was sent on 28 September 2018.

74. The Tribunal was unable to find any direct evidence of Dr Patel's intention to market the Model at the Expo Show. The Tribunal was not satisfied that it was possible to draw a

reasonable inference about Dr Patel's intention to market the Model. It was required to speculate on both what her intention was and what the meeting of minds had been between the protagonists. The evidence was of a tenuous character. It therefore concluded that taking the GMC's evidence taken at its highest, the Tribunal could not properly find paragraphs 1 and 2 proved to the civil standard.

75. Given the findings of no case to answer for paragraphs 1 and 2 of the Allegation, the Tribunal therefore determined that the GMC has failed to establish sufficient grounds for Dr Patel's alleged dishonesty.

76. As such, the Tribunal was not satisfied that a properly directed Tribunal could properly find these charges proved. The Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraphs 1, 2 and 3 of the Allegation.

Paragraphs 4, 5 and 6

4. On 10 October 2018, you sent a text message to Mr A, which stated 'Everything is on the backburner with model, my other business has taken off….so atm there's no update about the breast model', which was untrue.

5. You knew that the information you provided to Mr A as set out in paragraph 4 was untrue because you were intending to register your intellectual property rights in the Model.

6. Your actions as described at paragraph 4 were dishonest by reason of paragraph 5.

77. Mr McCaffrey submitted that the GMC have not provided any evidence to assert what was or was not in Dr Patel's mind on 10 October 2018 and noted that the GMC are no longer proceeding with these paragraphs of the Allegation. He submitted that this is due to an inability to demonstrate Dr Patel's intent. He stated that it is important to note this when considering the paragraphs of the Allegation that they do proceed with as he submitted that they rely on the same thinking.

78. Ms Kitzing made no submissions in relation to this application for these paragraphs of the Allegation.

79. The Tribunal noted that the GMC has not contested these paragraphs of the Allegation. It considered the LQC's advice:

> *'41 Charges 4, 5 and 6: The GMC make no submission on this. Whilst there is no express concession, the net effect is the same. In most legal contexts, an uncontested application must succeed in favour of the person making the application. There may be rare instances where that is not the case but my advice is that this is not one of*

them. Not least, these charges are infected by the same defects relating to not setting out factual allegations to be found proved as to the proper contractual/relationship background….'

80. The Tribunal accepted the LQC's advice, and considered the evidential defects in the case generally. There was sufficient concern about the state of the evidence that required the GMC to respond to the application. As it had not, the Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraphs 4, 5 and 6 of the Allegation.

Paragraphs 7a, 8 and 9

7. On 20 October 2018 you sent text messages to Mr A which stated:

   a. 'You wont be able to market my model as its legally and intellectually mine and protected as such';

   …

   which was untrue.

8. You knew that the information you provided as outlined at paragraph 7a was untrue because you had not filed an application to register the model as a registered design with the Intellectual Property Office.

9. Your actions as described at paragraph 7a were dishonest by reason of paragraph 8.

81. Mr McCaffrey stated that the text message Dr Patel sent to Mr A as outlined in paragraph 7a assumes that Dr Patel stated that she has registered the intellectual property of the Model. He submitted that it does not state that and Dr Patel is asserting that she conceived the idea, commissioned it and saw it to conclusion and that it is therefore not their concept to claim. He reminded the Tribunal that the GMC are no longer proceeding with paragraph 5 of the Allegation which related to Dr Patel's intent to register her intellectual property rights. He therefore submitted that without the need for Dr Patel to register her intellectual property rights on the Model, paragraphs 7a and 8 of the Allegation are incapable of proof.

82. Ms Kitzing submitted that the truth of the text message is a factual matter and the Tribunal must consider, on the evidence before it whether the Model was legally and intellectually protected. She reminded the Tribunal that it is an agreed date within the chronology that Dr Patel filed an application for a registered design for the Model on 11

November 2018 and that the design was registered with effect from this date. Ms Kitzing submitted that there is a sufficient case that Dr Patel knew the information in the text message outlined in paragraph 7a of the Allegation to be untrue and that this can be inferred by her subsequent registration of the Model within a period of approximately 3 weeks.

83. In considering these paragraphs of the Allegation, the Tribunal took into account the factual basis that the GMC has alleged and the evidence before it. It noted the complexities that were involved in the procuring of the Model, who was paying for it and who had a vested interest in it. It considered that Dr Patel's belief that she had rights over the Model was a consistent theme throughout the documentary evidence. It noted Dr Patel's earlier email to Mr C on 28 September 2017:

> *'This project is purely my idea and I have gone on to develop it as far as it has come so there has been no consultant input but it is a nationally recognised, BAAPS backed and grant funded concept so it has been extremely well received within the professional plastic surgery community.'*

84. The Tribunal noted Dr Patel had rights to the model assigned to her from the NHS hospital she worked at on 17 January 2019 (not 2018 as per Mr D witness statement). Mr D who was dealing with the assignment on behalf of the hospital also refers to Dr Patel having left "had left the Trust several months before". The Tribunal was able to draw a reasonable inference from his witness statements that the assignment process would have been ongoing between the hospital and Dr Patel before 17 January 2019. That meant the text message sent on 20 October 2018 was a few months before the NHS had finally assigned its rights over the Model and the design of it to Dr Patel. It considered that it was much more plausible that in those months before that took place, there was interaction between the NHS and Dr Patel in negotiating and concluding the assignment of rights. Whilst there is a limited amount of evidence before the Tribunal on this matter, it was sufficiently cogent to make reasonable inferences about this. In the alternative, it concluded that it was incumbent on the GMC to show that Dr Patel could not have asserted *'You won't be able to market my model as its legally and intellectually mine and protected as such'* because it was untrue. The fact there was a process going on in the background which ultimately led to the NHS assigning rights to Dr Patel meant the GMC had to show those matters did not materially detract from their case. There is sufficient doubt about what the true position was which makes the evidence tenuous as to drawing reasonable inferences about the statement being 'untrue' let alone that Dr Patel 'knew' as much.

85. In the alternative, the Tribunal considered that in order to assess these factual allegations, it needed to understand the legal and intellectual property matrix that underpinned the relationship between Dr Patel and Mr A. It took the view that, on the basis of the evidence before it and in the absence of any expert evidence on intellectual property law, it was not satisfied that it was able to draw reasonable inferences in order to consider whether paragraph 7a was untrue or that Dr Patel 'knew' it to be so under paragraph 8.

86. The Tribunal noted further deficiencies in paragraph 8 of the Allegation. It took the view that there was a deficiency in the evidence going to the factual background of the relationship between Dr Patel and Mr A, and who had IP rights over the model. It considered that expert evidence was required in order to assess this matter. That was particularly so given the various agencies involved in the procurement process and assignment of rights. The Tribunal decided the wording in paragraph 8 implies that Dr Patel could not have asserted legal and intellectual rights over the Model because to do so she would have had to file an application to register the Model with the Intellectual Property Office. That is the inference the GMC want the Tribunal to draw. In accepting the LQC's advice, the Tribunal concluded that expert evidence would be required to determine this matter as it falls outside of the Tribunal's expertise and therefore the GMC has failed to provide sufficient cogent evidence to prove this charge.

87. Taking all of those matters into account the Tribunal has decided there is no case to answer for paragraphs 7a and 8 of the Allegation. The Tribunal therefore determined that the GMC has failed to establish sufficient grounds for Dr Patel's alleged dishonesty, and paragraph 9 must also fail.

88. As such, the Tribunal was not satisfied that a Tribunal could properly find any of these paragraphs proved because of the inherent weaknesses in and tenuous character of the evidence relied on by the GMC. The Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraphs 7a, 8 and 9 of the Allegation.

Paragraph 12a

12. On 5 November 2018, you sent an email to Ms B which stated:

    a. 'I have a copy right [sic] in process already with the NHS I developed this with…', which was untrue;

89. Mr McCaffrey stated that on 5 November 2018, copyright was in process and the NHS interest was preserved in it and yet to be assigned. He reminded the Tribunal that it is now a fact that it was lodged and granted on 11 November 2018. He stated that this was before the NHS relinquished their ownership of the idea to her and they did therefore have an interest in the copyright of the Model. He stated that prior to the assignment in January 2019, the NHS did have an interest in it. He therefore submitted that this information was factually correct and not untrue as asserted.

90. Ms Kitzing reminded the Tribunal that the question of whether it is true or not that 'copyright was in process with the NHS already' on 5 November 2018 is a factual question. She submitted that the fact that the submission to the Intellectual Property Office did not take place until 6 days later, is sufficient evidence upon which this paragraph of the Allegation could be found proved.

91. The Tribunal had regard to the submissions made by both parties. It relies on the same rationale for paragraphs 7a and 8 that the process of assigning the rights of the Model to Dr Patel by the NHS was likely to have been well underway by November 2018. The GMC has failed to show sufficiently cogent evidence as to how Dr Patel's message could have been untrue (or that she would have known as much). Any inferences that could be drawn risked being purely speculative. There is an evidential void and the GMC has not adduced sufficient cogent evidence to determine on the balance of probabilities that the statement made by Dr Patel was untrue.

92. As such, the Tribunal was not satisfied that taking the GMC evidence at its highest it could find the charge proved. The Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraph 12a of the Allegation.

Paragraphs 13. 14 and 15

13. You submitted a letter dated 4 March 2019 with your counter DF19B form which stated:

a. you had filed for design registration after receiving acknowledgment that the design rights were yours from Health Education England and BAAPS, or words to that effect;

b. 'the design…was soon after registered at the suggestion of the current Head of School of Surgery, [Dr C]'.

which was untrue.

14. You knew the information you provided as set out in paragraphs 12a and 13 was untrue.

15. Your actions as described at paragraphs 12a and 13 were dishonest by reason of paragraph 14.

93. Mr McCaffrey submitted that the factual elements outlined at paragraphs 13a and 13b of the Allegation are accepted. He submitted that the interests of the NHS, who paid for the model, were assigned to Dr Patel formally in January 2019 which is after the application is submitted to the Intellectual Property Office and before the March correspondence. In respect of paragraph 13b of the Allegation, Mr McCaffrey submitted that Mr C has not been

spoken to and this paragraph is based on email communication from someone else claiming that Mr C has no recollection of it. He invited the Tribunal to consider that there is no evidence to assert this was untrue without it having to speculate and that third party hearsay evidence from an unclear witness does not meet the burden of proof.

94. Ms Kitzing submitted that the evidence as to the untruth of paragraph 13a of the Allegation is provided in the form of an email from Ms F who did not state that that BAAPS had acknowledged to Dr Patel that the design rights were hers. She submitted that this evidence is sufficient and this application should fail in respect of this charge. Ms Kitzing submitted that the evidence of Ms E, who stated that she did not recall receiving any instructions from Mr C to prompt Dr Patel to register her intellectual property rights. She submitted that Ms E is a well-placed witness and that her evidence has not been challenged by Dr Patel and is also sufficient, thereby meaning that the application in respect of this paragraph should fail.

95. The Tribunal first considered paragraph 13 of the Allegation and noted what was set out within the DF19B document, dated 4 March 2019. It was not satisfied that reasonable inferences can be drawn from any of the documentation to show that the contents of Dr Patel's letter were untrue. It considered the number of bodies involved in the procurement, payment and design of the Model which included Health Education England, BAAPS, University Hospitals Coventry and Warwickshire ('UHCW') and the Birmingham Women's and Children's NHS Foundation Trust and noted that their involvement has not been properly evidenced or explained by the GMC. It was the GMC's responsibility to set out the proper evidential and factual framework going to these serious charges (also referenced in charges above). The evidence that there was before the Tribunal was of a tenuous character and vague as clearly the relevant factual and evidential background was much more than the snippets relied on by the GMC.

96. Furthermore, the Tribunal considered the wording used within paragraph 13a of the Allegation. It noted that the University Hospitals Coventry and Warwickshire NHS Trust ultimately allocated the design rights to Dr Patel in on 17 January 2019. It noted that Dr Patel stated within the 4 March 2019 correspondence:

> *'HEE and BAAPS clearly acknowledge the design rights to lie with myself and after seeking their approval I filed for design registration.'*

97. The Tribunal concluded that it was unclear why there was not a specific recitation of what Dr Patel's email had stated within paragraph 13a or to properly explain what aspect of it was in issue and why.

98. The Tribunal accepted Mr McCaffrey's submission that no witness evidence has been provided by Mr C and therefore no opportunity to cross-examine him in these proceedings. It determined that the evidence before the Tribunal was vague and tenuous and that it was therefore not satisfied that the GMC's evidence going to paragraphs 13a and 13b was sufficiently cogent.

99. The Tribunal next considered paragraphs 14 and 15 of the Allegation. It determined that, given the findings above as to the insufficiency of evidence to determine paragraphs 12a and 13 of the Allegation, the GMC has failed to establish sufficient grounds for Dr Patel's alleged untruth and dishonesty.

100. As such, the Tribunal was not satisfied that a properly directed Tribunal could properly find these charges proved due to the inherent weaknesses and tenuous character of the evidence. The Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraphs 13, 14 and 15 of the Allegation.

Paragraph 16

16. One or more of your remarks as set out in paragraphs 7b and 12 were intended to:

a. intimidate and/or threaten the recipient(s);

b. dissuade the recipient(s) from protecting their intellectual property rights in the Model.

101. Mr McCaffrey reminded the Tribunal that Mr A pursued his case at the Intellectual Property Office. He submitted that this correspondence needs to be considered with the letter sent by Mr A that it responds to in order for it to be seen in its proper context. He stated that the letter from Mr A is threatening and full of false claims and legal terms with no basis at all. He stated that Dr Patel was entitled to respond factually. He stated that this sort of correspondence may have the effect of threatening the other side but that the GMC is unable to evidence Dr Patel's intent. Mr McCaffrey submitted that Artizan did not have any

rights to protect and so an intent to dissuade them from registering was impossible. He stated that this is confirmed by the Intellectual Property Office's determination.

102. Ms Kitzing submitted that the contents of the documents set out at paragraphs 7a and 12 of the Allegation are evidence in themselves of Dr Patel's intention to intimidate and / or threaten the recipients and to dissuade them from protecting their intellectual property rights. She stated that the content of the documents are sufficient evidence in accordance with rule 17(2)(g) at this stage.

103. The Tribunal noted paragraph 16 of the Allegation relies on both paragraph 7b and 12. The Tribunal has determined there is no case to answer in relation to paragraph 12 so it cannot form the basis of any case going forward as regards paragraph 16. As far as paragraph 7b is concerned Dr Patel accepts that her actions were untrue and dishonest. The Tribunal has considered paragraph 16 only in relation to paragraph 7b.

104. The Tribunal considered the text message Dr Patel sent to Mr A on 20 October 2018 as outlined at paragraph 7b:

> *'There is now also a legal contract of sales and marketing drawn up between myself and the British Aesthetics Surgeon's Association 'BAAPS') ….so if you go ahead and market this model you are going to be chased by them for sure'*

105. As this is the only direct evidence going to paragraph 16a the Tribunal considered that the words Dr Patel used in the text on 20 October 2018 do not have the qualitative nature required to demonstrate an intention to intimidate or threaten. The evidence is of a tenuous character and inherently weak. A reasonable inference cannot be drawn that there was such an intention. The Tribunal would be straying into speculating.

106. Furthermore, it noted Dr A's correspondence, dated 25 October 2018 which Dr Patel was responding to on 5 November 2018. It did not accept Mr A's assertion in his oral evidence that his letter was intended to start a conversation. The content of his letter was clearly strongly worded with legal threats and demands for money, citing further action would ensue. Whilst that was sent after the text referred to in paragraph 7b, it shows how the relationship, to the extent it existed had broken down. Dr Patel responds in a placatory manner. Her placatory responses after the text was sent on 20 October 2018 and after Mr A's strongly worded letter, make it implausible Dr Patel 'intended' to intimidate or threaten him

when the text was sent. The failure to properly evidence or charge all material surrounding facts to the complex relationship undermined the strength of the GMC case further.

107. In relation to paragraph 16b of the Allegation, the Tribunal considered that in order to assess whether Dr Patel intended to dissuade the recipients from protecting their intellectual property rights, infers they had right to protect in the first place. The Tribunal could not read into the charge any lesser meaning as that is broadly how the GMC case has been put throughout, that Mr A had some form of IP or contractual rights that Dr Patel was 'cheating' him out of. The formulation of the charge would require expert evidence as whether the recipient had intellectual property rights to protect in the first place. That is a matter outside of the Tribunal's expertise and required expert evidence.

108. The Tribunal considered that Dr Patel's response was asserting her own stance on these matters and was clearly not being intimidatory. It was not satisfied that the text message sent by Dr Patel on 20 October 2018, in the context of all the correspondence between her and Mr A at the time was likely to have been intimidatory or threatening. It therefore concluded that the GMC's evidence, taken at its highest was insufficient to establish that Dr Patel had been intimidatory or threatening as alleged. It further concluded that paragraph 16b is premised on the basis that the recipients had intellectual property rights to assert and that to determine such matters would require expert evidence.

109. Accordingly, the Tribunal was not satisfied that taking the evidence at its highest a properly directed Tribunal could properly find paragraph 16a or 16b proved. The evidence was lacking on key aspects of the factual, legal and IP issues as between the parties and what evidence there was before the Tribunal was inherently weak, vague and tenuous. The Tribunal determined to grant Mr McCaffrey's application under Rule 17(2)(g) in relation to paragraph 16 of the Allegation.

110. Overall, the Tribunal therefore determined to grant Mr McCaffrey's application under Rule 17(2)(g) in respect of all the paragraphs of the Allegation referred to within it as noted above. That means the only paragraphs proceeding in this case are those announced and found proved in their entirety at the outset (i.e. paragraphs 7b, 10 and 11). All other matters fall as a result of the Tribunal's decision under this 'half-time' submission under Rule 17(2)(g).