

**IN THE LEGAL PRACTITIONERS  
DISCIPLINARY TRIBUNAL**

**ACTION No. 9 of 2018**

**THE LEGAL PRACTITIONERS ACT 1981**

**IN THE MATTER OF:**

**JOHN MARK FITZPATRICK**

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**REASONS**

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**Background**

1. In this action the Legal Profession Conduct Commissioner (“the **Commissioner**”) has charged John Mark Fitzpatrick (“the **Practitioner**”) with professional misconduct pursuant to s82(2) of the *Legal Practitioners Act 1981* (SA) (“the **Act**”). He did not file a response to the charge.
2. The alleged professional misconduct arises out of proceedings brought by the Commissioner against the Practitioner in the Supreme Court of South Australia in action SCCIV 292 of 2017 (“the **Supreme Court proceedings**”), which were heard by the Honourable Justice Nicholson. In summary the charge, laid on 24 August 2018, is:
  - a. That the Practitioner breached an Order in the Supreme Court proceedings requiring him to provide to the Commissioner a report from his then-treating psychiatrist Dr Bagvati Asokan by 6 August 2017, and thereby breached a condition of his practising certificate (count 1);
  - b. That the Practitioner breached an Order in the Supreme Court proceedings requiring him to provide to the Commissioner a report from his then-treating psychiatrist Dr Asokan by 6 October 2017, and thereby breached a condition of his practising certificate (count 2);

- c. That the Practitioner swore an Affidavit dated 16 January 2018 which was filed and read in the Supreme Court proceedings, knowing that a portion of paragraph 3 of that Affidavit was false (count 3);
  - d. That by reason of the Practitioner's reliance upon that Affidavit in the Supreme Court proceedings, he misled, or attempted to mislead, the Supreme Court.
3. The hearing of the inquiry into the charge proceeded concurrently with actions 4 of 2017, 7 of 2018 and 3 of 2023 on 28 May 2024. The Practitioner did not participate in the hearing.
4. For an overview of why this and actions 4 of 2017 and 7 of 2018 have taken so long to reach a full hearing, see the decision published by the Tribunal<sup>1</sup> on 26 April 2023 and the addendum thereto published 16 August 2023.

### **Evidence**

5. The Tribunal admitted a Book of Documents prepared by the Commissioner (Exhibit C2). It contains:
  - a. Documents from the Supreme Court proceedings, including judgments and Orders of Justice Nicholson, transcript, the Third and Fourth Affidavits of Kathryn Anne Caird dated 8 December 2017 and 24 January 2018 respectively, the Sixth and Seventh Affidavits of the Practitioner dated 16 January 2018 and 25 January 2018;
  - b. Correspondence between the Commissioner's office and the solicitors for the Practitioner engaged in the Supreme Court proceedings, and the Associate to Justice Nicholson;
  - c. Material from the Commissioner's investigation file;
  - d. Material produced by Dr Asokan pursuant to a Summons dated 19 December 2017 in LPDT action number 4 of 2017.
6. In relation to the material produced pursuant to the Summons in action 4 of 2017, on 20 February 2018 the Commissioner applied for release from the implied undertaking not to use those materials for any purpose outside of that action. In a ruling made 30 April 2018, the Tribunal<sup>2</sup> granted that application.
7. No witnesses were called to give oral evidence at the hearing of this inquiry. Dr Asokan did give evidence in February 2018 during the first hearing of the inquiry in action 4 of 2017. Her oral evidence was of course directed to the issues in that

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<sup>1</sup> Differently constituted, Presiding Member M Pyke KC.

<sup>2</sup> Members O'Sullivan QC, A Burgess & F Camatta.

action and not this one. Even if there had been a formal application for us to consider her oral evidence as part of this inquiry, we would have refused it due to potential unfairness to the Practitioner.

### **Consideration – Counts 1 & 2**

8. As a result of disciplinary proceedings commenced in the Tribunal against the Practitioner on 23 February 2017, the Commissioner applied to the Supreme Court for an order suspending his practising certificate on an interim basis, pending the outcome of the proceedings before the Tribunal. Justice Nicholson refused the Commissioner's application for suspension, but imposed certain conditions on the Practitioner's practising certificate pursuant to s89A of the Act; *LPCC v Fitzpatrick* [2017] SASC 81 at [58]<sup>3</sup> and Orders dated 6 June 2017.<sup>4</sup>
9. Order 2(iv) was in the following terms:

*Until further order, the practitioner is to procure his treating psychiatrist to provide to the Commissioner at intervals of no less than every two months, a report as to the practitioner's medical state and progress which report is to include: the then present diagnosis, the severity of his then presenting symptoms, the current treatment plan and current prognosis.*
10. The first report pursuant to Order 2(iv) was due to be provided to the Commissioner by 6 August 2017 and the second by 6 October 2017. At the relevant time, the Practitioner's treating psychiatrist was Dr Asokan.
11. The Commissioner did not receive a report with respect to the Practitioner's mental health from Dr Asokan (or from any other psychiatrist) until the Practitioner's solicitor provided an unsigned report of Dr Asokan dated 3 November 2017 by way of email sent 13 November 2017.<sup>5</sup>
12. The Practitioner did not apply for an extension of time or to vary the terms of Order 2(iv) prior to the time for provision of the reports expiring.
13. Ultimately, in a ruling made 30 January 2018, Justice Nicholson did vary the Order to enable the provision of a report by either the Practitioner's treating psychiatrist or his General Practitioner, Dr Moten to allow for the possibility that his psychiatrist might not be able to produce regular reports within the required timeframes.<sup>6</sup> In the course of this ruling, Justice Nicholson also expressly stated that any inquiry into the Practitioner's frankness (or lack thereof) in his explanation for non-compliance

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<sup>3</sup> Exhibit C2 pp.23-24.

<sup>4</sup> Exhibit C2 pp.26-27.

<sup>5</sup> Exhibit C2 pp.30- 33, Third Affidavit of Kathryn Caird at [7]–[16].

<sup>6</sup> And the conditions were revoked following undertakings given to the Supreme Court by the Practitioner on 4 September 2019 Exhibit C2 p.325; *LPCC v A Practitioner* [2019] SASC 136.

with Order 2(iv) was a matter to be ventilated in the Tribunal, not the Supreme Court proceedings exercising the Order for liberty to apply.<sup>7</sup>

14. The Practitioner has admitted the breaches of Order 2(iv), both in a letter to the Supreme Court dated 13 November 2017<sup>8</sup> and in his Sixth Affidavit dated 16 January 2018 where at [19]<sup>9</sup> he apologised to the Court.
15. Whilst the effect of his apology is to purge contempt of the Supreme Court, that is not the end of the matter in circumstances where the Order breached was a condition on the Practitioner's right to practice.
16. There is no evidence that the Practitioner ceased to practice law during the period that he was in breach of Order 2(iv). On the contrary, from his reporting to the Supreme Court<sup>10</sup> as to his compliance with one of the other conditions placed on his practising certificate (namely to meet regularly with a mentor, Ms Margaret Graham-King as provided for in Order 2(i)) it is clear that in September and October 2017 the Practitioner was continuing to act for clients and took on four new matters.
17. Failure by a legal practitioner to comply strictly with conditions on their practising certificate is a serious matter. Given that conditions are generally imposed in order to protect the public, in this case to ensure that the Practitioner's mental health was not impacting on his ability to safely and properly serve his clients, failure to adhere to the conditions it is unacceptable. It is no answer to say that the Practitioner's mental health was in fact stable during the relevant period and therefore there was no risk to the public. The Order was made by the Supreme Court to ensure the Commissioner could monitor the state of the Practitioner's health. Up until 13 November 2017, the Commissioner was unable to properly do so. His office only had available to it what was reported by Ms Graham-King, which in turn was limited to whatever the Practitioner had conveyed to her about his state of health and appointments with medical practitioners. This was not sufficient for the Commissioner to discharge his important role.
18. Paragraph 20 of the Practitioner's Sixth Affidavit of 16 January 2017 is concerning because in it he says "it did not occur to me as useful or desirable to instruct my solicitor to bring the matter back on for an extension of time in relation to the reports".<sup>11</sup> This suggests the Practitioner lacks insight into the fact that whilst he remained in breach of the Orders, he was also in breach of a condition of his right

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<sup>7</sup> Exhibit C2, p.144.

<sup>8</sup> Exhibit C2 p.128.

<sup>9</sup> Exhibit C2 p.169.

<sup>10</sup> Practitioner's Sixth Affidavit of 16 January 2018 Exhibit JMF-4, Exhibit C2 p.172. See also Ms Graham-King's reports to the Commissioner of 29 August and 2 November 2017 Exhibit C2 pp.133-138.

<sup>11</sup> Exhibit C2 p.169.

to practice. The Practitioner should have instructed Dr Asokan early, and if she was unable to meet the Court's deadline, sought an extension as a matter of urgency.

19. In all of the circumstances, the Tribunal is satisfied that the Practitioner's conduct between the dates of 7 August 2017 and 12 November 2017 amounted to professional misconduct within the meaning of the Act.

#### **Consideration – Counts 3 & 4**

20. Count 3 of the charge relates to the underlined portion of paragraph 3 of the Practitioner's Sixth Affidavit of 16 January 2018 (filed in the Supreme Court proceedings):

*"Following the Orders made by this Honourable Court on 6 June 2017, I made an appointment to see Dr Asokan, and I saw her on 29 June 2017. At that appointment, I told her of the Orders handed down by the Court, that I was required to have her provide a report every two months. I did not go into detail and say to her that the reports were required to be provided on 6 August, 6 October, 6 December. With the benefit of hindsight, I should have been more insistent in ensuring that this compliance regime was properly instigated."*

21. The Commissioner alleges that the underlined words were false, and that the Practitioner knew them to be false at the time of swearing the Affidavit. The evidentiary grounds in support of the Commissioner's position are:

- a. That there is no mention of the Supreme Court's Orders in Dr Asokan's notes of the relevant consultation, which one might expect there to be if the Practitioner did tell her of the Order requiring her to write reports;
- b. That according to an attendance note prepared by Ms Caird (solicitor in the Commissioner's Office) of her meeting with Mr Michael Barnett (counsel for the Commissioner) and Dr Asokan on 15 December 2017, Dr Asokan confirmed that she was not aware at the time of the 29 June 2017 consultation with the Practitioner of the Supreme Court Orders, or what those Orders required, nor was she aware of the Supreme Court Orders or requirement for 2-monthly reports as at a subsequent consultations with the Practitioner on 28 September and 23 November 2017;<sup>12</sup>

22. Also in evidence is a letter from Dr Asokan to the Practitioner's solicitor Mr Watson dated 23 May 2018<sup>13</sup> in which she clarifies what she told Mr Watson in a

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<sup>12</sup> Exhibit C2 pp.241 - 242.

<sup>13</sup> Exhibit C2 p.353.

telephone conversation regarding whether the Practitioner advised her about the Court's requirement for regular reports. In that correspondence Dr Asokan confirms that her notes do not indicate that he did give that advice, but goes on to say:

*"You then asked me if I was certain he did not tell me about it and I replied I was not certain.*

*You then asked me if it was possible he might have told me about it and I replied it was possible but I did not recall it."*

23. The attendance note is of course indirect hearsay evidence, and it does not purport to record Dr Asokan's actual words, rather the effect of what she said during the meeting. Whilst we do not call into doubt that the investigating solicitor would have endeavoured to accurately record the meeting, we do not know precisely what questions were asked of Dr Asokan, and in particular if they were leading.
24. In the absence of hearing direct testimony from Dr Asokan on the issue, and especially in light of her correspondence dated 23 May 2018, the Tribunal is not satisfied that the underlined portion of paragraph 3 of the Practitioner's Affidavit was false. Accordingly count 3 of the charge is not established.
25. Count 4 of the charge is an allegation that the Practitioner misled the Supreme Court, or attempted to, by filing and reading the Practitioner's Sixth Affidavit. Since the Tribunal is not satisfied that the Affidavit contained a false statement, it follows that count 4 is not established.

**The Tribunal Orders:**

1. On counts 1 and 2 of the charge, by twice failing to comply with the Orders of the Supreme Court, the Practitioner was in breach of the conditions of his practising certificate in the period 7 August 2017 – 12 November 2017, and consequently the Practitioner is guilty of professional misconduct.
2. Counts 3 and 4 of the charge are not proven and are dismissed.
3. The Tribunal will invite submissions as to the appropriate sanction.
4. Costs reserved.

**DATED** the 11<sup>th</sup> of June 2024.



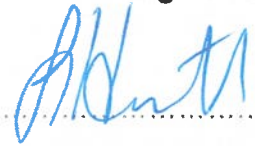
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**K Clark SC**



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**A Burgess AM**



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**L Hastwell**