

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2020-01843

BETWEEN

**IN THE MATTER OF AN APPEAL TO A JUDGE IN CHAMBERS
PURSUANT TO SECTION 37 OF THE DENTAL PROFESSION ACT, CHP. 29:54
OF THE REVISED LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

BETWEEN

DR DION KOONOLAL

Claimant/Appellant

AND

THE COUNCIL OF MANAGEMENT OF THE DENTAL BOARD OF TRINIDAD AND TOBAGO

A/C THE DENTAL COUNCIL

Defendant/Respondent

Before the Honourable Madam Justice Carol Gobin

Date of Delivery: May 20th 2021

Appearances: -

Mr Seuchand instructed by Ms David-Longe for the Claimant/Appellant

Mr Anthony Vieira, Mr Anil Maraj instructed by Ms Nicole de Verteuil-Milne for the

Defendant/Respondent

Judgment

The Proceedings

1. This is an appeal from a finding of a disciplinary panel of the Dental Council of Trinidad and Tobago (DCTT) against the Claimant/Appellant, Dr Dion Koonoolal. On 02/06/20 the panel found Dr Koonoolal guilty of unprofessional conduct for breaches of the Regulations as well as DCTT advisories against advertising. He was sentenced to a maximum two-week suspension from practice or until such time as he removed the 'offending material' from his web pages. Dr Koonoolal being unsatisfied with the decisions filed these proceedings. The appeal is a remedy given by section 37 of the Dental Profession Act Chp. 29:54. It is an appeal by way of a rehearing.

The Dental Profession Act Chp. 29:54

2. In Trinidad and Tobago, the practice of dentistry is governed by the Dental Profession Act. The Dental Board is a Body Corporate established by section 3 of the Act. Section 9 creates the Council of the Board (DCTT) and vests in it the responsibility for the Management of the Board. The Chairman of the Board (currently Dr Dharmendra Rohit) is the President of the Council. The material clauses of the Act are set out below:

Section 12 of the Act prescribes the regulatory functions and powers of the Council. In particular, Section 12 (h) provides the power and responsibility:

“to hold enquiries into allegations of improper or unprofessional conduct by dentists and dental auxiliaries and to discipline those found guilty.”

The range of sentences which may be imposed is provided by Section 29 (2) of the Act which states that the Council may investigate a person convicted or guilty of unprofessional conduct and on proof thereof may —

- (a) censure or reprimand that person;
- (b) suspend that person; or
- (c) cause the name of that person to be removed from the Register or Roll, as the case may be.

Section 45 of the Act provides:

The Council may make regulations for carrying out the purposes and provisions of this Act and in particular such regulations may provide:

- (k) For prescribing what constitutes unprofessional conduct; and
- (l) For the manner in which disciplinary proceedings may be conducted.

3. As to what constitutes unprofessional conduct, the Regulations are reasonably comprehensive. Of relevance to this appeal is regulation 33 which provides:

“A dentist is guilty of unprofessional conduct who —

- (g) advertises or canvasses, whether directly or indirectly, for the purpose of obtaining patients or promoting his own professional advantage and

this includes having any indication of his profession on the outside of any envelope being sent through the post.”

4. This is not the only reference to advertising in the Regulations. Regulations 28 and 29 provide a general prohibition against advertising with some exceptions as follows:

Regulation 28:

- “(1) Subject to this regulation and regulation 29 a dentist may not advertise.
(2) A dentist may upon starting a practice for the first time in Trinidad and Tobago publish that fact in the press.
(3) The publication may not exceed one standard newspaper column in width and 2.5 cm in height, may not contain references to qualifications, procedures or equipment and may not appear for more than three days.”

Regulation 29:

- “(1) Any publication by a dentist in a newspaper, broadcast or notice which includes—
(a) the name or professional address of the dentist; or
(b) an indication of his profession; or
(c) an indication that he is in practice, may be regarded as advertising.
(2) Subregulation (1) does not apply to entries in normal type in a telephone directory or books on scientific or professional subjects or articles or correspondence in professional journals.”

5. An obvious question that immediately arises is, how do these regulations 28 and 29 square with regulation 33 (g) when the first two provide what appears to be a general blanket prohibition with some very clear and stringent exceptions, and neither of these regulations creates an offence. The answer in my opinion is this: regulation 33 (g) adds a qualification to the general prohibition against advertisement in circumstances where the actions or breaches complained of are to found a complaint of unprofessional conduct. The express terms of regulation 33 (g) specifically identify the circumstances in which advertising may constitute unprofessional conduct. This excludes any

implication that breaches of regulations 28 and 29 per se, without more, may amount to unprofessional conduct. This is not to suggest that they may not be actionable otherwise.

The Impact of Digital Technology

6. The original regulations were promulgated in 1982, well before legislators and the DCTT, indeed any of us could have contemplated the technology that has introduced modern techniques of dissemination of information via the internet and the development of social media through digital channels. The advances in information technology and the advent of social media, in particular, have spawned a universal culture of instantaneous and perpetual connecting and communicating with friends, family, groups, businesses, strangers, machines and other devices. Not very much if anything is considered private or indeed mundane. Every human experience no matter how ordinary and every thought in our digital culture is routinely documented, videoed, shared and 'reviewed' on platforms and chats with any and everyone who cares to access a forum. No criticism is meant by this observation; we are all steeped in it. Indeed the benefit of this kind of connectivity in the time of this pandemic cannot be overstated. It has provided human contact, connections and comfort and has spared us the worst effects of the unnatural isolation that the Covid-19 virus has inflicted. It has contributed to our very survival.

7. However, this culture poses serious challenges for regulators such as the DCTT who are statutorily bound to apply and enforce rules, which by any standard have to be described as anachronistic. The specific reference in regulation 33 (g) to a dentist "having any indication of his profession on an envelope being sent through the post" as advertising or canvassing demonstrates how outdated the current restrictions are. In the world in which we now live, a visit to the dentist which was once considered very personal and something one tried to forget until the next time it became necessary (and I mean no disrespect to the profession), is now newsworthy and it is acceptable not only to share and discuss and review but to rate the experience. Sharing and discussing is no longer done by word of mouth but in digital spaces including spaces provided by the dentist. Patients who participate are simply exercising their right to freedom of expression in a convenient and accessible forum and availing themselves of feedback. The value of this to consumers of goods and services including those of health care professionals cannot be overstated. Feedback provided by other consumers informs choices.

8. On the other side, digital platforms are now used by dentists to communicate with clients and this allows them to receive feedback, inform about services or other activities and events. This new method of communicating assists in building and maintaining a relationship with their client base in what has no doubt become a commercially competitive business environment for dentists. There is nothing inherently objectionable in this but the potential for abuse is real. Digital spaces afford opportunities for dentists who wish to unfairly advertise and promote their practices and services and products to believe that they can do so with impunity. It is important to remember that while prohibitions against advertising are aimed primarily at protecting the public, regulation also serves to promote the dignity and reputation of the profession as a whole.

Response of DCTT

9. In recent times, the DCTT became increasingly and rightly concerned about the thorny issue of advertising in our digital age. It felt it had to be addressed. It determined that in doing so it had to be mindful of its statutory regulatory functions while at the same time it had to give consideration to “softening its approach” to allow for “informational advertising on websites and on social media to bring itself in line with the realities of the digital world.” Dr Rohit sought to explain the DCTT’s objectives in this way. He said;

“although the prohibition against advertising is generally restrictive, Council made clear that we would exercise ‘prosecutorial discretion’ and take no action against dentists who posted informational advertising on websites and in social media. We took pains to explain that informational advertising was the digital equivalent of what dentists are permitted to post in the analog world, that is to say: the name of the dentist or dentists at a practice; their qualifications and areas of specialization; and contact particulars such as address, telephone numbers and email.”(affidavit of Dr Rohit filed 2020/08/10.)

10. One has only to look at the guidelines which, for example, permit photographs of a dentist’s office (even unenhanced) to conclude that the guidelines have gone beyond what was contemplated or allowed in the analog world. I make the point only to recognise the difficulty which the DCTT would have encountered in its attempt to translate its laudable objectives, into new rules that are compatible with the outdated regulations which prescribe what is permissible under the existing law with such rigidity. There was always going to be the risk of the blurring of the lines between

what is permissible and enforceable under the Regulations and under DCTT's policy but the shift was necessary.

11. The manner in which the DCTT went about this difficult task of trying to balance its obligations to enforce the existing law and to modernise its approach is above criticism. It engaged in broad consultation with the profession. It conducted a survey, considered proposals on the subject dated 2011 and 2016 and sought legal advice. At the end of the exercise, the Council produced an Advisory on Guidelines for Informational Advertising in or about December 2018. A further Advisory on Advertising dated 10/05/2019 was published and circulated to the membership and finally the Council produced its Advisory and Guidelines dated 21/10/2019. On 27/06/2019 at an Extraordinary General Meeting, which was called to discuss the subject, the Member of Council from the Ministry of Health presented "An update on Advertising in Dentistry in Trinidad and Tobago."

The Status of the Guidelines and Advisories

12. The Council has at all times recognised that the guidelines and advisories lack statutory force and that they are "an indication of policy and a set of guideposts to keep in view". In the absence of an amendment to the subsidiary legislation that incorporates the guidelines or any aspect of them, the Council's position is correct. This is not to say that the advisories and guidelines are entirely without significance or effectiveness. So long as the Council is able to secure voluntary compliance then the objective of self-regulating for the good of the profession and the maintenance of acceptable standards can be achieved. But more importantly, conduct that is prohibited by the guidelines and advisories may provide a proper basis for charges to be brought against a member provided that all the other legal requirements are met.
13. Where a breach of the advertising guidelines is intended to found a charge, in my opinion, the offensive conduct, has to be alleged with sufficient particularity and it must be established on the evidence to be for the purpose of obtaining patients or promoting the dentist's professional advantage. This is because this provision, regulation 33 (g) is penal in nature. If the Council resorts to invoking its power to discipline for unprofessional conduct, then every element of "the offence" has to be proved. Where a dentist or a member of any profession is to be exposed to legislative penal sanctions, including suspension or being struck off the register, loss of livelihood and damage to professional reputation, the Court is constrained to apply a narrow construction to the

regulation and to require strict compliance with terms if illegal conduct is to be established. But proof of intention in the circumstances is not impossible. In my opinion to make them workable and to bring them in line with regulation 33 (g), the advisories may go so far as to indicate on the matter of Disciplinary Proceedings that where it is satisfied on the evidence that a breach of the guidelines is established the Council may infer that breaches are committed for the purpose of obtaining or promoting the dentist's professional advantage, but that is a matter for the DCTT and the guidelines must say so explicitly and it must leave no room for uncertainty.

14. I have considered whether the mandate to apply a narrow construction to a penal provision limits the unlawful advertising caught by regulation 33 (g) so as to exclude advertising in a digital space. This was an issue raised by me. I am satisfied that the regulation applies to digital advertising. Support for this conclusion is to be found in the judgment of Sir Richard Scott VC in **Victor Chandler International v Customs and Excise Commissioners and Anor [2000] 2 All ER 315**. In rejecting an argument that a provision in the Finance Act 1952 which made it an offence for a person knowingly to issue, circulate or distribute any advertisement in documentary form was intending to catch advertisements in documentary form only, the learned Judge of Appeal said,

“There are of course some gaps in legislation that cannot be filled by Judge made law, but it is now a well-known rule of statutory construction, that an ‘ongoing’ statutory construction should be read as always speaking. The principle is set out in Benion Statutory Interpretation 3rd Edition 1997 p686. It is presumed that Parliament intends the court to apply to an ongoing Act, a construction that continuously updates its wording to allow for changes since the Act was initially framed.”

The Judge stated further:

“So far as the mischief at which section 1 (b) is aimed I can see no difference at all between advertisements inserted in a newspaper or periodical, advertisements recorded on film and projected on a cinema screen, advertisements stored in electronic form and broadcast for television screens. In each case in my judgment, the advertisements are of a sort that falls squarely within the mischief that section 9 (1) (b) was trying to prevent.”

15. This reasoning is apposite in the instant case. The targeted mischief is advertising. Our Court of Appeal in **Attorney General v Vijay Maharaj Civ. App. No. P023 of 2020** has also recently provided guidance that an offence requiring proof of publishing and disseminating seditious material “cannot be time bound and must be accorded flexibility to keep pace with advances in communications.”
16. The Council has to be commended for its efforts to address this difficult problem. The machinery for monitoring and enforcement is wholly inadequate to effectively discharge its supervisory role and statutory duties. While the constitution and structure of the Council have not changed since the Act was first introduced in 1982, I take notice of the fact that the number of admissions to the dental profession annually, as with other professions, has increased dramatically. This has significantly expanded the burden of the DCTT’s regulatory and supervisory responsibility, forcing it to spread its resources thinly. The members of the DCTT are all practicing dentists themselves. They are but nine in number.
17. To cope with the demands of the drive to deal with advertising the DCTT decided that it would appoint from among its members one dedicated investigator, Dr Tamika Peters, who would monitor websites and social media. Where she found apparent infringements she would gather evidence, and contact the offending dentist. If the offender admitted the breach and undertook to remove the offending material “the dentist would get a non-punitive reprimand. Where the dentist denied guilt and contested the allegations, formal charges against him/her would be forwarded to a three (3) member panel for inquiry and determination.” The difficulty it has encountered is that in its attempt to “soften its approach” and to allow for some flexibility it may have just left enough room for uncertainty.

The Reprimand /The Charges

18. Sometime on or about 31/01/2020, the Council’s investigator, Dr Peters, called Dr Koonoolal while he was with a patient. They had a brief conversation. The details of the exchange are in dispute, but following it, Dr Koonoolal was advised by letter dated 11/02/20 that he had been reprimanded by the Council for breaching advertising regulations. He was reminded of an alleged undertaking he had given to Dr Peters to “be more vigilant in the future so as to refresh yourself with recent guidelines.” The letter went on to allege continued breaches; it stated that despite the undertaking

he had given to Dr Peters, Dr Koonoolal had on his business Facebook account, celebrity posts and patient reviews. He was notified that he had been reprimanded in these terms:

“As such, you are hereby reprimanded for the display of celebrity posts and patient reviews on your Facebook page and you are to rectify remaining breaches with immediate effect. This reprimand will remain on your file.”

19. Dr Koonoolal was surprised to receive this letter; he claimed he did not know what if anything he had done wrong. He consulted his attorney who dispatched a pre-action letter to the Council complaining of a breach of the rules of natural justice. Essentially the complaint was that a disciplinary process had been engaged, of which he had had no knowledge and that he had had no opportunity to be heard.
20. By letter dated 20/04/20, the Council withdrew the reprimand, but it simultaneously issued a formal notice of allegations of the charges. The notice is set out in full:

“To: Dr Dion Koonoolal
254 Southern Main Road
Cunupia

Notice

Notice is hereby given to you that in consequence of information by us from Dr Tamika Peters, the officer assigned by the Dental Council to monitor, gather facts and obtain evidence relevant to allegations of breaches of the prohibitions and guidelines against advertising (‘the Case Investigator’), a hearing is to be held into the following allegation against you.

That being a registered dentist and a member of the Dental Board of Trinidad and Tobago:

1. Between 1 September 2019 and 15 April 2020, you continued posting what appears to be celebrity endorsements on the Facebook account of your dental practice Caribbean Smiles Dental Place. Copies of the postings are attached as Exhibit 1.
2. On or around 16 March 2020 you posted on Facebook and Instagram pages what appears to be a promotion by offering to give away 2,000 free

surgical masks to patients and non-patients at the offices of your dental practice Caribbean Smiles Dental Place. Copies of the alleged promotion are attached as Exhibit 2.

3. Between 1 September 2019 and 15 April 2020, you allowed to have posted on your Facebook account what appears to be patient testimonials and reviews. Excerpts of the patient testimonials and reviews (found at the Review Tab on your Facebook page) are attached as Exhibit 3.
4. Between 1 September 2019 and 15 April 2020 you continued posting on your Facebook account what appears to be promotional material relating to your practice Caribbean Smiles Dental Place, specifically photos of the booth hosted by your dental practice at the Health Fair in October 2018. Copies of the photos are attached as Exhibit 4.

Your actions as described at 1, 2, 3 and 4 above, if proven, would be a breach of the prohibitions against advertising, specifically Regulations 28 (1); 29 (1); and 33 (g) of the Dental Regulations and may constitute professional misconduct.

Notice is further given to you that on **5 May 2020 at 2 p.m.** a remote **Disciplinary Hearing** will be held to consider the above-mentioned allegation against you.

The Disciplinary Panel will comprise 3 members of the Dental Council, namely: Dr Dharmendra Rohit, Dr Surendra Rampersad, and Dr Christopher Mawer (the Panel).

You are invited to appear via video conference before the Panel on the date and time specified above, for the purpose of answering the above-mentioned allegation. You may appear in person or be represented by an attorney at law. The Panel has the power, if you do not appear, to hear and decide upon the allegation in your absence.

Any answer, admission or other statement or communication which you may wish to make with respect to the allegation should be addressed to the Secretary of the Dental Council.

If you wish to make an application that the hearing should be postponed, you should send the application to us as soon as possible, stating the grounds on which you desire a postponement.

The Panel's duty is to provide a fair hearing. You have the right to present evidence and to call and cross-examine witnesses, including the Case Investigator. You will be afforded every opportunity to explain your actions and to be heard in detail in rebuttal of the allegation.

Dated this 20th day of April 2020

Sincerely,

Signed by Dr Ingrid Seeberan

Secretary – DDS (Hon)"

The Hearing/The Findings

21. On 12/05/2020 the Council convened the disciplinary hearing remotely. Dr Koonoolal was represented by Counsel, Mr Sieuchand, who answered the allegations via a slide show presentation. It reserved its decision and by letter dated 02/06/2020, the Council communicated its findings of guilt on three of the four charges. The material parts of the letter are set out hereunder:

"After careful consideration of all the charges brought against Dr Dion Koonoolal we respond as follows:

1) Celebrity Endorsements on Facebook page – The issue from the date of the posts being archived posts is irrelevant since, included in the DCTT guidelines issued on 3rd May 2019, dentists were put on notice that there was a grace period ending August 31st 2019, in which practitioners were urged to ensure all infringements as outlined by the guidelines, that existed on their social media pages were corrected. Members were advised that any infringements found after September 1st 2019 will be subject to disciplinary proceedings. The panel takes into consideration that the posts in question may not meet the criteria to be considered a celebrity

endorsement; but may be photos of a considered celebrity, at the dental practice. We, therefore, find the client not guilty of this charge.

2) Surgical Mask posts on Facebook and Instagram Account – The Panel stands firm on the decision to categorize this as a promotional post. The masks were offered to patients and non-patients, therefore, indicating the canvassing of patients. The argument from the client indicating that it was an act in good faith because of the mandatory request from the Ministry of Health for masks to be worn, is unacceptable as no such request was given from the Ministry of Health at the time of the post: it was actually advised that masks should not be worn by non-medical staff; the date of advisory from the Ministry of Health was on April 5th 2020; while the client’s post was on March 16th 2020 on both Instagram and Facebook. We, therefore, find the client guilty of this charge.

3) Patient testimonials and reviews on the Facebook Account – As indicated in our Advertising Guideline dated 23rd October 2019, patient reviews and testimonials are considered prohibited advertising. Facebook allows the restriction of what posts a practitioner allows on their page. Restricting these features can be discussed with any IT personnel to bring posts within the required DCTT guidelines. We, therefore, find the client guilty of this charge.

4) Health Fair Postings – The Panel encourages and commends Dr Koonoolal for giving back to the respective community by hosting a health fair. However, the posting of a banner at the health fair which may be outside of DCTT signage guidelines, and the subsequent posting of pictures taken at the health fair on social media may be considered advertising. The instance that a practitioner takes to social media to post charitable actions that they are doing in their own private capacity, may be perceived as promoting the practitioner and their practice; this undermines the truly altruistic nature of the action. We, therefore, find the client guilty of this charge.

On the issue of Bias – It should be noted that our legal advice was to follow a soft approach after finding prohibited advertising on the social media page of a registered dentist. We were advised to begin a process with a phone call to the dentist by the case investigator to discuss the content found. The dentist will then be given 48 hours to rectify the identified issues. The pages will then be checked by the investigator again and if the content was still present, notice is then sent to the Secretary to prepare a letter of reprimand. If after the reprimand the issues are not rectified, the case is then sent to a Disciplinary Panel to decide on suitable or necessary disciplinary action. It is important to note that during the initial phone call by the case investigator the dentist was informed of all the possible steps that may follow in the event of non-compliance.

We hereby find Dr Koonoolal guilty on three (3) out of four (4) charges brought against him. Disciplinary Action to follow.

Dated this 24th day of May 2020

Signed by: Dr Dharmendra Rohit

Dr Christopher Mawer

Dr Surendra Rampersad”

The Sentence/Suspension

22. A remote sentencing hearing was held on 25/06/2020. On 09/07/2020 the DCTT notified Dr Koonoolal of his suspension from the practice of dentistry for a period of 14 days or until he caused the offending posts and promotional material to be removed, whereupon the Appellant promptly filed this appeal pursuant to section 37 of the Act. He sought and was granted a stay of the suspension.

The Appeal

23. The wide scope of the Court’s powers on the appeal is to be found in Part 60.8 of the CPR which provides:

“(1) The appeal is to be by way of rehearing.

(2) The court may receive further evidence on matters of fact.

(3) The court may draw any inferences of fact which might have been drawn

in the proceedings in which the decision was made.

(4) The court may—

- (a) give any decision or make any order which ought to have been given or made by the tribunal or person whose decision is appealed;
- (b) make such further or other order as the case requires; or
- (c) remit the matter with the opinion of the court for rehearing and determination by the tribunal or person.

(5) The court is not bound to allow an appeal because of—

- (a) misdirection; or
- (b) the improper admission or rejection of evidence, unless it considers that a substantial wrong or a miscarriage has been caused.”

24. The Defendant accepts that the Court’s powers are wide. Indeed it urged the exercise of the power to receive evidence of matters of fact in support of an application to cross-examine Dr Koonoolal on his affidavit. I refused that application in the peculiar circumstances of the procedure, which had been adopted by the Council at the disciplinary hearing on 12/05/2020. I did not consider it fair in the circumstances to essentially allow the Defendant to elicit evidence through cross-examination on matters which were not in issue at the hearing and which in any case the panel, had it considered it material then, could have asked but simply did not. It is important to note that while the rehearing in a sense places the Court in “the shoes of the DCTT”, as Mr Vieira, Counsel for the Defendant put it, it does not impose on the Judge a prosecutorial function. In other words, it does not permit this Court to fill evidential gaps or to correct fatal procedural flaws to secure a conviction.

25. Even as it recognised the scope of powers, the DCTT urged judicial deference to their findings as a professional disciplinary tribunal as to what constituted misconduct. It submitted:

“In enquiring a fair and just adjudication of this appeal, the Court clearly has broad powers to resolve issues of legal principle but on the issue of determining whether the identified posts constitute advertising a matter concerning the ethics of the dental profession it is respectfully submitted that this is a power and function given by the Council not the Court.”

26. The prohibition against advertising is not unique to the dental profession. Indeed Dr Rohit in his affidavit filed on 09/11/2020 adverted to similar concerns expressed by the then President of the Law Association about “the proliferation of publications in the print and social media which appear to violate the Code of Ethics governing advertising by members of the (legal) profession.” Indeed the Dental Council found it gratifying to read as it showed that dentistry was not the only profession wrestling with the “advertising Conundrum.” In one of its advisories, the DCTT pointed out that it is “dentists” rather than clients who are the ones who notice unethical advertising practices and that is so. Similarly, lawyers and members of the legal profession who are familiar with and who respect the code of ethics and operate within the code of conduct can readily recognise unacceptable advertising. Every Judge who was at some time bound by that code is well equipped to recognise breaches of rules, which prohibit advertising. The mischief that is targeted is common.
27. There is no hard and fast rule mandating deference for if it were so, the Court’s jurisdiction would be circumscribed and as a consequence, the Claimant’s right of appeal would be rendered nugatory. This case raised questions of law as to and including the role of the DCTT’s advisories in the formulation of the charges and the adequacy of them, the fairness of the procedure adopted by the panel, the impact on the findings of guilt and the justifiability of the suspension of a member of a profession. I determined it appropriate in all the circumstances to exercise the widest powers of an appellate court.

The Procedure at The Hearing

28. The Council has made no regulations pursuant to section 45 (I) as to how disciplinary hearings are to be conducted. It now falls to the Court to determine whether the procedure it adopted was fair. For convenience, I shall summarize what I consider to be relevant without reproducing the entire transcript of the proceedings. The Chairman began with an indication of the approach, he said:

“It’s dentists dealing with dentists and it’s not like we are legal and lawyers, it’s not a Court case and I think we should hear from Dr Koonoolal and that’s the way I would like it to go.”

He then ascertained that the Claimant was aware of the charges and Counsel confirmed that he was. Dr Rohit called upon him to indicate his plea and Dr Koonoolal entered a plea of not guilty on all the charges. The Chairman then stated:

“So based on the charges that we have I need to get some information. Did you make any corrections or are you planning to make any corrections at this point?”

29. This prompted a question from Counsel and a reminder that the burden of proof was on the DCTT and then an enquiry as to what was the evidence against Dr Koonoolal. The question posed by the Chairman could quite reasonably have raised a more serious concern about whether there had not been a predetermination that the charges had been made out, hence the leap to the enquiry about “prospective corrective action”. Dr Rohit confirmed that the evidence was “all the documents and the exhibits.” The Claimant’s Counsel confirmed it was the notice of allegations and the exhibit and went on to indicate that he had prepared a presentation that would stand as Dr Koonoolal’s answer to the charges. As he was about to begin, the Chairman informed him that “there was an update from the investigator.” Counsel objected to this and the hearing eventually resumed. The Council led no evidence. The investigator was not called.

30. It appears from the utterances of the Chairman, that the Council conflated the laying of the charges with the making out of charges. The invitation to indicate whether the Claimant intended to make any correction at the beginning betrayed a gross misunderstanding as to its role and as to the basic requirements of fairness.

31. The Council has sought to justify the remarkable lack of formality it adopted in relation to the procedure at the hearing. The Chairman explained its position at para 141 of his affidavit dated 09/11/2020:

“It may be helpful to point out that the Council’s enquires are inquisitorial, not adversarial. There are no litigants, simply witnesses who have or may have knowledge of some of the matters under investigation. The procedural requirements of adversarial litigation and the strict rules of evidence do not apply. Questions are not designed to prove or disapprove “a case”. The essential duty

of The Disciplinary Panel is to provide a fair and unbiased hearing in keeping with the rules of natural justice.”

32. I reject this attempt to justify, ex post facto, the laxity of the approach to the hearing. This was in stark contrast to what the Council itself published in the Advisory of 23/10/2019. That document included legal language and terminology and set out processes which involved steps and protections commonly found in more formal legal proceedings. So for example, under the rubric **“How does the Council propose to investigate breaches of the Regulation on Advertising and what sanctions are to be applied”**, it warned:

“The Council will investigate and deal with all complaints against advertising including complaints from dentists about other dentists and complaints from the Trinidad and Tobago Dental Association.”

33. It set out a fairly detailed procedure that would be invoked “where there is sufficient evidence.” This is significant. It is a recognition of the requirement for sufficient evidence and this by implication must have contemplated some assessment by the tribunal. It introduced a distinct legal process of a “show cause hearing”, before a panel of Council Members at which “Members will be given an opportunity to contest the allegations, make submissions and offer pleas in mitigation.” It warned of “censure or suspension, depending on the severity of the offence.”

34. The guidance on **Advertising in print and digital media** was premised on situations “where there is sufficient evidence for a dentist to be called upon to answer the complaint...”, a clear recognition that the DCTT had to adduce evidence before an accused dentist would be called upon to answer a case. It warned those who did not comply with a request that inquiries into allegations of unprofessional conduct would be initiated.

35. Under **“Council’s Discretion”** it reiterated its prosecutorial discretion by using this language:

“Ordinarily, Council would not commence disciplinary action against a dentist unless there is reason to believe that the conduct complained of constitutes an offence and there is good and sufficient evidence **to obtain a conviction**. But

even if a successful prosecution is probable and **prima facie** evidence of **guilt** is available, we may still decide not to prosecute if:

- 1) Prosecution will serve no substantial public interest
- 2) The contravention is trivial and not worth the effort of prosecution
- 3) The relevant law or regulation is obsolete, not repeated but out of time with modern thought, etc.” (emphasis added).

36. It closed with these words:

“Council has a statutory duty to ensure the maintenance of proper standards of professional conduct by a dentist, and to discipline those found guilty. Board Members can rest assured that in the exercise of those functions:

- 1) It is within our power to make a determination between acceptable information and prohibited advertising
- 2) We will weigh the evidence carefully, skilfully and wisely
- 3) It is within our purview to give policy guidance on the subject without the need for changes to the law

Dentists who advertise do not operate in a law-free zone.”

37. What transpired at the hearing constituted a significant departure from what any accused dentist could reasonably have expected having regard to the import of the language used in the advisories and guidelines, some of which has been highlighted above. Indeed, the notice of the charges itself indicated a process that was sufficiently formal and appropriate to the occasion as the letter set out at para 21 above shows. It warned Dr Koonoolal that his actions “if proved would be a breach”. It indicated the composition of the panel, the purpose was for his “answering the allegation”, his entitlement to legal representation and an invitation to submit a written response on his admission (prior to the hearing it seems).

38. The notice of allegations acknowledged as part of its duty to provide a fair hearing, a right on the part of Dr Koonoolal to present evidence and to **cross-examine witnesses including the case investigator** (emphasis added). In the circumstances, the failure to call any evidence, more fundamentally to call even the case investigator, deprived Dr Koonoolal of a fair hearing, even on the terms set out by the Council. The level of flexibility and informality which the panel allowed

itself fell way below what could be considered commensurate with the seriousness of the allegations and the far-reaching consequences of a finding of guilt for Dr Koonoolal. It was not what he had been led to expect and it fell short of what should have been afforded.

39. The procedure adopted by the DCTT effectively shifted the burden of proof to the Claimant with the result that it was fundamentally flawed and all findings which flowed from it were as a consequence, illegal. The fact that Dr Koonoolal's attorney chose to make his case through his presentation on the basis of the exhibits cannot be considered a waiver of his client's right to a fair hearing and his entitlement to procedural fairness. In **Kuzmin v General Medical Council [2019] EWHC 2129** (a case in which the Court considered whether it was permissible for a tribunal to draw adverse inferences from a doctor's decision to remain silent at the hearing) Lord Justice Hinckinbottom offered applicable guidance. On the issue of the standard of proof, the Court made clear that disciplinary proceedings are not criminal in nature. He stated:

“Disciplinary Tribunals are part of the regulatory scheme which governs the relationship between professional associations and individuals who practice a profession and as a condition of doing so sign up to that scheme. In form, they may have “charges” in the form of alleged breaches of the regulatory scheme under which the individual operates, which are prosecuted by the regulatory authority and, of course, the Disciplinary Tribunal has the power to impose sanctions for breaches which may have very severe consequences for the individual involved. However, as the Courts repeatedly emphasised they are civil, not criminal proceedings.”

40. His Lordship stated further :

“It is true that, because they concern important rights and may result in very severe consequences for an individual, disciplinary proceedings often demand strong procedural safeguards including some safeguards regarded as essential in criminal proceedings.”

His Lordship proceeded to identify one of the mandatory safeguards vital in criminal proceedings as the requirement to be properly informed of the nature of the disciplinary charges against him. He continued at para 39:

“Whether proceedings are fair can, as ever, only be assessed by looking at the process as a whole. It is true that some propositions are likely to be generally applicable to disciplinary proceedings, in the sense that without certain procedural steps being taken it is likely that the proceedings will not be lawful, e.g. **the allegations (or charges) which the individual faces must be made known to him and must be clear, and he does not bear the burden of proof.**” (emphasis added)

41. At para 51 he opined that it might be reasonable to expect the accused person to respond to the allegation **“where the regulators have established a prima facie case against him...”** This underscores the point that the burden of proof is on the regulator. The failure to call evidence, and in the absence of such to call upon Dr Koonoolal to answer the charges, removed an important procedural safeguard. Dr Koonoolal was deprived of the right to a fair hearing.

42. As I have indicated above, advertising is prohibited under regulations 28 and 29, but no penalty is prescribed in them. The provision which creates the offence under regulation 33 (g) qualifies the general prohibition against advertising. If it is to found a charge, it must be advertising of the specific kind and with the specific purpose identified in the Regulations. In other words, advertising which does not fall within the parameters of regulation 33 might well be actionable but it cannot constitute grounds for a charge of unprofessional conduct. The assurance to Board Members in the advisory dated 23/10/2019 that “it is within our power to make a determination between acceptable information and prohibited advertising” is subject to the qualification, that if it decides to prosecute a dentist for the offence under regulation 33 (g) it must establish on evidence the elements of the offence. The mere annexure of the alleged offending publications was insufficient to discharge the burden of proof. The absence of formal procedural rules could not validate a process that called on the Claimant to answer a charge in respect of which no evidence had been called however informally.

The Charges

43. I turn to the specific charges and the findings of the panel. The reasons for the findings of not guilty on the first charge underscore the irregularity of the procedure. No evidence as to the notice and advice as to infringements after 01/09/2019 was led. The photos were always just what they were eventually found to be, that is, photos of celebrities at the practice. If the finding of not guilty suggests this is permissible, then the question arises, why was this charge even laid. Had the investigator been called, it may well be that Dr Koonoolal would not have been called upon to answer the charge. In any case, this is a matter on which the Council's policy appears to lack clarity and certainty. There can be no room for such if the breach of a guideline is to found a charge of professional misconduct. If dentists are prohibited from crossing a line, the line must be clear.
44. The finding of guilt on the second charge is simply unsupportable. The guidelines prohibited "discounts, promotions or other attractions to the service" without clearly explaining the terms and conditions of the offer. This is not a prohibition against offers generally. The examples, which were provided in the advisories, while they are not exhaustive, indicated the mischief that the DCTT was targeting. In Dr Koonoolal's case, there was no allegation that there were any terms and conditions of the offer. It was a pure giveaway of masks to patients as well as non-patients. There was nothing on the mask such as a logo that advertised the practice. The invitation to persons to attend to get the masks was an obvious safeguard against the abuse of his generosity. The Council could not be genuinely concerned that the giveaway of a free mask during a pandemic would cause patients to go to Dr Koonoolal for anything other than the mask. The social media posts informing of the giveaway which were considered unacceptable by the DCTT were in my view the most effective way of communicating the offer to the public.
45. The giveaway of masks early on in the pandemic demonstrated Dr Koonoolal's generosity and I daresay foresight. His actions did not fall within the Council's definition of a prohibited promotion. Two examples of advertisements that appeared to demonstrate the kind of offers that may have been targeted and which were close enough to the examples used in the advisory were provided by Counsel for Dr Koonoolal. The mask giveaway did not come close to those. If both were equally offensive, the guidelines did not indicate this with sufficient clarity. This again underscores the need for certainty.

46. What is particularly troubling about the finding of the Council on this charge is that it referred to an argument that was never made by Dr Koonoolal and which it rejected in order to arrive at or support the findings of guilt. In its reasons for rejecting the argument that Dr Koonoolal never made, the DCTT disclosed that it had conducted its own research as to the date of the advisory on Mask Wearing from the Ministry of Health. This was irregular. The investigation was long over and the investigator had not been called as a witness. It was not open to the tribunal to conduct further investigations of its own after the case had been completed and pending its decision. Not only was the product of its enquiry irrelevant to any issue before it, but the disclosure also raised a question as to a predisposition, and bias that was sufficient in my view to vitiate the proceedings entirely.

Patient Testimonials

47. The finding of guilt on the charge relating to patient testimonials and reviews on the Facebook account is equally unsupportable. In his affidavit filed on 08/10/2020, the Chairman of the Council annexed the report to the Council on “Findings of the Advisory Committee on Advertising” dated 14/04/2016. It suggested amendments to the Regulations among which report was the following:

“(5) Using Testimonials in advertisements either on a website or social media controlled by the Dentist.

Patients may post comments on such sites but the dentist should not use the postings as part of an advertisement to promote a dentist or service and must remove comments that may stand to go against the regulations as though the dentist himself/herself posted the comment.”

This suggestion was incorporated verbatim in the Council’s advisory. The guidelines, in plain language, permitted the posting of patient testimonials on Dr Koonoolal’s Facebook page. What was annexed to the charges were copies of posts of comments including one very negative one. It would make little sense to expressly permit such comments only to impose a duty on the dentist to remove them. The mischief targeted appeared to be the use by a dentist of such comments in an advertisement. An example of how this could be done was also provided by the Claimant’s Counsel in his presentation. The DCTT it seems failed to consider the submission. Whatever may be the intention of the DCTT in this regard and on the face of it, it seems clear enough to the Court, that messaging appears to be mixed. This was borne out in the course of the address of Counsel for the DCTT when he insisted that the advisory did not mean what it appeared to say.

Health Fair Postings

48. The charge was that Dr Koonoolal continued to post promotional material relating to the practice, specifically photos of the booth hosted by his practice at the Health Fair in October 2018. The finding that the posting of a banner outside of the DCTT's signage guidelines may be considered advertising, is irrelevant. The charge did not include any breach of signage guidelines. It was therefore not open to the Council to consider it far less to find Dr Koonoolal guilty while taking that into account. As to the posting of Health Fair photographs, in my opinion, this too fell squarely within what was permissible under the guidelines of 03/05/2019 which stated:

“First and foremost, it should be observed that there is nothing wrong per se in posting information on the internet or on social media. The real issue is the kind of information and its intended purpose. So for example “factual reports of events, developments of public concern, writings on matters where the public may have a legitimate interest ... may all be permissible provided that the article is free from any suggestion of personal advertising, puffery or flamboyancy ... usually it is not the article which gives occasion for the offence, but the personal puff.”

49. The finding that the posting of a celebrity visit is permissible and posting of a picture of a Health Fair Booth is not, is in my opinion irreconcilable. There is no evidence on the face of the photograph of the Health Fair Booth of puffery or flamboyancy. The conduct which again showed the generosity of Dr Koonoolal quite properly attracted the commendation of the Council. It however found him guilty because taking to social media to post charitable actions “may be perceived as promoting the practitioner and their practice, this undermines the truly altruistic nature of the action.” The Council's cynicism is unfortunate and, in the absence of evidence that this was anything more than a report of a factual event, irrelevant. The finding of guilt is unsustainable.

The Sentence

50. In light of my findings as to the decisions on the findings of the panel, it is not necessary to address this issue.

Bias

51. The matter having proceeded and there has been no complaint of it on the record of the proceedings, the issue of bias is of no relevance. Out of deference to Counsel, however, I shall deal with it very briefly. In the weeks leading up to the proceedings, the Claimant's attorney inquired as to whether any members of the proposed panel had participated in the previous process that had resulted in the formal reprimand of which he had been notified in the February 13th letter. The Council did not respond. At the disciplinary hearing, Counsel for the Claimant reminded the Council of the request and sought an assurance that if any member of the panel as constituted had done so, that that member would cast aside any prejudice. The record of the proceedings contains no complaint of bias as a basis for disqualification.
52. There is no general requirement for a Disciplinary Tribunal to certify or warrant that it is free from bias. Where an issue is raised by the alleged offender, provided that it is not frivolous, fairness and natural justice would demand that it be addressed. Having regard to the history of this matter and the context in which the enquiry was made, I do not consider that it was frivolous or unreasonable. The course of events that give rise to this litigation began with disciplinary action (of which Dr Koonoolal claimed to be unaware) and a reprimand, which could only have been issued after a consideration however cursory, followed by satisfaction as to guilt and a decision as to an appropriate sentence by members of the Council.
53. The DCTT belatedly in its submissions sought to explain its denial of the request and its neglect to address it by suggesting that such a reprimand was issued without a hearing "automatically". It submits therefore that there was no duty to assure that it was free from bias. The DCTT sought to equate the finding on the investigator's complaint about non-compliance with advertising advisories and the issuance of a reprimand as a mere administrative act, but I do not think that such a comparison is appropriate. The matter of prohibited advertising for dentists stands on a very different footing. It exposes a dentist to disciplinary proceedings for unprofessional conduct, which can result in serious consequences. The reprimand issued was not a bare reprimand. It was coupled with a demand and/or an injunction to remove the material. It was made clear that it was going to remain on the Claimant's file. The decision to file formal charges followed the alleged breach of an undertaking to desist from unlawful conduct. There was clearly an element of "moral approbation" and punishment which distinguished this case from the authorities relied upon by the Defendant.

54. Disposition

- 1) The Appeal is allowed.
- 2) There shall be judgment for the Claimant/Appellant.
- 3) The findings of Guilt made by the Respondent dated May 24th 2020 in respect of charges made against the Claimant/Appellant are hereby set aside.
- 4) The Notice of Suspension dated July 9th 2020 issued by the Respondent against the Claimant is hereby set aside.
- 5) An Order is granted and it is declared that the Claimant/Appellant is found not guilty of all allegations made against him in the Notice of Allegations issued on April 20th 2020;
- 6) It is ordered that the Defendant/Respondent do pay to the Claimant/Appellant his costs of this Appeal and his costs incurred in the proceedings before the Respondent and/or the Respondent's Panel to be assessed by the Registrar in default of agreement.
- 7) That there be a stay of execution for 14 days from the date hereof.

Carol Gobin

Judge