JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	NUGAWELA -v- MEDICAL BOARD OF AUSTRALIA (WA BRANCH) [No 2] [2024] WASC 15
CORAM	**:**	LEMONIS J
HEARD	**:**	13 OCTOBER 2023 & 19 JANUARY 2024
DELIVERED	**:**	25 JANUARY 2024
FILE NO/S	**:**	GDA 11 of 2022
BETWEEN	**:**	PATRICK NUGAWELA Appellant AND MEDICAL BOARD OF AUSTRALIA (WA BRANCH) Respondent

ON APPEAL FROM:

For File No	**:**	GDA 11 of 2022
Jurisdiction	**:**	STATE ADMINISTRATIVE TRIBUNAL
Coram	**:**	MS PATRICIA LE MIERE (MEMBER)
File Number	**:**	VR 53/2020

Catchwords:

Medical profession - Medical practitioner - Vocational proceedings before State Administrative Tribunal - Finding of professional misconduct - Appeal where orders made by consent following a mediation - Member's power to make orders where member was also the mediator - Permitted grounds of appeal - Whether practitioner denied procedural fairness - Assertions of inadequate legal representation, unconscionability and deprivation of vocation - Whether conflict between *Bankruptcy Act 1966* (Cth) and *Health Practitioner Regulation National Law (Western Australia)* - Effect of bankruptcy on professional obligations of practitioner - Whether constitutional issue raised

Legislation:

Bankruptcy Act 1966 (Cth)
Constitution
Health Practitioner Regulation National Law (WA) Act 2010 (WA)
Health Practitioner Regulation National Law (Western Australia)
Health Practitioner Regulation National Law Regulation 2018 (WA)
Medicines and Poisons Act 2014 (WA)
State Administrative Tribunal Act 2004 (WA)
State Administrative Tribunal Regulations 2004 (WA)

Result:

Leave to appeal granted in respect of ground 1
Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : In person
Respondent : R Young SC

Solicitors:

Appellant : Not applicable
Respondent : Clayton Utz

Case(s) referred to in decision(s):

Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321
Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3) [2019] FCA 72
Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc [1999] FCA 18
Benfield v Australian National Railways Commission (1992) 8 WAR 285
Blair v Curren [1939] HCA 23; (1939) 62 CLR 464
Burns v Corbett [2018] HCA 15; (2018) 265 CLR 304
Chang v Legal Profession Complaints Committee [No 2] [2020] WASCA 208; (2020) 56 WAR 263
Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16
Commissioner for Consumer Protection v Carey [2014] WASCA 7
Connor v Veitch [2023] WASCA 186
Huggins v The State of Western Australia [2018] WASCA 61
Jackson v Goldsmith [1950] HCA 22; (1950) 81 CLR 446
Kakavas v Crown Melbourne Ltd [2013] HCA 25; (2013) 250 CLR 392
Matsoukatidou v Yarra Ranges Shire Council [2013] VSC 299
Mustac v Medical Board of Western Australia [2007] WASCA 128
Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd [2003] WASCA 11
Panegyres v Medical Board of Australia [2020] WASCA 58
Paradis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Real Estate and Business Agents Supervisory Board v Landa [2009] WASCA 191
Thorne v Kennedy [2017] HCA 49; (2017) 263 CLR 85
Tomlinson v Ramsey Food Processing Pty Ltd [2015] HCA 28; (2015) 256 CLR 507
Unilever Plc v Proctor and Gamble Co [2000] 1 WLR 2436
Wreford v Lyle [No 3] [2021] WASCA 20

LEMONIS J:

1 The appellant, Mr Nugawela, was first registered as a general medical practitioner on 13 May 1975. Until the events the subject of this appeal, Mr Nugawela had not previously been the subject of any sanctions by the first respondent (the Medical Board) and his registration had been unaffected by any conditions.

2 Mr Nugawela now appeals against orders made by a member of the State Administrative Tribunal (SAT) on 8 September 2022 in VR 53/2020. Those proceedings had been commenced against him by the Medical Board. The orders made contained a finding that Mr Nugawela had behaved in a way that constitutes professional misconduct under the *Health Practitioner Regulation National Law (Western Australia)* (the HPL).[1] The orders also imposed conditions on Mr Nugawela's registration as a medical practitioner. The member who made the orders was a legally qualified member of SAT.

3 For introductory purposes, Mr Nugawela's grounds of appeal can sufficiently be described by reference to their headings: denial of procedural fairness, ineffective legal representation, unconscionable agreement, deprivation of vocational livelihood and conflict of laws between the *Bankruptcy Act 1966* (Cth) and the HPL.

4 Before turning to the substance of the appeal, it is useful to address the background to the making of the orders and also to this appeal in some detail.

Background

5 On 21 February 2017, Mr Nugawela was declared bankrupt. He is yet to be discharged from bankruptcy. As at February 2017, Mr Nugawela was carrying on medical practice from a property in Greenwood that he owned (the premises).

6 On 1 September 2017, Mr Nugawela's trustee in bankruptcy directed that Mr Nugawela cease using the premises immediately. Further, there was a registered mortgage over the premises in favour of a bank. On 21 June 2018, the bank took possession of the premises in its capacity as mortgagee. These steps taken by the trustee and the bank appear to be the precursor for the difficulties that Mr Nugawela now confronts.

[1] The HPL applies as a law of Western Australia pursuant to s 4 of the *Health Practitioner Regulation National Law (WA) Act 2010* (WA).

7 Some time after the bank took possession of the premises, Mr Nugawela was deregistered as a medical practitioner; he believes that occurred in April 2020. Mr Nugawela understood the deregistration came about because of the Medical Board's asserted inability to verify his contact details. He challenged the deregistration by proceedings in SAT against the Australian Health Practitioner Regulation Agency (AHPRA). Those proceedings were VR 50/2020. After the commencement of VR 50/2020, AHPRA re-registered Mr Nugawela as a medical practitioner with effect from 1 October 2019.[2]

8 On 16 June 2020, the Medical Board commenced VR 53/2020 against Mr Nugawela, being the proceedings the subject of this appeal. The Medical Board raised a number of areas of concern. Broadly speaking, they can be characterised as Mr Nugawela failing to:

1. appropriately store, manage and transfer clinical records;

2. appropriately store and dispose of medication;

3. respond to requests for information set out in notices issued by AHPRA requiring the provision of information regarding his medical practice; and

4. notify AHPRA of a change of his principal place of practice, and of the address to which the Medical Board should send him correspondence.

9 For a short period of time, proceedings VR 50/2020 brought by Mr Nugawela against AHPRA, and proceedings VR 53/2020 brought by the Medical Board against Mr Nugawela, were on foot at the same time.

10 Proceedings VR 50/2020 came back before the President of SAT on 30 June 2020. The President discussed with Mr Nugawela the available options given AHPRA had reinstated and backdated his registration as a medical practitioner. With Mr Nugawela's agreement, the President made an order pursuant to s 46(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) that Mr Nugawela have leave to withdraw VR 50/2020 and it was thereby withdrawn.[3] AHPRA did not object to the withdrawal.

[2] Hearing in VR 50/2020 on 30 June 2020, ts 5.
[3] Hearing in VR 50/2020 on 30 June 2020, ts 8.

11 Proceedings VR 53/2020 had a rather lengthy history. Unsuccessful mediations were held on 17 September 2020 and 23 October 2020. Two further dates for mediation were listed, but they did not proceed. Ultimately, a further mediation was held on 8 September 2022, which resulted in the orders the subject of this appeal.

12 The mediation on 8 September 2022 went from approximately 10.00 am to 6.00 pm. Mr Nugawela had lawyers assisting him on a pro bono basis, however their precise role is a matter of controversy from his part.

13 At the conclusion of the mediation, Mr Nugawela and the Medical Board's counsel signed consent orders putting forward an agreed resolution of the matter. Upon being presented with the orders, the SAT member presiding at the mediation said words to the effect that she would make orders to give effect to the signed minute of consent orders. That is what then happened. A separate hearing was not held to consider whether the making of the consent orders was appropriate.

14 The orders (amongst other matters) imposed a supervision condition on Mr Nugawela's registration, requiring that he be supervised by another medical practitioner in respect of the management and storage of clinical records and the storage of medicine. Within 28 days of the making of the orders, Mr Nugawela was required to nominate a proposed supervisor and at least one alternate supervisor, who needed to be approved by the Chair of the Medical Board. If there was no approved supervisor willing to take on the role, Mr Nugawela was required to cease practice immediately until one could be found.

15 Mr Nugawela did not nominate any proposed supervisors and as a consequence, his registration has been suspended. Mr Nugawela says he has not been able to find anyone willing to take on the supervisor role, although there is no evidence to that effect. The Medical Board has not suggested any suitable candidates willing to take on the supervisor role.

16 Now a rather dissatisfied Mr Nugawela, who for about 47 years never had any conditions imposed on his medical registration, has brought this appeal against the orders. There are also other proceedings on foot between Mr Nugawela and the Board, however I do not need to concern myself with them for the purpose of disposing of this appeal.

17 It is necessary at this point to explain the interaction between the HPL and the SAT Act, and also to explain the jurisdictional basis upon which the SAT member had the power to make the orders.

HPL and the SAT Act

18 The HPL applies to many different health professions; the medical profession is one of them.

19 The HPL provides for National Health Practitioner Boards to have oversight of the health professions that are subject to the HPL. The Medical Board is the designated board in respect of the medical profession: s 31(1) of the HPL and r 4 of the *Health Practitioner Regulation National Law Regulation 2018* (WA).

20 The Medical Board, as a designated National Board, has a number of functions: s 35(1) of the HPL. These functions include registering suitably qualified and competent medical practitioners and, if necessary, imposing conditions on their registration: s 31(1)(a). The functions also include referring matters about medical practitioners to responsible tribunals: s 35(1)(i).

21 SAT is the responsible tribunal in Western Australia: s 6 of the *Health Practitioner Regulation National Law (WA) Act 2010* (WA).

22 Pursuant to s 193 of the HPL, the Medical Board (as the relevant National Board) must refer a matter about a medical practitioner to SAT (as the responsible tribunal) if the Medical Board reasonably believes the practitioner has behaved in a way that constitutes professional misconduct. That is what has happened here.

23 The parties to proceedings referred under s 193 are the Medical Board and the relevant medical practitioner: s 194.

24 Section 5 of the HPL defines professional misconduct as including:

> (a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
>
> (b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and

> (c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.

25 This is however not an exhaustive definition and behaviour that falls outside these categories can constitute professional misconduct if it has the requisite gravity to be so characterised.[4]

26 Section 5 defines unprofessional conduct to mean professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner's professional peers and then sets out certain matters that are regarded as falling within that classification.

27 Section 196 of the HPL sets out what decisions the responsible tribunal may make. Section 196(1) starts with the words:

> After hearing a matter about a registered health practitioner, a responsible tribunal may decide - …

28 Section 196 is then structured in the following way.

29 Section 196(1) sets out the primary decision which the responsible tribunal may make. The applicable decisions are that:

1. the practitioner has no case to answer: s 196(1)(a);

2 the practitioner has behaved in a way that constitutes unsatisfactory professional performance, unprofessional conduct or professional misconduct: s 196(1)(b)(i) - (iii);

3. the practitioner has an impairment: s 196(1)(b)(iv);

4. the practitioner's registration was improperly obtained: s 196(1)(b)(v).

30 If the responsible tribunal makes a primary decision under s 196(1)(b), it may decide to also impose regulatory sanctions against the practitioner. The regulatory sanctions available include a caution or reprimand (s 196(2)(a)) and imposing conditions on the practitioner's registration (s 196(2)(b)).

[4] See ***Panegyres v Medical Board of Australia*** [2020] WASCA 58 [149] - [150], [152].

31 Where conditions on registration are imposed, the responsible tribunal must also decide a review period for the condition: s 196(3). The review period limits the right of the practitioner, and the relevant Board, to change or remove a condition. Section 125 provides that a health practitioner may apply to the relevant Board to change or remove a condition imposed on their registration. However, this cannot be done during the review period unless the practitioner reasonably believes there has been a material change in their circumstances: s 125(2)(a). Similarly, the Board cannot change or remove such a condition during the review period unless the Board reasonably believes there has been a material change in the practitioner's circumstances: s 126(3)(a) and s 127(3)(a).

32 This recitation of the legislative regime provided for by the HPL reveals that upon mandatory referral to a responsible tribunal under s 193, the responsible tribunal is to make a number of decisions. These decisions include whether the practitioner has no case to answer, whether any of the matters prescribed by s 196(1)(b) have been made out and what, if any, regulatory sanctions should be imposed if a ground of complaint is made out. Further, if the regulatory sanctions include the imposition of conditions on registration, the responsible tribunal must decide the applicable review period.

33 The HPL does not envisage that a matter can be finally disposed of by agreement of the parties alone.

34 Sections 193 to 196 all appear in pt 8 div 12 of the HPL. Section 198, which also appears in pt 8 div 12, provides that:

> This Division applies despite any provision to the contrary of the Act that establishes the responsible tribunal but does not otherwise limit that Act.

35 Thus, s 193 to s 196 prevail over any of the provisions of the SAT Act, to which I now turn.

36 Under the SAT Act, the Medical Board is a vocational regulatory body and the HPL is a vocational Act.[5] The HPL is also an enabling Act under the SAT Act - it confers jurisdiction on SAT. If there is any inconsistency between the SAT Act and an enabling Act, the enabling Act prevails: s 5 of the SAT Act.

[5] See the definition of *vocational regulatory body* in s 3(1) of the SAT Act and *State Administrative Tribunal Regulations 2004* (WA), r 4 and sch 1.

37 VR 53/2020 was brought in SAT's original jurisdiction, the proceedings being the referral to SAT of a matter by the Medical Board under s 193 of the HPL.[6]

38 Section 11 of the SAT Act deals with how SAT is to be constituted when exercising its jurisdiction. As a starting proposition, SAT is to be constituted by one or more persons who are Tribunal members, as specified by the President: s 11(1). This is subject to what then follows in s 11.

39 Section 11(4) relevantly provides that when dealing with a matter that is brought before SAT by a vocational regulatory authority (so, the Medical Board), the President is to ensure the Tribunal is constituted by three persons, the relevant qualifications of which are set out at s 11(4)(a), (b) and (c). One of those persons is to be a legally qualified member.

40 However, s 11(5) provides that s 11(4) does not apply in certain scenarios. They are:

> (a) a hearing at which the Tribunal makes a decision other than a final decision; or
>
> (aa) a hearing at which the Tribunal makes a final decision with the consent of the parties; or
>
> (b) a compulsory conference; or
>
> (c) the appointment of a Tribunal member as a mediator.

41 A final decision is a decision that disposes of a matter raised in an application. The orders the subject of this appeal constitute a final decision as they dispose of VR 53/2020.

42 Compulsory conferences are provided for by s 52. A member of the Tribunal presides at a compulsory conference: s 52(2). The purpose of a compulsory conference is to identify and clarify the issues in the proceeding and promote the resolution of the matters by a settlement between the parties: s 52(3). If a settlement appears to be reached at a compulsory conference, the Tribunal member presiding may reduce the terms of settlement to writing and make any orders necessary to give effect to the settlement: s 52(6).

[6] See s 15(1) of the SAT Act.

43 Mediations are provided for by s 54. The specified mediator has to be a person who has been approved by the President as a person who may act as a mediator: s 54(2). If the mediator is a Tribunal member and it appears a settlement has been reached, the mediator may reduce the terms of settlement to writing and make any orders necessary to give effect to the settlement: s 54(8).

44 Section 56 deals with settlements generally. It provides that if the parties agree in writing to settle a proceeding, the Tribunal may make any orders necessary to give effect to the settlement: s 56(1). This is subject to the qualification that the Tribunal cannot make an order under s 56(1) unless satisfied it has the power to do so: s 56(2).

45 It seems to me these provisions work in the following way in relation to vocational matters.

46 A member presiding at a compulsory conference has the power to make orders in a vocational matter disposing of the matter if the orders are agreed to by the parties. This arises from a combination of s 11(5)(b) and s 52(6). Similarly, a mediator who is a member has the power to make orders in a vocational matter disposing of the matter if the orders are agreed to by the parties. This arises from a combination of s 11(5)(c) and s 54(8). Section 11(5)(b) and (c) facilitate the member being able to exercise the powers granted by s 52 and s 54 in respect of conciliation conferences and mediations generally. However, they do not vest in the member any additional rights to hear the matter on their own.

47 Also, SAT constituted by one or more members as specified by the President, has the power to make orders in a vocational matter necessary to give effect to a settlement agreed in writing. This arises from a combination of s 11(1), s 11(5)(aa) and s 56(1).

48 The available procedures which I have described at [46] and [47] operate as an exception to the requirement in s 11(4) that the Tribunal in a vocational matter is to be constituted by three members, one of whom is legally qualified. They facilitate SAT being empowered with the discretion to make a decision without the need for a contested hearing.[7]

49 That being said, what I have explained at [46] and [47] only sets out the source of the member's powers to make the orders. Those

[7] ***Chang v Legal Profession Complaints Committee*** [No 2] [2020] WASCA 208; (2020) 56 WAR 263 [182].

powers must be exercised in accordance with pt 8 div 12 of the HPL. Accordingly, the member making the orders has to independently satisfy themselves of the appropriateness of the decisions reflected by the agreed orders. The parties' agreement to the orders only reflects what the parties consider to be an appropriate disposition of the matter. That is a relevant consideration for the member to take into account.[8] The parties' agreement also reflects that the facts set out in the annexure to the orders are agreed facts and thus do not require proof. Here, the consent orders do not however reflect a form of contract between the parties.[9]

50 Furthermore, when deciding whether to make orders that have been agreed by the parties at a compulsory conference or a mediation, in my view s 52(6) and s 54(8) respectively permit the member to have regard to the knowledge of the proceedings they acquired during the course of the conference or mediation. It would be artificial to invest the member with the power to make the orders, yet exclude from their consideration the knowledge of the proceedings that they acquired during the conference or mediation. If the member is not satisfied the orders should be made, then in respect of a conciliation conference, the member cannot be one of the members constituting the Tribunal for the purposes of dealing with the matter: s 52(7). In relation to a mediation, the member cannot take any further part in dealing with the matter unless the parties agree: s 54(10).

51 To properly understand the orders that were made, it is helpful to first explain the findings that the Medical Board had sought against Mr Nugawela.

The Medical Board's Statement of Issues, Facts and Contentions

52 The ultimate allegations made by the Medical Board against Mr Nugawela are set out in the Medical Board's Substituted Statement of Issues, Facts and Contentions filed 18 October 2021.[10] For the sake of simplicity, I will call this document the Medical Board's Statement of Issues.

53 The proceedings against Mr Nugawela came on for hearing on 27 October 2021. At that hearing, Mr Nugawela represented himself.

[8] See by way of analogy, ***Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc*** [1999] FCA 18 [22] - [23].
[9] See ***Benfield v Australian National Railways Commission*** (1992) 8 WAR 285, 293 per Malcolm CJ. See also ***Connor v Veitch*** [2023] WASCA 186 [25] - [27].
[10] Mr Nugawela's appeal book, 208 - 216.

SAT gave the Medical Board leave to amend in accordance with the document filed 18 October 2021. SAT vacated the hearing, being of the view that Mr Nugawela was prejudiced by the late amendments.

54 The concluding paragraphs of the Medical Board's Statement of Issues were as follows:

> 56. Dr Nugawela engaged in *professional misconduct* and *unprofessional conduct* in each of the following ways:
>
> (a) failing to appropriately store and manage clinical records at the Property, and then failing to arrange for their transfer in the lead up to, and after, his eviction on 21 June 2018,
>
> (b) failing to appropriately store and manage Schedule 4 and Schedule 8 medications at the Property, including failing to make provision for them in the lead up to, and after, his eviction on 21 June 2018,
>
> (c) acting in breach of the Code, and in breach of the *Medicines and Poisons Regulations 2016* (WA) and relevant Department of Health requirements, and
>
> (d) failing to provide information, including practice information to Ahpra, and failed to comply with s 131 of the National Law.
>
> 57. If the [Medical Board] establishes the failures of Dr Nugawela as contended for in paragraph 56 above, but the Tribunal is not satisfied that any of these failures alone constitute *professional misconduct* but they do constitute *unprofessional conduct*, then the [Medical Board] contends that Dr Nugawela is guilty of *professional misconduct* by reason of having engaged in more than one instance of *unprofessional conduct* that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a practitioner with an equivalent level of training and experience.

55 As can be seen, pars 56 and 57 of the Medical Board's Statement of Issues set out alternate pathways to a finding of professional misconduct. First, that the conduct separately described at each of par 56(a) to par 56(d) constituted professional misconduct itself. Second, that each instance of conduct constituted unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a practitioner with an equivalent level of training and experience.

The making of the orders and their terms

56 The making of the orders by the SAT member occurred in the following sequence.

57 Mr Nugawela and counsel for the respondent signed a minute of consent orders.[11] Up until then, the parties and their representatives had been separated during the mediation. Upon the consent orders being signed, the parties and their representatives all went into the hearing room. Once together in the room, the SAT member said words to the effect that she would make orders to give effect to the signed minute of consent orders.[12] While Ms Pallas' affidavit does not expressly say so, the clear inference is that the signed minute was given to the SAT member before she said those words.

58 The final orders made are in identical terms to the consent orders that the parties signed.

59 The heading to the orders refers to the date of decision and it being a decision of the member who conducted the mediation. The orders commence with the words:

> On the application of the parties to settle the proceedings:

60 The orders then state:

> **The Tribunal notes:**
>
> The Applicant alleged that there is proper cause for disciplinary action against the Respondent under s 193(1)(a)(i) of the Health Practitioner Regulation National Law (WA) Act 2010.
>
> At the Mediation conducted on 8 September 2022 the parties agreed the substantive terms upon which the proceedings could be settled.
>
> The facts agreed by the parties are contained in Annexure A.
>
> The Tribunal is satisfied that proper cause exists for disciplinary action against the Respondent.
>
> **The Tribunal orders:**
>
> To give effect to the agreed terms of settlement, it is ordered that:

[11] Affidavit of Ms Pallas affirmed 7 June 2023, par 10.
[12] Affidavit of Ms Pallas affirmed 7 June 2023, par 11.

> 1. The Tribunal finds that by engaging in the conduct set out at Annexure A, the Respondent has behaved in a way that constitutes professional misconduct as defined in section 5 of the National Law;
>
> …

61 The reference in this passage to s 193(1)(a)(i) of the 'Health Practitioner Regulation National Law (WA) Act 2010' is clearly intended to be a reference to the HPL, which applies pursuant to that Act. Similarly, the reference in the order to the National Law is clearly intended to be a reference to the HPL. I proceed on that basis.

62 The language of the orders reflects that the member presiding has decided to make the findings and other orders which are set out. In this respect, the orders state that they are made on 'the application of the parties to settle the proceedings'. Further, the orders use the words '[t]he Tribunal is satisfied that proper cause exists for disciplinary action against [Mr Nugawela]' and '[t]he Tribunal finds' that Mr Nugawela has behaved in a way that constitutes professional misconduct.

63 The orders also state that the facts agreed by the parties are contained in Annexure A to the orders. Annexure A starts with the words:

> The parties have agreed the following relevant facts:

64 These words reflect that Mr Nugawela and the Medical Board accept that the facts set out in the annexure are proven without more. The agreed facts set out five separate subject matters of conduct. Those subject matters have the following headings: Clinical Records; Medication; National Law - Breach of section 132; National Law - Breach of Schedule 5; and National Law - Breach of section 131.

65 The orders contain a reprimand of Mr Nugawela pursuant to s 196(2)(a): order 2.

66 The conditions imposed by order 3 are directed to imposing a regime of supervised practice in relation to the maintenance and the storage of clinical records and storage of medicines, Mr Nugawela undertaking education predominantly directed to those same topics and more general matters directed to the steps Mr Nugawela was to take upon commencing practice at a new place of practice.

67 The supervised practice conditions required that within 28 days of notice of the imposition of the conditions, Mr Nugawela nominate a primary supervisor and at least one alternate supervisor to be approved by the Chair of the Medical Board: order 3(b). The orders also provide that where no approved supervisor is willing or able to provide the supervision required, Mr Nugawela must cease practice and must not resume practice until a supervisor has been nominated by him and approved by the Chair of the Medical Board: order 3(d).

68 Further, pursuant to the orders, Mr Nugawela must ensure that each nomination is accompanied by a written acknowledgement from each nominated supervisor that they are willing to undertake the role and are aware that AHPRA will seek reports from them: order 3(c).

69 The orders impose a review period as required by s 196(3) of the HPL, that period being six months: order 4.

70 In respect of the finding that Mr Nugawela has engaged in professional misconduct, the order does not go as far as delineating that any of the specific instances of conduct in the agreed facts *by themselves* constitute professional misconduct. Rather, the finding is that 'by engaging in the conduct set out in Annexure A, [Mr Nugawela] has engaged in professional misconduct…'. Counsel for the Medical Board candidly accepts that the orders are not clear in this respect. The orders differ from the language used in the primary relief sought by the Medical Board's Statement of Issues, which expressly delineated that each instance of conduct complained of constituted professional misconduct and unprofessional conduct. In my view, the preferred interpretation of the orders is that the finding of professional misconduct is addressed to the entirety of Mr Nugawela's conduct taken as a whole and not to each of the specific instances of conduct described in the agreed facts. This is consistent with the words used in the orders, which speak of the conduct set out in Annexure A as opposed to each instance of conduct which is set out. Accordingly, the effect of the finding of professional misconduct is that the entirety of Mr Nugawela's conduct taken as a whole constitutes unprofessional conduct by him that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience. It therefore falls within paragraph (a) of the definition of professional misconduct.

71 I am satisfied that the SAT member made an independent decision to make the orders set out in the consent orders and this accorded with

the requirements of the HPL. In this respect, the SAT member presided over the mediation for the whole day and must have been familiar with the issues by the time the member said she would make the orders. Further, the overwhelming inference is that the SAT member was familiar with the terms of the orders that were presented to her, given she was presiding over the mediation at which the consent orders were signed. This is to be contrasted with a scenario where a decision is made in such circumstances that the decision maker could not have had time to consider the decision that was made.[13]

72 Also, the consent orders were presented as an *application* to the SAT member. The consent orders themselves reflected that the SAT member needed to approve that application. Also, the terms of the orders reflected that the SAT member had made an independent decision in terms of the orders. The SAT member had the power to make such a decision by virtue of the operation of s 11(5)(c) and s 54(8) of the SAT Act.

73 I therefore am satisfied that the orders constitute decisions made under s 196(1)(b)(i) and (ii), s 196(2)(a), s 196(2)(b) and s 196(3) of the HPL.

74 Having said that, with the benefit of hindsight, the situation regarding the orders could have been made clearer. It would have been helpful if the SAT member's satisfaction of the relevant requirements was stated at the time the SAT member said she would make orders to give effect to the consent orders. Also, it would have been preferable for the orders to expressly state the basis upon which the conduct set out in Annexure A constituted professional misconduct.

75 In relation to the review period contained in the orders, the Medical Board accepts that review period has now expired. It is therefore open to Mr Nugawela to apply to the Board to change or remove the conditions to take account of his asserted difficulty in finding an appropriate supervisor. Such an application is not a matter that I can deal with.

76 I turn now to addressing the framework within which the appeal is brought.

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[13] See Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) [6.150].

The appeal

77 Mr Nugawela's Appeal Notice states that it is filed under s 105(3)(b) and s 105(13) of the SAT Act, and s 199 of the HPL.

78 Section 199 of the HPL provides for a right of appeal from a decision of the relevant National Board or of a panel established under the HPL. Such an appeal is made *to* the responsible tribunal. Section 199 does not apply to an appeal *from* a decision of the responsible tribunal. Section 199 therefore does not apply here, this appeal being from a decision of SAT as the responsible tribunal.

79 Section 105 of the SAT Act deals with appeals from decisions of SAT. Mr Nugawela is a party to VR 53/2020. He therefore may appeal from a decision of SAT in VR 53/2020, but only if the court to which the appeal lies gives leave to appeal: s 105(1). Leave should be granted if in all the circumstances it is in the interests of justice that there be a grant of leave.[14]

80 As the decision the subject of the appeal was not made by a judicial member, the appeal lies to the General Division of the Supreme Court: s 105(3).

81 The appeal can only be brought on a question of law: s 105(2). Section 105(13) provides for an exception to s 105(2). The exception is engaged where the decision under appeal is made under an enabling Act and 'has the effect of depriving a person of the person's capacity to lawfully pursue a vocation'. Where this exception is engaged, an appeal may be brought by the person affected on any ground whether it involves a question of law, a question of fact or a question of mixed law and fact.[15]

82 Section 105(13) is concerned with the legal, as distinct from the practical, effect of the decision.[16]

83 The orders under appeal here do not have the legal effect of depriving Mr Nugawela of his capacity to pursue his vocation as a medical practitioner. Mr Nugawela contends it is not reasonably possible for him to obtain a suitable supervisor and thus the orders have the effect of depriving him of his vocation. Even if that were the case, such a contention reflects the practical effect of the orders, not their

[14] ***Paradis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [16] - [18].
[15] ***Paradis*** [48] - [51].
[16] ***Paradis*** [48].

legal effect. In any event, there is no evidence before me that sustains Mr Nugawela's proposition.

84 Furthermore, after the conclusion of the review period of six months, Mr Nugawela has an absolute right to seek to change the conditions. Also, within that 6-month period, Mr Nugawela had a qualified right to seek to change the conditions if he reasonably believed there was a material change in his circumstances.

85 For completeness, I note that after the orders were made, Mr Nugawela kept practicing as a medical practitioner.[17] That he did so runs counter to the proposition that the effect of the orders was that he was not able to do so.

86 For these reasons, I proceed on the basis that s 105(2) applies to the appeal. Accordingly, the appeal can only be brought on a question of law.

87 An appeal under s 105(2) is analogous to judicial review, subject to s 105(2) applying to all errors of law, jurisdictional or otherwise.[18] A decision does not involve an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[19] The appeal is not by way of rehearing. As a consequence of the limited scope of the jurisdiction, the court hearing the appeal does not have express or implied power to receive additional evidence.[20]

Evidence on the appeal

88 The evidence on the appeal consists of the following.

89 Mr Nugawela relies on his affidavit sworn 18 May 2023. As I will come to explain, portions of this affidavit were struck out pursuant to orders of Forrester J made 24 July 2023.

90 The Medical Board relies on an affidavit of Ms Pallas affirmed 7 June 2023 and affidavits of Ms Millar affirmed 9 June 2023 and 6 October 2023. Ms Pallas is a senior legal advisor at AHPRA.

[17] Mr Nugawela's affidavit, par 69. Further, at the hearing before Forrester J on 2 February 2023, Mr Nugawela informed her Honour he was still practicing medicine.
[18] ***Commissioner for Consumer Protection v Carey*** [2014] WASCA 7 [72] (McLure P) and [170] (Murphy JA agreeing).
[19] ***Australian Broadcasting Tribunal v Bond*** [1990] HCA 33; (1990) 170 CLR 321, 353.
[20] ***Carey*** [71] (McLure P), [170] (Murphy JA agreeing) and [167] (Buss JA).

Ms Millar is a lawyer employed as a senior associate by the Medical Board's solicitors and has the day-to-day conduct of the matter.

91 The Medical Board did not cross-examine Mr Nugawela on his affidavit. Mr Nugawela cross-examined Ms Pallas.

92 Further, Mr Nugawela relied on material contained in his appeal book.

93 The parties have proceeded on the basis that evidence pertaining to the steps leading up to the making of the orders is admissible. I think that is right. Evidence in relation to those steps is not 'additional evidence'. It reflects the procedural context to the making of the orders.

94 I do have my doubts as to whether Mr Nugawela's evidence pertaining to his perceived difficulties in complying with the conditions is admissible on this appeal. That does seem to me to be additional evidence. It relates to the question of the appropriateness of the conditions having regard to events post the making of the orders. In any event, given the Medical Board does not oppose my receipt of that evidence I have had regard to it in determining this appeal.

95 The Medical Board did object to a number of the documents comprised within Mr Nugawela's appeal book. The large part of those objections was on the ground that the document was irrelevant. It is not necessary to directly deal with those objections. To the extent I refer to such a document in these reasons, I am satisfied it is relevant to the outcome, or at least to explaining the background to the orders.

96 The Medical Board also objected to documents 14 and 21 on the ground they constituted without prejudice communications. Document 14 is a minute of proposed consent orders dated 7 October 2020 and document 21 is a without prejudice letter of 25 February 2021 from the Medical Board's solicitors to Mr Nugawela. It is not suggested that the communications occurred within a mediation process. Therefore I do not need to consider s 55 of the SAT Act, which limits the evidentiary use that can be made of anything said or done in a mediation. I say something further at [103] about s 55 in terms of its application to the appeal generally.

97 The documents are without prejudice communications and ordinarily the privilege attaching to such communications would mean that resort cannot be had to them. However, the without prejudice rule is not absolute and resort may be had to without prejudice material for a

variety of reasons when the justice of the case requires it.[21] Broadly speaking, ground 3 of Mr Nugawela's appeal raises matters of unconscionability in respect of the making of the orders. I am satisfied that ground should not be considered in a vacuum from what happened earlier on in the negotiations. Accordingly, I am satisfied the justice of the case requires that Mr Nugawela be permitted to rely on without prejudice communications preceding the mediation at which the orders were made in relation to ground 3.[22]

98 As will become apparent, there is a significant lacuna in the evidence.

99 The evidence before me does not explain the legal advice that Mr Nugawela received regarding the consent orders, their effect and their implementation. As I understand it, Mr Nugawela's affidavit did initially address these matters to some extent. However, by order of Forrester J made 24 July 2023, her Honour ordered that those parts be struck out unless Mr Nugawela filed a notice indicating that legal professional privilege is waived in relation to his discussions with his pro bono lawyers as to their representation of him at the mediation: order 1. The relevant parts to be struck out were set out in Annexure A to the orders.

100 If Mr Nugawela did file the notice of waiver, then the Medical Board had leave to issue a subpoena to Mr Nugawela's lawyers directed to the production of copies of all documents identifying the scope of, or produced as a result of, their pro bono engagement by Mr Nugawela in VR 53/2020.[23] The subpoena went on to identify specific documents of which production was sought. Mr Nugawela did not file the notice of waiver. The paragraphs set out in Annexure A to the orders were therefore struck out and the Medical Board did not have leave to issue the subpoena.

101 It is not apparent on the material before me why Mr Nugawela declined to file the notice of waiver. The consequence of his decision not to do so is that I do not have before me any evidence as to his communications with his lawyers, including, most importantly, the legal advice that he received.

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[21] ***Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd*** [2003] WASCA 11 [94] (McLure J).
[22] See by analogy ***Unilever Plc v Proctor and Gamble Co*** [2000] 1 WLR 2436, 2444, point (2).
[23] See order 2 made 24 July 2023, as amended by order made 26 July 2023.

102 Further, by order made 2 February 2023, Forrester J made orders for the filing of affidavits, also ordering that except with the leave of the court, no party may adduce evidence in chief from any witness whose affidavit has not been served in accordance with the orders and may not adduce evidence in chief which has not been set out in that witness' affidavit: order 8. On the hearing of the appeal, Mr Nugawela mentioned that affidavit material in another matter may be of relevance, however he had not made any application for leave to adduce that evidence. Therefore that material, even if it was admissible on this appeal, was not before me.

103 In relation to the application of s 55 of the SAT Act to the appeal generally, the Medical Board's position is that s 55 does not preclude either party from leading evidence in this appeal of anything that was said or done in the course of the mediation.[24] Forrester J deferred considering the application of s 55 to this appeal until after Mr Nugawela had filed his evidence.[25] Accordingly, Mr Nugawela was not prevented from *seeking* to adduce evidence of what happened at the mediation, with the question of its admissibility to be determined at a later date. Ultimately, given the orders which Forrester J made regarding the striking out of parts of Mr Nugawela's affidavit, it was not necessary for her Honour to consider the application of s 55.

104 I now turn to the grounds of appeal.

General observations regarding the grounds

105 The Medical Board does not suggest that a ground of appeal does not lie because the orders were made by consent. I think that is right. As I have explained, the consent orders constituted an application to the member. Accordingly, it is open to Mr Nugawela to contend that there was an error of law in the making of the orders. That does not however mean that Mr Nugawela's consent to the orders is irrelevant. It is still a matter to take into account in assessing whether there was any error of law. In that respect, it was Mr Nugawela who signed the consent orders, not his lawyers. Accordingly, this is not an instance where it can be suggested Mr Nugawela's lawyers acted beyond their authority or made a mistake by agreeing to the consent orders.

[24] Medical Board's submissions filed 30 January 2023.
[25] Directions hearing 14 April 2023, ts 48 - ts 49.

106 As will become apparent, there is a degree of overlap in the grounds of appeal. It is however preferable to deal with them separately.

Ground 1

107 Ground 1 is in the following terms:

> **DENIAL OF PROCEDURAL FAIRNESS**
>
> a. Fundamental rules of natural justice were breached as the mediator commenced with an apparent acceptance of a conduct-finding instead of dealing with the issues in dispute on the alleged charges. The appellant's Statement of Issues, Facts and Contentions (SOFIC) was totally dismissed such that the defendant was presumed guilty on all conduct charges, and the mediation was premised solely on the penalty.
>
> b. Additional factors showing overt denial of natural justice are contained in the Appellant's letter to the SAT dated 21 September 2022.
>
> c. The appellant's signature was obtained under duress. Stress and duress were expressed openly at the mediation, and immediately ridiculed by the mediator in suggesting that the appellant should not then be practising medicine. Other unsupported assertions were made.

108 This ground is directed to a denial of procedural fairness. The Medical Board by their counsel's written submissions rightly accept that a denial of procedural fairness is a question of law.[26]

109 The specific complaints raised are directed to allegations the mediator disregarded Mr Nugawela's position, presumed him guilty of the allegations, conducted the mediation on the premise that it was solely on penalty and his signature to the consent orders was obtained under duress. I have read Mr Nugawela's letter to SAT dated 21 September 2022 (referred to in ground 1(b)) which broadly accords with the specific complaints made in ground 1.

110 Mr Nugawela's affidavit sets out the following matters in relation to ground 1:

> 59. The mediation was compulsory, as was the appointment of pro-bono lawyers whose brief was representation for management at least of the 'tricky' legal issues - *Bankruptcy Act*

[26] ***Matsoukatidou v Yarra Ranges Shire Council*** [2013] VSC 299 [4] (Mukhtar AsJ).

> provisions overriding Medical Board Code of Conduct obligations. The fundamental relevance to Storage of Medical Records and Medicines and Poisons (schedule 4 and 8) - became Tribunal orders and currently the basis for Immediate Action to suspend registration.
>
> 60. [Redacted] I understood their presence was to clarify and narrow issues in the SFIC in preparation for the trial, for which programming orders for the hearing were in existence under Justice Pritchard's Orders.
>
> …
>
> 64. [Redacted] This belief was based on Justice Pritchard's orders which initially set firm hearing dates as well as consideration for mediation prior to the hearing; and which was subsequently revised to October dates after the mediation session. I therefore believed that mediation would narrow the issues for the hearing and any orders made would then be finalised at the October hearing.

111 As can be seen, Mr Nugawela's affidavit is directed to his belief as to the purpose of the mediation. Mr Nugawela does not however explain his state of mind when he signed the consent orders, nor does he address what he understood to be the purpose of those orders. Mr Nugawela's affidavit does not suggest that he misunderstood the orders or misapprehended their effect. Accordingly, Mr Nugawela's affidavit does not provide support for ground 1.

112 Further, Mr Nugawela's allegations in support of ground 1 cannot be inferred from the terms of the orders. In certain circumstances, it might be possible to infer a denial of procedural fairness if the orders are so unusual or disproportionate that a person's agreement to them could not be said to be a rational decision. However, such an assessment cannot be undertaken in isolation from the circumstances in which the orders were made, which relevantly in this case includes the legal advice that Mr Nugawela received. Moreover, for reasons which I express at [142] to [147] below, there is not a requisite degree of disproportionality between the orders made and the Medical Board's allegations such as to support an inference of procedural unfairness.

113 The Medical Board submits that leading up to the mediation, including at directions hearings, it was made clear to Mr Nugawela that the purpose of the mediation was to resolve the matter in its entirety. The Medical Board therefore submits I should not accept Mr Nugawela's evidence that he believed the mediation would narrow

the issues for the final hearing listed in October 2022 and any orders made would be finalised at that final hearing (par 64 of his affidavit). A difficulty with this submission is that Mr Nugawela was not cross-examined on his affidavit. And, what might now be obvious from a precise analysis of the procedural history leading up to the mediation, might not necessarily have been obvious to Mr Nugawela at the time. In any event, I do not need to make a final determination on the Medical Board's submission. This is because, in my view, the critical point for the assessment of Mr Nugawela's state of mind is when he signed the orders, and his affidavit does not address that topic.

114 Putting the Medical Board's submission to one side, the lead up to the mediation does not provide any contextual support for an allegation that Mr Nugawela was denied procedural fairness. Judicial members of SAT went to great lengths to secure pro bono legal representation for Mr Nugawela. This included by way of orders made 27 October 2021 and 21 June 2022 and by e-mail of 3 May 2022 from the President's associate to Ms McGrath of Panetta McGrath.

115 Ultimately, in relation to ground 1, it is for Mr Nugawela to demonstrate that he was denied procedural fairness in respect of the conduct of the mediation. The limited material that is before the court does not sustain the allegations that are comprised within ground 1.

116 In terms of Mr Nugawela's written submissions, broadly speaking they raise two matters in support of the assertion that he was denied procedural fairness.

117 The first matter concerns the Medical Board's allegations that Mr Nugawela had breached s 131, s 132 and sch 5 of the HPL. Mr Nugawela contends such allegations had previously been made by the Medical Board in VR 50/2020. He says that it can be inferred from the order made disposing of VR 50/2020 that he was 'acquitted' of the alleged breaches. This assertion is not comprised within ground 1. The assertion seems to be that there is an issue estoppel preventing the Medical Board from raising those same matters in VR 53/2020. [27]

[27] Assuming issue estoppel applies in SAT - see ***Mustac v Medical Board of Western Australia*** [2007] WASCA 128 [55]. See also ***Chang*** [334] - [345].

118 In the joint judgment of French CJ, Bell, Gageler and Keane JJ in ***Tomlinson v Ramsey Food Processing Pty Ltd***,[28] their Honours stated:

> Estoppel in that form [issue estoppel] operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a 'judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'. (footnotes omitted)

119 Accordingly, for an issue estoppel to arise, the issue of the breaches which Mr Nugawela has identified needs to have been necessarily resolved in VR 50/2020 as a step in reaching the ultimate determination made in that matter.

120 There is no evidence before me as to the substance of the issues raised in VR 50/2020. Furthermore, the order made in respect of VR 50/2020 was that Mr Nugawela had leave to withdraw the proceedings. I have read through the transcript of the hearing on 30 June 2020 when the order for leave to withdraw was made. The order was made because the subject matter of VR 50/2020 had become futile, given AHPRA had reinstated and backdated Mr Nugawela's registration as a medical practitioner. No findings were made; the order was that Mr Nugawela have leave to withdraw. The making of such an order in those circumstances does not give rise to any form of issue estoppel in respect of the breach allegations which Mr Nugawela says were made against him in VR 50/2020.[29]

121 The second matter is that Mr Nugawela asserts the facts and legal matters the subject of the Medical Board's allegations were not tested. However, with respect to Mr Nugawela, this misapprehends the nature of a mediated outcome, which is then put to SAT for approval. A mediation advances the prospect of the matter being resolved without the need for a contested hearing.[30] At the mediation, the parties seek to find common ground for an ultimate disposition of the matter, which can then be put to the SAT member for approval. In a case such as this, the common ground is directed to both the underlying factual basis, and

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[28] ***Tomlinson v Ramsey Food Processing Pty Ltd*** [2015] HCA 28; (2015) 256 CLR 507 [22]. See also ***Blair v Curren*** [1939] HCA 23; (1939) 62 CLR 464, 531 - 532; ***Jackson v Goldsmith*** [1950] HCA 22; (1950) 81 CLR 446, 466.

[29] Given this finding, I do not need to consider whether AHPRA and the Medical Board are privies, they respectively being the other parties to VR 50/2020 and VR 53/2020.

[30] See ***Chang*** [182].

also to the appropriate disposition of the matter having regard to that factual basis.

122 In terms of the facts set out in Annexure A to the orders, Mr Nugawela's signature to the consent orders accepts that those facts are proven. Those facts are admitted facts from the perspective of both the Medical Board and Mr Nugawela. They provide, and also limit, the foundational bases for the orders made. There is no evidence before me that by signing the consent orders, Mr Nugawela did not intend to admit the facts comprised within Annexure A.

123 In terms of the legal findings, the consent orders only have the effect of the parties accepting that the legal findings are established and the disposition is appropriate. However, ultimately it was for the SAT member to be independently satisfied of this. As I have explained, in my view, the SAT member was independently satisfied that the proposed legal findings and disposition were established and appropriate.

124 A further matter which Mr Nugawela emphasised in his oral submissions was he expected there to be a further hearing at which the appropriateness of the disposition reflected by the consent orders could then be agitated. Mr Nugawela seemed to suggest that at a later stage he could agitate the appropriateness of the orders to which he had consented.[31] If that is what Mr Nugawela is suggesting, there is an air of unreality to it. On the one hand, by signing the consent orders, Mr Nugawela has conveyed that the consent orders reflect an appropriate disposition of the matter and that he accepts the facts as set out are proven. Yet, on the other hand, Mr Nugawela would be able to agitate at a later hearing that the disposition was not appropriate. In any event, there is no evidence before me to the effect that Mr Nugawela understood the consent orders to only reflect an indicative position on his part.

125 For these reasons, ground 1 is not made out. In considering ground 1, it was necessary to first determine the jurisdictional basis upon which the SAT member made the orders, including the interaction between the SAT Act and the HPL. That being so, I consider it is in the interests of justice that there is a grant of leave in respect of ground 1, even though ground 1 does not succeed.

[31] ts 161.

Ground 2

126 Ground 2 is in the following terms:

> **INEFFECTIVE LEGAL REPRESENTATION**
>
> a. The Tribunal ordered pro bono assistance for the final hearing. The lawyers decided to represent the appellant at mediation as well.
>
> b. The lawyers were hitherto not significantly involved in the primary action (VR53), and not at all for the inter related actions. The focus at mediation was on the respondents' case and outcome they wanted from the outset. The appellant had consistently rejected the outcomes which were outdated yet still pressed.
>
> c. The Bankruptcy Act's federal jurisdiction and its impact on the SAT action were not examined to any significant degree. The lawyers did not refer to Justice Pritchard's view noted on the subject at the June hearing. [*Transcript SAT hearing on 21/6/22 pg. 7 on*]
>
> d. The terms signed off upon at the mediation bore a striking resemblance to those that Justice Jackson had criticised previously (VR21/2022) and which His Honour indicated was based on a lack of the respondents' understanding of the appellant's practice. The appellant had shown then that those conditions, which pertained also to clinical supervision, were irrelevant to the cause of action.
>
> e. The respondents' conditions for settlement were consistently rejected from the start of the mediation until the almost the very end, some 7 hours after commencement of what Justice Pritchard ordered as a 'half day mediation'.
>
> f. The lawyers did not support the termination of the mediation when the appellant requested it openly on various occasions during the 7-hour mediation.
>
> g. The focus of mediation was on the respondent's case and their terms. There was no document presented on the appellant's case. The approach taken was damage containment rather than a robust defence for the appellant, thus planning to fail.

127 As can be seen, this ground in effect alleges incompetence of legal representation.

128 In criminal proceedings, a ground directed to the incompetence of legal representation is in effect that there has been a miscarriage of

justice by reason of the incompetence. It is not sufficient that the lawyers have been incompetent; the incompetence must have occasioned a miscarriage of justice.[32] In civil proceedings, the incompetence of legal representation will not enliven the court's discretion to set aside the relevant orders occasioned by the incompetence.[33]

129 I have not been taken to any case authority that suggests incompetent legal representation provides an arguable basis to set aside orders made by an administrative body. The Medical Board says that complaints of ineffective legal representation are not questions of law and thus do not constitute an available ground of appeal for that reason.

130 I do not need to determine whether the allegations comprised in ground 2 articulate an available ground of appeal. I have come to the view that ground 2 is not made out in any event.

131 Predominantly, this is because there is no evidence which supports ground 2. Mr Nugawela did not adduce any evidence as to the advice given, or steps taken, by his legal representatives. He did not call evidence from his legal representatives. He declined to waive legal professional privilege in relation to his discussions with his lawyers as to their representation of him at the mediation. There is therefore no material before me upon which I can be satisfied that Mr Nugawela was incompetently represented, or that any such incompetence brought about an unfairness to Mr Nugawela in the making of the orders.

132 The substantive complaint made in Mr Nugawela's written submissions regarding the nature of his legal representation is that:[34]

> 49. The role of pro bono lawyers was consistent with containing, if not concluding, the matter than defending the appellant's position. They scaled down the appellant's responsive SIFC to reduce burden of evidentiary load and length of hearing. The SIFC put the Board to proof on all issues.
>
> 50. However, the final outcome was no proof on any issues being called or tested. This reduced cost to the Tribunal of a hearing and to all parties including the pro bono lawyers who bore their own costs.

[32] ***Huggins v The State of Western Australia*** [2018] WASCA 61 [375].
[33] See ***Wreford v Lyle [No 3]*** [2021] WASCA 20 [89] - [91].
[34] Mr Nugawela's written submissions [49] – [50].

133 These paragraphs do not engage with the basis upon which the orders were made. The orders were made consequent upon a mediation, not a final hearing. As I have explained earlier, the purpose and conduct of a mediation is different to that of a final hearing - see [121] above.

134 An implicit suggestion that arises from Mr Nugawela's written submissions is that SAT had some form of oversight over his lawyers. Mr Nugawela asks rhetorically in his submissions whether the lawyers' ultimate client was in effect SAT.[35] As I have already explained, SAT made considerable efforts to assist Mr Nugawela in obtaining pro bono legal representation, bearing in mind that he was and remains an undischarged bankrupt. There is no suggestion on the material before me that SAT sought to assert any form of influence whatsoever over the pro bono lawyers who provided legal assistance to Mr Nugawela.

135 For these reasons, ground 2 is not made out. I do not consider it is in the interests of justice that leave to appeal be granted in respect of it. I therefore decline to grant leave to appeal in respect of ground 2.

Ground 3

136 Ground 3 is in the following terms:

> **UNCONSCIONABLE AGREEMENT**
>
> a. The purported agreement reached was unconscionable. The respondents would have been aware that a finding of professional misconduct would not likely be sustained if the matter went to trial. They were alleged administrative errors which caused no harm to any patient, did not arise from complaint by any patient or member of the public. The appellant had unblemished medical registration each year since commencement in 1975 - i.e. unconditional, free of endorsements, restrictions or undertakings.
>
> b. The publicity of 'annexure a' of the Tribunal orders on the AHPRA public website is harsh, disproportionate, unwarranted and liable to cause damage to reputation and confidence in the medical practice. The respondents, as professional litigants in medical vocational matters, would have been aware of the degree of unreasonableness of what they sought.
>
> c. The respondents knew that the bankruptcy trustee attended the closed medical practice and removed the hard drives of all the

[35] Mr Nugawela's written submissions [47].

> computers containing the entire clinical records of the 45-year old medical practice, private, personal and third-party confidential material. He also removed other boxes of materials. His entry and removal of material was not made known to the appellant by any party until the commencement of the SAT action (VR53) in 2020, after the property was sold.
>
> d. What records and materials left behind by the trustee 4 years ago, now stored by the mortgagee BankWest, is what the respondents claim constitutes professional misconduct.
>
> e. The mediator was aware of the appellant's medical history and capitalised on the disability by naming the medical specialist and drawing unfair and incorrect inferences from the appellant's admission of stress during the mediation process in support of terminating it and going to a SAT hearing.
>
> (footnotes omitted)

137 By ground 3 and Mr Nugawela's written submissions in support of it, Mr Nugawela points to a combination of the terms of the orders, their effect and the conduct of the mediation as giving rise to the asserted unconscionability.

138 The Medical Board's submissions place Mr Nugawela's ground 3 within the rubric of the equitable principles of unconscionable conduct in order to impugn a transaction, thus requiring that Mr Nugawela be under a special disadvantage and the Medical Board to have unconscientiously exploited that disadvantage.[36] However, respectfully, that does not appear apt to the complaint which Mr Nugawela makes.

139 Rather, it seems to me that Mr Nugawela's complaint is that the orders, their effect and the conduct of the mediation, taken as a whole, reflect that there was a substantial deviation from the standards of fairness which ought to have been afforded to him at the mediation.[37] Characterised in that way, it is not necessary for Mr Nugawela to establish that he was subject to a special disadvantage, nor that such a disadvantage was unconscientiously exploited. Furthermore, characterised in that way, ground 3 reflects a denial of procedural fairness and thereby raises a question of law.

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[36] See ***Kakavas v Crown Melbourne Ltd*** [2013] HCA 25; (2013) 250 CLR 392 [122] - [124] and ***Thorne v Kennedy*** [2017] HCA 49; (2017) 263 CLR 85 [38].

[37] See by way of analogy, ***Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3)*** [2019] FCA 72 [662] - [663] as to what constitutes unconscionable conduct under the *Australian Consumer Law*.

140 However, the difficulty for Mr Nugawela is that there is no substantive evidence which supports the assertions comprised in ground 3. Most importantly, there is no evidence as to Mr Nugawela's state of mind when he signed the orders. So, there is no evidence as to how any such alleged unfairness affected his thinking when signing the consent orders. There also is no evidence as to the legal advice he received in relation to the consent orders and their implementation, or as to the legal advice he received throughout the course of the mediation.

141 In aid of his assertion of unconscionability, Mr Nugawela seeks to downplay the seriousness of the Medical Board's allegations. However, at their core and taken as a whole, those allegations did raise matters of substantial concern.

142 The allegations made by the Medical Board's Statement of Issues included the following. On 21 June 2018, the mortgagee took possession of the premises from which Mr Nugawela conducted his medical practice. That day, the mortgagee's agent inspected the premises and took photos depicting medicines that were not securely stored and patient files left out in consultation rooms and in reception. On 23 August, 10 September and 26 November 2018, the mortgagee wrote to Mr Nugawela requesting that he remove the clinical records left at the premises. On 23 January 2019, representatives of AHPRA inspected the premises and observed clinical and patient records that were readily accessible to anyone entering the premises. The AHPRA representatives also observed Schedule 4 medicines and Schedule 8 substances which were not securely stored. On 25 January 2019, the Department of Health seized these medicines and substances from the premises.

143 Schedule 4 medicines are prescription only medicines. Schedule 8 substances are controlled drug substances.[38] The medicines seized are quite extensive. The table listing them annexed to Ms Millar's affidavit affirmed 9 June 2023 runs to four and a half pages. There is one Schedule 8 substance (pethidine). The balance are all Schedule 4 medications, save for one instance where it is uncertain if it is a Schedule 3 (pharmacist only medicines) or a Schedule 4 medicine.

144 The Medical Board's allegations, if proven, were not trivial. The conduct complained of, if proven, put at risk the confidentiality of private patient information. It also gave rise to a risk that the

[38] *Medicines and Poisons Act 2014* (WA), s 4(1).

Schedule 4 medicines and the Schedule 8 substance might be unlawfully distributed into the community, given they were not securely stored.

145 Mr Nugawela asserts that the trustee in bankruptcy or the mortgagee in possession later secured the medical records. However, even if that were the case, it did not absolve Mr Nugawela from his obligations to secure the clinical and patient records when he was operating the practice, and to seek to secure or transfer the clinical and patient records once the mortgagee took possession.

146 Another matter that Mr Nugawela raises is that his conduct did not cause any harm to his patients. This is, of course, a factor to consider in assessing the overall disposition of the Medical Board's allegations. However, that no harm was caused to Mr Nugawela's patients does not mean the risk of harm was trivial, either in terms of the extent of the risk, or the gravity of the harm which might be caused if the risk eventuated.

147 When regard is had to the matters set out at [142] - [146], the ultimate disposition of the matter constituted by a reprimand and conditions of supervision, education and notification is not on its face disproportionate to the underlying agreed factual basis for the orders. Also, at the risk of repetition, the orders had a relatively short review period of six months.

148 As to Mr Nugawela's complaint regarding publication of the orders on the AHPRA website, this is expressly provided for by the HPL. Section 225(j) and s 225(k) require the relevant register of practitioners to include the fact that a practitioner has been reprimanded and to include any conditions imposed on the practitioner's registration. This is subject to s 226, which provides the relevant National Board with a discretion not to include such information in certain circumstances. Section 226(3) provides that the National Board may decide to remove the fact of a reprimand from the register if it is no longer necessary or appropriate for it to be recorded. Further, s 226(2) provides that on request by the practitioner, a National Board may decide to remove information from the register if the Board reasonably believes the inclusion of such information would present a serious risk to the practitioner's health or safety. Thus, the publication provisions have 'carveouts' that protect against undue harm to the practitioner. Mr Nugawela has not adduced any evidence of a particular

vulnerability that he has which is not adequately accommodated by s 226.

149 Mr Nugawela also asserts the Medical Board's position as reflected by the consent orders does not reflect any compromise on their part. This was in part the focus of his cross-examination of Ms Pallas. However, even if there had not been a substantial change of position, that does not by itself constitute substantial unfairness to Mr Nugawela. The Medical Board has responsibilities under the HPL which constrain the extent to which it can negotiate. It is not in the position of a commercial party, which ordinarily has much greater scope to negotiate.

150 Furthermore, the Medical Board's position did change. As I have already explained, the finding of professional misconduct made by the final orders is not to the effect that each instance of conduct complained of itself constituted professional misconduct. Rather, the finding is that the entirety of the conduct constitutes professional misconduct. Accordingly, the ultimate finding made was of a lesser seriousness than the primary finding sought by the Medical Board in its Statement of Issues. There were also changes directed to the supervisory regime. The final orders extended the period for Mr Nugawela to nominate a supervisor from 14 days to 28 days. The final orders also removed the need for a senior person at any practice where Mr Nugawela worked to be willing to provide reports to AHPRA.[39] The Medical Board also did not press for a fine, although that being said, the costs ordered increased from Mr Nugawela paying 60% of the Medical Board's costs to paying all of them. The final orders also included matters in mitigation, which the Medical Board acknowledged it did not dispute.

151 For completeness, I should also say that if the Medical Board's characterisation of ground 3 is correct, the evidence does not demonstrate that the Medical Board took unconscientious advantage of Mr Nugawela at the mediation. This is predominantly for the same reasons which I have already given in respect of both this ground and also ground 1.

152 For these reasons, ground 3 is not made out. While ground 3 could be regarded as raising a question of law, I do not consider that it is in the interests of justice that leave to appeal be granted in respect of it. I therefore decline to grant leave to appeal in respect of ground 3.

[39] See ts 170 - ts 172 for a more detailed explanation of the differences.

Ground 4

153 Ground 4 is in the following terms:

> **DEPRIVATION OF VOCATIONAL LIVELIHOOD**
>
> a. The conditions imposed on the appellant are unworkable for a solo GP practice and have already been alluded to. They are similar to those which were unsuccessful at all the SAT 'Immediate Action' hearings this year (VR21/2022) and then 'revoked' by the respondents and not substituted. Then Lazarus-like, they have resurrected.
>
> b. The conditions imposed would not be entertained in a group practice for they are conditions affecting the entire practice and practitioners and could potentially result in the entire practice being shut down purely on procedural grounds.
>
> c. The respondents were made aware that the appellant no longer stores Schedule 4 or Schedule 8 at his practice.
>
> d. The respondents were already aware at the time of the mediation that the appellant is, and was at the time of the alleged infractions, fully computerised. No confidential paper clinical records are stored on-site. Storage and security of computerised information would be the domain of a computer professional to supervise, not the province of a medical practitioner or lay person.
>
> (footnotes omitted)

154 I have held at [83] that the orders do not have the legal effect of depriving Mr Nugawela of his capacity to pursue his vocation as a medical practitioner and that as a consequence, Mr Nugawela's appeal grounds need to raise a question of law.

155 The Medical Board submits that ground 4 does not raise any question of law. It seems to me that the substance of Mr Nugawela's complaint is that at the point in time the orders were made, the conditions that they imposed were substantially unnecessary and substantially unworkable. It may well be that where a condition is imposed that is substantially unnecessary or substantially unworkable, there could be an argument that the decision is unreasonable and thus there has been a failure to properly exercise the discretion reposed by

law in SAT. If that were the case, it would constitute an implied error of law.[40]

156 However, the difficulty for Mr Nugawela is that there is no evidence before me which supports such a conclusion. In this respect, at the directions hearing held on 2 February 2023, Forrester J informed Mr Nugawela that:[41]

> Now, you're going to need to satisfy me at the hearing of this appeal that the tribunal's orders actually prevent you from carrying out your occupation, okay? So that's a preliminary issue that you're going to need to satisfy me of, because that will affect your grounds of appeal and which ones can be properly heard and which ones can't.

157 Mr Nugawela's affidavit asserts that the conditions are 'unworkable for a solo GP practice as a sole means of livelihood…'.[42] In his affidavit, Mr Nugawela also alludes to the cost of the required supervision being prohibitive.[43]

158 However, Mr Nugawela does not identify in his affidavit any steps he has taken to find a suitable supervisor. In his oral submissions on the hearing of the appeal, Mr Nugawela said that his approaches to colleagues to take on the supervisory role were unsuccessful. There is however no evidence before me as to the substance of those approaches, or when they occurred. There also is no evidence which explains the financial viability of Mr Nugawela's practice, such as to give weight to the proposition that the cost of supervision is prohibitive.

159 Furthermore, Mr Nugawela's signature to the consent orders conveys an acceptance that the conditions were at least capable of being achieved.

160 To the extent Mr Nugawela's complaint is directed to a current inability to comply with the conditions, he is able to seek to change or remove the conditions; see [31], [69], [75] and [84] above.

161 In relation to the particulars to ground 4, I have already addressed the substance of particular (a). Further, the reference in particular (a) to what occurred in VR 21/2022 may well have been a matter to be raised at the mediation and possibly at a contested hearing if VR 53/2020 had

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[40] See for example ***Real Estate and Business Agents Supervisory Board v Landa*** [2009] WASCA 191 [25] (McLure JA), [85] (Newnes JA agreeing) and [70] (Pullin JA).
[41] Hearing on 2 February 2023, ts 23.
[42] Mr Nugawela's affidavit, par 76.
[43] Mr Nugawela's affidavit, pars 78 and 79.

proceeded to a contested hearing. However, any such possible relevance does not demonstrate error on a question of law. Further, there is no substantive evidence before me as to what occurred in VR 21/2022.

162 In relation to particular (b), there is no evidence that supports the assertions made. Further, the orders only apply to Mr Nugawela and not to other practitioners operating within a general practice.

163 In relation to particular (c), if Mr Nugawela no longer stores Schedule 4 medicines or Schedule 8 substances at his practice, then compliance with the conditions pertaining to their storage is straightforward. That he no longer stores such medicines does not create a prejudice which affects his ability to practice. Moreover, the orders do not preclude Mr Nugawela from storing such medicines or substances in the future. Thus, even if he was not storing them at the time the orders were made, he retained the ability to do so in the future. The supervisory conditions therefore ensure an appropriate regime is in place if Mr Nugawela decided to again store Schedule 4 medicines or Schedule 8 substances.

164 In relation to particular (d), if Mr Nugawela's records were fully computerised, then compliance with the supervisory conditions pertaining to record storage is more straightforward. The computerisation of the records does not make the conditions unnecessary. Nor does it give rise to a prejudice which affects Mr Nugawela's ability to practice.

165 For these reasons, ground 4 is not made out. I do not consider that it is in the interests of justice that leave to appeal be granted in respect of it. I therefore decline to grant leave to appeal in respect of ground 4.

Ground 5

166 Ground 5 is in these terms:

> **INTERACTION WITH FEDERAL LAW**
>
> a. Justice Pritchard referred to the effect of superior law on state laws under which the current matter is litigated (SAT Act 2004, National Law 2010). Refer Bankruptcy Act 1966 Cth. s.27.
>
> b. President Justice Pritchard fixed a directions hearing for 9-August-2022. That hearing was cancelled without the knowledge or consent of the appellant.

> c. As to medical records, the mediator noted near the start of mediation that a High Court decision ruled that these were the property of the medical practitioner. The vesting of the medical practitioner's property with the trustee was not raised. The trustee exercised jurisdiction on the appellant's property and medical records by entry to the closed practice and unfettered possession.
>
> (footnotes omitted)

167 SAT is an administrative tribunal. It is not a court. SAT only has the jurisdiction which is conferred on it by the SAT Act or an enabling Act.[44] SAT does not have jurisdiction with respect to any matter arising under the *Constitution* or arising under the laws made by the Commonwealth Parliament.[45]

168 The overall context to ground 5 is that Mr Nugawela was declared bankrupt on 21 February 2017 and as a result, his property then vested in his trustee in bankruptcy: s 58 of the *Bankruptcy Act*.

169 The broad contentions underpinning ground 5 are two-fold. First, that the HPL is inoperative by force of s 109 of the *Constitution* in that it is inconsistent with the provisions of the *Bankruptcy Act*. Second, the Medical Board's allegations raised in VR 53/2020 required SAT to rule on what right or rights Mr Nugawela had to property vested in his bankruptcy trustee, which was outside the jurisdiction of SAT. Mr Nugawela therefore contends the proceedings give rise to a matter of a description within s 76(i) and s 76(ii) of the *Constitution*. Accordingly, Mr Nugawela contends SAT should not have proceeded to dispose of the proceedings, as it did not have jurisdiction to do so. This raises a question of law.

170 In relation to a constitutional claim of the type raised by Mr Nugawela, Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ in their Honours' joint judgment in ***Citta*** stated that: [46]

> … it is enough that the claim or defence be genuinely in controversy and that it give rise to an issue capable of judicial determination. That is to say, it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument.

[44] ***Chang*** [155] (Buss P & Murphy JA).
[45] ***Burns v Corbett*** [2018] HCA 15; (2018) 265 CLR 304; ***Citta Hobart Pty Ltd v Cawthorn*** [2022] HCA 16 [1] - [3].
[46] ***Citta*** [35] - [36].

> That is what should be taken to have been meant by repeated acknowledgements that the assertion of a claim or defence will not give rise to a matter within the description in s 76(i) or s 76(ii) of the Constitution if the claim or defence is 'unarguable' or if the claim or defence is 'colourable' in that it is made for the purpose of 'fabricating' jurisdiction.

The first contention

171 In respect of Mr Nugawela's first contention, Mr Nugawela simply asserts in very broad terms that there is an inconsistency between the operation of the *Bankruptcy Act* and the HPL. Mr Nugawela has not pointed to any provisions of the *Bankruptcy Act* which expressly or by implication are inconsistent with the provisions of the HPL. In my view, a claim raised in such a broad and imprecise manner is incapable on its face of legal argument.

172 Moreover, while it may be accepted that the vesting of Mr Nugawela's property in his trustee in bankruptcy may affect how as a matter of *practicality* he goes about working as a medical practitioner, that does not give rise to any inconsistency between the HPL and the *Bankruptcy Act*. Furthermore, the *Bankruptcy Act* does not prevent Mr Nugawela from working as a medical practitioner.

173 Accordingly, Mr Nugawela's first contention in support of ground 5 does not give rise to a matter of a description in s 76 of the *Constitution.*

The second contention

174 Mr Nugawela's second contention is directed to the vesting of his property in the bankruptcy trustee. Mr Nugawela contends that the issues in VR 53/2020 required the determination of his rights to that property. This contention needs to be looked at within the framework of the issues that arose in VR 53/2020; it is not to be addressed in the abstract. The relevant issues are those concerning the medical records and the medicines and substances found at the premises, which I have described at [142] and [143].

175 I will address separately the issues raised in VR 53/2020 pertaining to the medical records and the medicines.

Medical records

176 In respect of the medical records, the Medical Board's Statement of Issues referred to the Code of Conduct for doctors in Australia as follows:

> 15. Good Medical Practice: A Code of Conduct for Doctors in Australia in effect until 30 September 2020 (**Code of Conduct**) at clause 8.4.2 states:
>
> *Good medical practice includes: […] Ensuring that your medical records are held securely and are not subject to unauthorised access.*
>
> 16. The Code of Conduct at clause 3.15.2 states:
>
> *When closing or relocating your practice, good medical practice involves: […] Facilitating arrangements for the continuing medical care of all your current patients, including the transfer or appropriate management of all patient records. You must follow the law governing health records in your jurisdiction.*

177 The Medical Board's Statement of Issues then referred to the matters I have summarised at [142] in respect of the medical records.

178 Paragraph 21 alleged that Mr Nugawela 'took no steps, nor made any attempts, to arrange to access and remove the clinical records and patient documents on the [premises]'.

179 The Medical Board's Statement of Issues also referred to the mortgagee advising Mr Nugawela that it held six archive boxes of medical records that had been left at the premises and requested details so it could arrange for delivery of them to Mr Nugawela, and that he did not make arrangements for this to occur.

180 In Mr Nugawela's Substituted Statement of Facts, Issues and Contentions (Mr Nugawela's Statement of Issues), he responded to the allegations regarding the storage and transfer of medical records as follows:

> 13. [Mr Nugawela] rejects ASSFIC paragraph 21 as there is no evidentiary basis whatsoever for asserting [Mr Nugawela] took no steps nor made any attempts to deal with documents on the property. Instead, [Mr Nugawela] states:
>
> (i) All property at the practice vested in the Trustee upon his appointment in February 2017.

> (ii) [Mr Nugawela] reiterates the Trustee's September 2017 letter and meeting and the subsequent November 2017 cautionary letter to [Mr Nugawela] not to sell or remove any property under threat of breaching s 265 and s 265A of the *Bankruptcy Act*.
>
> (iii) [Mr Nugawela] further states that the Trustee himself removed these items subsequently.
>
> (footnotes omitted)

181 Mr Nugawela also asserted that he advised the mortgagee to contact his trustee in bankruptcy in respect of the archive boxes of medical records which had been left at the premises.[47]

182 The Medical Board's allegations against Mr Nugawela did not depend upon, nor did they raise questions pertaining to, Mr Nugawela's rights to the medical records.

183 Rather, the Medical Board's complaints were directed to Mr Nugawela not taking any steps, nor making any attempts, to arrange to access and remove the medical records that were on the premises. This core allegation recognises that he did not have control over the medical records. The Medical Board's allegations therefore did not require SAT to determine what rights Mr Nugawela had to the medical records.

184 Mr Nugawela could have engaged with both the mortgagee and his trustee in bankruptcy so as to put in place appropriate arrangements for the storage or possible transfer of the relevant documentation. It was Mr Nugawela who had the unique knowledge as to what was there and the need for it to be stored or transferred.

185 Furthermore, prior to Mr Nugawela being evicted from the premises on 21 June 2018, it was Mr Nugawela who was the person that had been carrying out medical practice there. Accordingly, the state of the medical records as observed at the inspections carried out by the mortgagee's agent on 21 June 2018 and by the AHPRA representatives on 23 January 2019, reflected how, as a matter of fact, Mr Nugawela had been conducting his medical practice.

186 The agreed facts do not contain any findings that pertain to Mr Nugawela's rights to the medical records.

[47] Mr Nugawela's Statement of Issues [14].

187 The agreed facts record that on 21 February 2017, a trustee in bankruptcy was appointed over Mr Nugawela's estate including the medical practice conducted from the premises: par 4. The agreed facts also record that on 21 June 2018, Mr Nugawela was evicted from the premises and the mortgagee took possession: par 5. Thus, the agreed facts do not assert any right of ownership.

188 The agreed facts record that the medical records were not stored appropriately when the practice was inspected and that Mr Nugawela did not facilitate the transfer of all patient records upon the mortgagee taking possession: pars 7 - 9. These facts do not depend upon, nor do they contain any findings concerning, Mr Nugawela's rights to the medical records. Rather, they reflect as a matter of fact what did, and did not, occur.

189 Accordingly, the issues in VR 53/2020, and their resolution by way of the orders, do not require or involve any determination as to Mr Nugawela's rights to the medical records.

Storage and disposal of medicines

190 In relation to the storage and disposal of medications, the Medical Board's Statement of Issues sets out the applicable regulatory regime in the following terms:

> 24. The *Medicines and Poisons Regulations* 2016 (WA) state:
>
> (a) any medicine held at the Practice that is Schedule 4 poison must be stored in a container, cabinet or room that is kept locked (regulation 90(2)); and
>
> (b) any medicine held at the Practice that is a Schedule 8 poison must be stored in a small safe (regulation 95).
>
> 25. The Department of Health requires unwanted, used or expired medications to be disposed of so that there is no risk to the public of the medicine being reused or diverted, as stated on the Department of Health's website (Disposal of medicines, Department of Health).
>
> (footnotes omitted)

191 The Medical Board's Statement of Issues then refers to the matters I have summarised at [142] and [143] concerning the extent and location of medicines and substances when AHPRA representatives inspected the premises on 23 January 2019.

192 The Medical Board's allegations comprise two components. First, how Mr Nugawela had stored the medicines when he was carrying on practice from the premises. Second, that he did not take steps to secure or destroy the medicines after the mortgagee took possession.

193 Where the medicines were located within the premises reflects how Mr Nugawela had been conducting his medical practice as a matter of fact, not of right. Similarly, that Mr Nugawela did not take steps to secure or destroy the medicines after the mortgagee took possession looks at what steps he endeavoured to take to destroy or secure the medicines, not what his rights to the medicines were.

194 The agreed facts record that the medicines were not stored appropriately: pars 10 - 12. These facts do not depend upon, nor do they contain any findings concerning, Mr Nugawela's rights to the medicines. They are directed to what Mr Nugawela did not do as a matter of fact.

195 Further, the agreed facts record that after the mortgagee took possession, Mr Nugawela 'did not destroy or make suitable arrangements for the destruction of medications' at the premises: par 13. This fact must be looked at in the context of the facts as a whole, which recognise that Mr Nugawela had been evicted from the premises where the medicines were located and the trustee in bankruptcy was appointed over his estate, including his medical practice. Understood in this way, the phrase 'did not destroy' conveys that Mr Nugawela did not seek approval from the mortgagee and trustee to destroy the medicines, to the extent the medicines ought to have been destroyed under the applicable regulatory regime.

196 Accordingly, the issues in the proceedings, and their resolution by way of the orders, do not require or involve any determination as to Mr Nugawela's rights to the medicines.

Additional matters regarding the agreed facts

197 The matters in mitigation set out in the agreed facts are directed to Mr Nugawela's belief as to the effect on his property rights of the appointment of the trustee in bankruptcy. While the matters in mitigation are included in the agreed facts, they are not actually agreed facts. Rather, they are matters raised by Mr Nugawela in mitigation which the Medical Board did not dispute for the purposes of settlement.

198 The relevant paragraphs noted that Mr Nugawela submitted and the Medical Board did not dispute for the purposes of settlement the following matters in mitigation:

> 26. [Mr Nugawela] maintains that, prior to January 2019, he was not aware that anyone had entered the Practice and believed that the Practice had been secured by the Mortgagee;
>
> 27. [Mr Nugawela] maintains that, at the material time he was under the belief that his property at the Practice was the property of the Bankruptcy Trustee and [Mr Nugawela] was not permitted to deal with it;
>
> 28. [Mr Nugawela] now understands and accepts that the beliefs and understandings he held in respect of the impact of his being made bankrupt and the role of the Bankruptcy Trustee were not relevant to his ongoing duties under the Code of Conduct and the National Law; …

199 As can be seen, these matters do not constitute any finding as to Mr Nugawela's rights to the medical records or the medicines. They constitute matters in mitigation which the Medical Board does not dispute.

Conclusion regarding Mr Nugawela's second contention

200 For these reasons, VR 53/2020 did not raise any controversy that required a determination of Mr Nugawela's rights in respect of the medical records or the medicines. Accordingly, VR 53/2020 does not raise a matter within s 76(i) or (ii) of the *Constitution*.

Specific particulars to ground 5

201 In respect of the specific particulars to ground 5, as to particular (a), as I understand it, Mr Nugawela relies on the comments made by the President of SAT at the hearing on 21 June 2022 to support his contention that there was an issue raised in VR 53/2020 as to the inconsistency between the *Bankruptcy Act* and the HPL. I have read the transcript of the hearing on 21 June 2022. The President was endeavouring to 'tease out' what the issues might be so as to facilitate the most efficient disposition of the matter. The President did not make any finding as to what issues were actually raised by VR 53/2020. Particular (a) does not therefore advance Mr Nugawela's contention.

202 In respect of particular (b), this has no bearing on the asserted constitutional and federal law issues raised by Mr Nugawela.

203 In respect of particular (c), there is no evidence that the mediator said that the medical records were the property of Mr Nugawela. In any event, that was not the Medical Board's case against Mr Nugawela, nor did it form part of the agreed facts. Further, as I have set out at [187], the agreed facts expressly recognised that the trustee in bankruptcy was appointed over Mr Nugawela's estate, including his medical practice. The agreed facts also recognised he had been evicted from the premises. Accordingly, particular (c) does not assist Mr Nugawela.

Disposition regarding ground 5

204 In light of these reasons, ground 5 is not made out. I do not consider the interests of justice require that leave be granted in respect of it.

Conclusion

205 For these reasons, I grant leave to appeal in respect of ground 1, refuse leave to appeal in respect of grounds 2, 3, 4 and 5 and I dismiss the appeal.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AS
Associate to the Honourable Justice Lemonis

25 JANUARY 2024