HCAL 2267/2020
[2021] HKCFI 2914

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2267 OF 2020

BETWEEN

LEUNG KA LAU — Applicant

and

THE MEDICAL COUNCIL OF HONG KONG — Putative Respondent

Before: Hon Chow JA (sitting as an additional judge of the Court of First Instance) in Court

Date of Hearing: 29 June 2021

Date of Judgment: 5 October 2021

J U D G M E N T

INTRODUCTION

1. This is an application for judicial review of Section 5.2.1.2(d) of the Code of Professional Conduct for the Guidance of Registered Medical Practitioners (Revised in January 2016) ("**the Code**") promulgated by The Medical Council of Hong Kong ("**the Council**"), which provides that information provided by a doctor to the public or his

patients in respect of his services must not "aim to solicit or canvass for patients" ("**the Impugned Restriction**").

2. In what follows, unless the context indicates otherwise, references to "Sections" shall be to the Code.

BACKGROUND FACTS

3. Dr Leung is a registered medical practitioner on the General and Specialist Registers maintained by the Council, and practices at Best View Medical and Endoscopy Centre ("**the Clinic**"). He is also one of the directors and shareholders of Best View Endoscopy Centre Company Ltd, which operates the Clinic.

4. On 15 June 2016, the Council received a complaint ("**the Complaint**") about a number of advertisements ("**the Advertisements**") promoting the Clinic's gastroscopy and colonoscopy services at discounted prices and with limited quotas, including:

(1) A printed advertisement stating that the Clinic was offering services for early stomach cancer and colorectal cancer screenings at discounted prices (優惠價) of HK$5,200 and HK$6,500 from the original prices (原價) of HK$6,800 and HK$8,500 respectively, but they were subject to a quota (額滿即止).

(2) A Facebook post describing the promotion as an "early bird discount" (早鳥優惠) and stating that the offer was subject to a 30-person quota (名額各 30 個，額滿即止).

(3) An advertisement on the Clinic's website referring to a "promotion scheme for early stomach cancer and colorectal cancer screenings" (早期胃癌及腸癌篩檢優惠計劃). Details of the promotion scheme (including the discount prices) appeared on another webpage accessible through a hyperlink on the said advertisement.

5. By a letter dated 11 December 2018, the Council informed Dr Leung that the Complaint had been referred to the Chairman of the Preliminary Investigation Committee of the Council ("**the PIC**") for consideration, and the Complaint might raise a question of whether Dr Leung was guilty of misconduct in a professional respect. Copies of the Complaint (in the form of an email dated 15 June 2016) and the Advertisements were attached to the Council's letter of 11 December 2018.

6. On 26 July 2019, the Council wrote to inform Dr Leung that the PIC had considered the Complaint and decided that the Complaint should proceed further. The Council set out the specific allegations against Dr Leung as follows:

> "The particulars of the complaint are that in or about June 2016, you, being a registered medical practitioner, sanctioned, acquiesced in or failed to take adequate steps to prevent the soliciting and/or canvassing for patients by the provision of discount to patients on the website <www.bestview.hk> and Facebook page of your clinic, namely, Best View Endoscopy and Medical Centre."

The Council invited Dr Leung to submit any written explanation of his conduct or any matter alleged in the Complaint which he might have to

offer for the PIC to decide whether an inquiry before the Council should be held.

7. On 26 October 2019, Dr Leung, through his solicitors Howse Williams, made (*inter alia*) the following submissions for consideration by the PIC:

> "5. Dr Leung accepts that, in or around June 2016, Best View Endoscopy and Medical Centre ('the Clinic') offered to provide endoscopy and colonoscopy examination services to some patients at lower fees.
>
> 6. Notwithstanding the above, Dr Leung wishes to point out that he was unaware of how the Clinic was publishing such information, including the format or contents of any publication.
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> 7. As can be seen from the attachments to the PIC Notice dated 11 December 2018, the publications do not refer to Dr Leung or that he would be providing the relevant services.
>
> 8. Furthermore, Dr Leung had given express instructions to the Clinic staff that if any patients contact the Clinic to specifically request his services (whether endoscopy or other services), the patients would be required to make an appointment for consultation, and the lower fees would not apply.
>
> 9. Unlike cosmetic medicine, which may be considered as non-essential treatment, Dr Leung would like to point out that upper endoscopy and colonoscopy are essential services with long waiting times in public healthcare system. Such screening for stomach and colorectal cancers for certain demographics is highly recommended and encouraged by the Government and relevant medical bodies. Reduced fees for undergoing these essential examination services provide financial relief for patients who require or are indicated for such examinations."

8. The matters stated in paragraphs 5 to 8 of Howse Williams' letter dated 26 October 2019 are matters which will have to be considered

by the Council at the inquiry proper should it be proceeded with. On the other hand, the matters stated in paragraph 9 of that letter form the backbone of Dr Leung's challenge to the constitutionality of the Impugned Restriction. In the Form 86, Dr Leung has given the following explanation why "screening for stomach and colorectal cancers for certain demographics" should be considered "essential examination services" (excluding references to exhibits):

> "[19] According to the Department of Health of the HKSAR Government, colorectal cancer is the second most common cause of cancer deaths in Hong Kong, just after lung cancer… It is well established that colorectal cancer screening would be able to identify those with colorectal cancer before they have any symptoms and early detection would significantly improve prognosis and reduce mortality.
>
> [20] Accordingly, the Department of Heath introduced a Colorectal Cancer Screening Programme ('CRCSP') in August 2018, under which a patient will receive a Faecal Immunochemical Test ('FIT'). If the FIT result is positive, the patient will receive a colonoscopy examination, and if necessary, the removal of polyp. Both the FIT and the colonoscopy examination as well as the removal of polyp are heavily subsidized by the HKSAR Government. The first phase of the CRCSP covered participants between the age of 60 to 75. On 1 January 2019, the scheme was extended to cover all Hong Kong residents aged 50 to 75. It is well established that people at the age of 50 or above is a high-risk group, and the purpose of the CRCSP is to encourage, with financial subsidy, all Hong Kong residents to undergo colorectal screening.
>
> [21] Likewise, according to the Centre for Health Protection of the Department of Health, stomach cancer was the sixth commonest cancer in Hong Kong in 2017 and the sixth leading cause of deaths in Hong Kong. Similar statistics of incidence rate and [mortality] rate were recorded by the Hong Kong Cancer Registry of the Hospital Authority in 2018. Academic studies on endoscopic screening of gastric cancer in Asia find evidence of reduction of gastric cancer mortality by

> early screening. There is an increased risk of gastric cancer in adults aged 40 years or above.
>
> [22] Thus, the colonoscopy and gastroscopy services provided by the Applicant in advertisement are indicated medical services, meaning medical services indicated for appropriate population and considered as justified after proper assessment. Such medical examination is encouraged by the Department of Health, to the extent that a heavily subsidized scheme has been introduced by the Government. The target group of the advertisement is those aged 50 or above, which is the high risk group as identified by the CRCSP for receipt of subsidized screening services."

9. On 10 February 2020, the Council informed Dr Leung that at a meeting of the PIC held on 15 January 2020, the PIC decided that the Complaint should be referred to the Inquiry Panel of the Council for inquiry.

10. On 8 September 2020, the Council gave notice to Dr Leung that an inquiry ("**the Inquiry**") would be held into the following charge against him:

> "That in or about June 2016, you, being a registered medical practitioner, sanctioned, acquiesced in or failed to take adequate steps to prevent the soliciting and/or canvassing for patients by the provision of discount to patients on the website <www.bestview.hk> and Facebook page of your clinic, namely, Best View Endoscopy and Medical Centre.
>
> In relation to the facts alleged, either individually or cumulatively, you have been guilty of misconduct in a professional manner."

Pausing here, it may be noted that the disciplinary charge against Dr Leung relates only to the Facebook post and the advertisement in the

Clinic's website referred to in §4(2) and (3) above, but not the printed advertisement referred to in §4(1) above.

11. In the Council's letter of 8 September 2020, Dr Leung was also informed that the Inquiry would be held on 8 December 2020 to consider the above charge against him. The hearing date of the Inquiry has since been adjourned pending the outcome of the present application for judicial review upon the request of Dr Leung's solicitors.

RELEVANT LEGAL AND REGULATORY FRAMEWORK

(i) The Medical Council of Hong Kong

12. The Council is established under s 3 of the Medical Registration Ordinance, Cap 161 ("**the Ordinance**"). Under s 3(2) of the Ordinance, the Council is made up of a total of 32 *ex officio*, nominated, appointed and elected members (comprising 24 medical practitioners and 8 lay members).

13. The functions of the Council are prescribed by the Ordinance. One of the functions of the Council relates to the discipline of registered medical practitioners. Part IV of the Ordinance sets out a detailed statutory framework relating to "Inquiries, Disciplinary Proceedings, and Offences" applicable to registered medical practitioners. For the purpose of this judgment, it is not necessary to set out the details of the statutory framework, save to mention that, under s 21(1) of the Ordinance, if, after due inquiry into any case referred to it by a PIC (or any case remitted by the Court of Appeal), an inquiry panel of the Council is satisfied that any registered medical practitioner has been "guilty of

misconduct in any professional respect", the panel may, in its discretion, exercise the disciplinary powers mentioned in sub-paragraphs (i) to (v) of s 21(1) of the Ordinance.

14. Another relevant function of the Council relates to matters of ethics. Under s 20BA(2) of the Ordinance, the Council may establish an Ethics Committee, whose composition is prescribed by s 20P(1) of the Ordinance (which includes a chairman and 4 other members of the Council elected from amongst its members, 4 registered medical practitioners who are not members of the Council, and 1 to 3 lay persons). Under s 20Q of the Ordinance, the Ethics Committee has the following functions -

(a) to study and review any case relating to medical ethics or professional conduct, either on its own motion or at the request in writing of not less than 20 registered medical practitioners;

(b) to advise and make recommendations to the Council on matters about medical ethics and professional conduct generally; and

(c) to make recommendations to an inquiry panel on a referral under s 20Y(a) of the Ordinance.

15. In practice, the Ethics Committee performs its functions and make recommendations from time to time to the Council for consideration and decision at Policy Meetings of the Council.

(ii) The Code

16. The Code originally took the form of a Warning Notice issued by the Council in 1957 and later took the form of a Professional Code and Conduct in March 1994.

17. In Section A (Introduction) of Part I of the Code, the following is stated:

> "Medicine as a profession is distinguished from other professions by a special moral duty of care to save lives and to relieve suffering. Medical ethics emphasizes the priority of this moral ideal over and above considerations of personal interests and private gains. The earliest code of medical ethics was the Hippocratic Oath (4th Century B.C.) While the Medical Registration Ordinance (Cap. 161) confers upon the medical profession considerable freedom of self regulation, the profession is obliged to abide by a strict code of conduct which embodies high ethical values, protects patients' interests, and upholds professional integrity.
>
> Trust is essential to the practice of medicine. There can be no medicine in the absence of trust. The patient's trust imposes upon the doctor a corresponding duty to be trustworthy and accountable. Whereas a patient's trust is fundamental to the process of healing, the ability to heal depends importantly on one's professional knowledge and skills. It is therefore necessary for every doctor to attain continuous professional development through lifelong learning in order to fulfill the duty of care to patients.
>
> This Code of Professional Conduct was originally published as a Warning Notice in 1957 and as the Professional Code and Conduct in 1994…
>
> The Code embodies two cardinal values of the medical profession. It is committed to maintaining high standards of proper conduct and good practice to fulfill doctors' moral duty of care. Importantly also, the Code upholds a robust professional culture to support self-governing through identifying role-specific obligations and virtues of the medical profession. These obligations and virtues define the moral ethos and shape the professional identity of the medical community. The Code emphasizes that the hallmark of a profession is its

> distinctive identity and continuous self-development. The Code marks the profession's commitment to integrity, excellence, responsibility, and responsiveness to the changing needs of both patients and the public in Hong Kong.
>
> This Code is only a guide and is by no means exhaustive. It will be updated from time to time, and subsequent amendments will be published in the website of the Medical Council (www.mchk.org.hk) and the Council's newsletters. It is not a legal document and should be given a fair interpretation in order to attain the objects of the relevant provisions…
>
> Contravention of this Code, as well as any written and unwritten rules of the profession, may render a registered medical practitioner liable to disciplinary proceedings."

18. The Code has been kept under continuous review by the Council in light of international practices, local peer opinion, legal requirements, public expectations and moral obligations. The latest edition of the Code was published in January 2016 (with some further amendments thereafter).

19. The Code consists of 2 parts with a number of appendices. Part II of the Code concerns professional conduct and responsibilities. Of relevance for the purpose of the present case is Section B5 of Part II of the Code under the sub-heading "Professional communication and information dissemination".

(iii) The history of section 5.2.1.2(d) of the Code

20. One of the matters regulated by the Code (and its predecessor) concerns practice promotion by medical practitioners. Through revisions and amendments of the relevant parts of the Code from time to time, there has been a gradual relaxation of the restriction against practice promotion.

21. In general, up to 1992, any advertising or canvassing for patients by medical practitioners was prohibited by the Council, breach of which could lead to disciplinary actions. For example, in the Warning Notice issued in 1969, the following was stated: "It is in the opinion of the Council contrary to the public interest and discreditable to the profession of medicine for any registered medical practitioner to advertise or canvass, whether directly or indirectly, for the purpose of obtaining patients or promoting his own professional advantage. Accordingly, a registered medical practitioner who advertises or canvasses for any such purpose or who employs or is professionally associated with anyone who does so, or who procures or acquiesces in the publication of notices commending or drawing attention to his own professional skill, knowledge, qualifications or services or depreciating those of others, is liable have his name erased from the register." Similar prohibitions against advertising or canvassing for patients by doctors appeared in the Council's Waning Notices issued in 1971, 1976, 1982, 1988 and 1992.

22. In the November 2000 version of the Code, at Section 4.2.2.1 under the sub-heading "Practice Promotion", it was stated that "Practice promotion means the promotion of a doctor, his work, his practice or his group, by himself or others, and includes the provision of information, advertising and publicizing to both the public and patients. Self advertisement, canvassing or publicity to enhance or promote a professional reputation for the purpose of attracting patients would constitute professional misconduct." Nevertheless, some limited dissemination of information about a doctor's professional services to the public (by way of signs, stationery, announcements by media, telephone

directories and internet homepages) and to his patients was permitted under Sections 4.2.3 to 4.2.4 of the Code.

23. In February 2004, pursuant to the recommendation of the Ethics Committee, the Council informed the medical profession *via* the Council's Newsletter Issue No 9 (February 2004) that, in recognition that ready access to information on professional services by doctors is important for patients to make an informed decision in engaging such services, the scope of permitted dissemination of service information under the Code would be extended in two specific areas with immediate effect, namely, (a) the display of fee schedules and medical services provided in the form of service information notices at the exterior of doctors' offices, and (b) collective dissemination of professional services information by approved professional medical organizations in the form of doctors directories. Nevertheless, it was also expressly stated that it was necessary to ensure that "doctors do not supply excessive information to the extent of self-advertising or canvassing for the purpose of attracting patients", and that the new provision "is not meant to encourage fee competition amongst doctors or canvassing for patients".

24. In December 2004, the Council accepted the recommendation of the Ethics Committee to provide clearer guidelines to medical practitioners on the dissemination of professional services information to the public. Among other changes in relation to signboards and logos, a range of fees of medical services were now allowed to be included by doctors in service information notices and doctors directories. The relevant paragraphs in Section 4 of the Code were amended, and the previous version issued in November 2000 was

superseded. This was made known to the medical profession by the Council's Newsletter Issue No 10 (December 2004).

25. By the Council's Newsletter Issue No 12 (March 2006), the Council informed the medical profession that it had decided to promulgate Section 5 of the updated Code on "Professional communication and information dissemination" ahead of the promulgation of the complete updated Code, and that Section 5 of the updated Code would replace Section 4 of the existing Code on "Communication in professional practice". The updated Section 5.2.2 (Practice promotion) stated as follows:

> "5.2.2.1 Practice promotion means publicity for promoting the professional services of a doctor, his practice or his group, excluding communication with medical and dental practitioners [and other medical and healthcare service providers]. Practice promotion in this context will be interpreted by the Medical Council in its broadest sense, and includes any means by which a doctor or his practice is publicized, in Hong Kong or elsewhere, by himself or anybody acting on his behalf or with his forbearance (including the failure to take adequate steps to prevent such publicity in circumstances which would call for caution), which objectively speaking constitutes promotion of his professional services, irrespective of whether he actually benefits from such publicity.
>
> 5.2.2.2 Practice promotion by individual doctors, or by anybody acting on their behalf or with their forbearance, to people to who are not their patients is not permitted except to the extent allowed under section 5.2.3."

Sections 5.2.3 and 5.2.4 of the updated Code went on to prescribe the permissible scope of dissemination of service information to (i) the public, and (ii) patients respectively.

26. In 2006, Dr Kwok-Hay Kwong commenced judicial review proceedings against the Council in relation to certain restrictions on practice promotion under the Code (*Dr Kwok-Hay Kwong v The Medical Council of Hong Kong*, HCAL 46/2006). Dr Kwong was successful before Reyes J at first instance (judgment given on 11 August 2006) and in the Court of Appeal (judgment given on 24 January 2008, [2008] 3 HKLRD 524). The scope of 4 restrictions in the Code relating to the dissemination of professional service information was held to constitute unlawful restrictions on the freedom of expression. I shall come back to the *Dr Kwok-Hay Kwong* case later in this judgment. In view of the judgments in *Dr Kwok-Hay Kwong*, the Council revised the Code in various aspects concerning restrictions on the dissemination of professional service information which it is not necessary to set out in this judgment.

27. On 21 May 2008, the Ethics Committee discussed certain proposed revisions to Section 5.2.1 of the Code at its 83rd meeting. Under the proposal, Section 5.2.1 was made a single principle governing professional service information dissemination. As recorded in the minutes of that meeting, none of the members of the Ethics Committee expressed any adverse comment in relation to the restriction that information provided by a doctor must not "aim to solicit or canvass for patients" in the proposed draft Section 5.2.1.2(d).

28. On 4 June 2008, the Council, at its Policy Meeting, agreed with the Ethics Committee's recommendation, subject to a further revision of Section 5.2.1.3, and informed the medical profession of the revised Section 5.2.1 *via* the Council's Newsletter Issue No 15 (October

2008). The revised version of Section 5.2.1 adopted by the Council in 2008 is the same as the current version now appearing in Section 5.2.1 of the Code (2016). This was also the first time that the phrase "aim to solicit or canvass for patients" appeared in the Code.

(iv) Section 5 of the current version of the Code

29. The subject matter of challenge in this application for judicial review is Section 5.2.1.2(d) of the Code, which provides that information provided by a doctor concerning his professional services to the public or his patients must not "aim to solicit or canvass for patients".

30. Section 5.2.1.2(d) should be read in its proper context as part of Section 5 (Professional communication and information dissemination) of the Code, which states, so far as material, as follows:

> "5.1 *The need for good communication and accessible information*
>
> 5.1.1 Good communication between doctors and patients, and between doctors, is fundamental to the provision of good patient care.
>
> 5.1.2 A key aspect of good communication in professional practice is to provide appropriate information to users of a doctor's service and to enable those who need such information to have ready access to it. Patients need such information in order to make an informed choice of doctors and to make the best use of the services the doctor offers. Doctors, for their part, need information about the services of their professional colleagues. Doctors in particular need information about specialist services so that they may advise patients and refer them, where appropriate, for further investigations and/or treatment.

5.1.3 Persons seeking medical service for themselves or their families can nevertheless be particularly vulnerable to persuasive influence, and patients are entitled to protection from misleading advertisements. Practice promotion of doctors' medical services as if the provision of medical care were no more than a commercial activity is likely both to undermine public trust in the medical profession and, over time, to diminish the standard of medical care.

5.2 *Principles and rules of good communication and information dissemination*

5.2.1 A doctor providing information to the public or his patients must comply with the principles set out below.

5.2.1.1 Any information provided by a doctor to the public or his patients must be:-

(a) accurate;

(b) factual;

(c) objectively verifiable;

(d) presented in a balanced manner (when referring to the efficacy of particular treatment, both the advantages and disadvantages should be set out).

5.2.1.2 Such information must not:-

(a) be exaggerated or misleading;

(b) be comparative with or claim superiority over other doctors;

(c) claim uniqueness without proper justifications for such claim;

(d) aim to solicit or canvass for patients;

(e) be used for commercial promotion of medical and health related products and services (for the avoidance of doubt,

recommendations in clinical consultations are not regarded as commercial promotion of products and services);

(f) be sensational or unduly persuasive;

(g) arouse unjustified public concern or distress;

(h) generate unrealistic expectations;

(i) disparage other doctors (fair comments excepted).

5.2.2 *Practice promotion*

5.2.2.1 Practice promotion means publicity for promoting the professional services of a doctor, his practice or his group, excluding communication with registered medical and dental practitioners, Chinese medicine practitioners, chiropractors, nurses, midwives, pharmacists, medical laboratory technologists, radiographers, physiotherapists, occupational therapists and optometrists. Practice promotion in this context will be interpreted by the Council in its broadest sense, and includes any means by which a doctor or his practice is publicized, in Hong Kong or elsewhere, by himself or anybody acting on his behalf or with his forbearance (including the failure to take adequate steps to prevent such publicity in circumstances which would call for caution), which objectively speaking constitutes promotion of his professional services, irrespective of whether he actually benefits from such publicity.

5.2.2.2 Practice promotion by individual doctors, or by anybody acting on their behalf or with their forbearance, to people who are not their patients is not permitted except to the extent allowed under section 5.2.3."

31. Although a doctor is prohibited from publishing information relating to his professional services with the aim of soliciting or canvassing for patients, he is permitted to provide information relating to his fees in defined circumstances. In particular:

(1) Under Section 5.2.3.5, a doctor may publish his professional service information in his practice website and/or the website of other medical practice group(s) of which he is a *bona fide* member carrying the service information which is permitted on doctors directories under Section 5.2.3.7. Section 5.2.3.7, read together with Appendix D to the Code, provides that a directory may contain information relating to "range of consultation fees, or composite fees including consultation and basic medicine for a certain number of days" of a doctor.

(2) Under Section 5.2.3.6, a doctor may display at the exterior of his office a service information notice bearing the fee schedules and the medical services provided by him, provided that the service information notice complies with the guidelines set out in Appendix C to the Code.

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

32. By a Form 86 dated 16 November 2020, Dr Leung applied for leave to apply for judicial review of Section 5.2.1.2(d).

33. As can be seen from the Form 86 and confirmed in §2 of the Skeleton Submissions of Mr Johannes Chan, SC for Dr Leung dated 17 June 2021, only one ground of judicial review is advanced by Dr Leung to challenge the Impugned Restriction, namely, that the blanket

ban on dissemination of information which "aim to solicit or canvass for patients" regardless of the nature of the medical procedure or service being advertised amounts to a disproportionate restriction of the freedom of expression and is inconsistent with Article 27 of the Basic Law of the HKSAR ("**BL 27**") and/or Article 16 of the Hong Kong Bill of Rights ("**BOR 16**").

34. At §4(2) of Skeleton Submissions for the Applicant, Mr Chan submits that, in view of the Council's acceptance of the concept of "clinically indicated medical procedure"[1], the question for determination by the court becomes more confined, namely, "whether by failing to draw any distinction between non-indicated or unnecessary medical services and/or procedure and (clinically) indicated medical services and/or procedure, the Impugned Restriction amounts to a blanket prohibition of advertising which cannot be constitutionally justified".

35. According to Mr Chan, crucial to the consideration of the present judicial review is the concept of "indicated medical services", which Dr Leung has explained as "medical services indicated for appropriate population and considered as justified after proper assessment"[2]. Professor Joseph Lau (Chairman of the Council) has referred to a slightly different concept, namely, "clinically indicated" medical procedure, which he says means that "a patient should only undergo a medical procedure, particularly intrusive ones, after a doctor examines a patient's medical condition and history, family history, and

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[1] See §49 of the First Affirmation of Lau Wan Yee, Joseph (Chairman of the Council).

[2] See §22 of the Form 86.

correlates them with clinical symptoms if any"[3]. Professor Joseph Lau says that the concept of "indicated medical services" advanced by Dr Leung is a novel one which is not supported by any medical literature. Mr Chan has confirmed that Dr Leung is prepared to accept Professor Lau's definition of "clinically indicated" medical procedure to avoid factual disputes. Mr Chan further says that the bottom line is that both Dr Leung and the Council share the view that some medical service or procedure may be considered as clinically indicated after proper assessment or examination by a doctor, and this type of medical service or procedure is, and should be, distinguished from "unnecessary treatments". In what follows, I shall use Professor Lau's concept of "clinically indicated medical procedure" to describe the sort of medical procedure or service in respect of which Dr Leung says a doctor should be permitted to disseminate information relating to his professional services even if such dissemination aims to solicit or canvass for patients contrary to Section 5.2.1.2(d).

36. In the Form 86, Dr Leung seeks the following declaratory relief:

(1) a declaration that Section 5.2.1.2(d), insofar as it purports to prohibit a doctor from providing information on discount rates for "indicated medical services", is inconsistent with BL 27 and/or BOR 16, and therefore unconstitutional and void;

(2) further or in the alternative to (1), a declaration that Section 5.2.1.2(d), upon its proper interpretation in light of

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[3] See 49 of the First Affirmation of Lau Wan Yee, Joseph.

> Section 5 and Appendices C and D of the Code, does not prohibit a doctor from providing accurate price information, including an offering of a discount price for "indicated medical services", whether through Service Information Notice or Doctors Directories as allowed by Section 5 and Appendices C and D of the Code or by other medium/media.

37. On 17 November 2020, the court directed a rolled-up hearing of the present application for judicial review.

THE COUNCIL'S RESPONSES TO THE APPLICATION

38. On behalf of the Council, Mr Jin Pao, SC, submits that the court should refuse to grant leave to apply for judicial review, or in the event that leave is granted, to dismiss the substantive application for judicial review, for the following reasons.

39. First, the application for judicial review should not be entertained because Dr Leung has failed to exhaust alternative remedies in relation to relief sought, in light of the pending disciplinary inquiry against him before the Inquiry Panel. Dr Leung has not demonstrated that there are exceptional reasons to justify seeking judicial review prior to the determination of the disciplinary proceedings before the Inquiry Panel.

40. Second, Dr Leung has chosen not to challenge any decision of the Inquiry Panel, but instead seeks to challenge the Code itself. As such, Dr Leung has delayed inexplicably for over 12 years in seeking to

bring the application, and there is no good reason to grant an extension of time to apply for leave to apply for judicial review.

41. Third, the application has no merit in any event, because freedom of expression is not absolute, and the Impugned Restriction passes the proportionality test:

(1) There is no challenge to the entirety of Section 5.2.1.2(d). Dr Leung does not seek to strike it down completely. This judicial review only concerns a narrow sub-set of commercial speech, namely, the advertising of discounted services by medical practitioners which aims to "solicit or canvass for patients". There is little, if any, public interest which attaches to the publication of this type of information which, in reality, aims to achieve a private commercial gain. This is not a case concerned with the provision of a medical practitioner's range of fees which is expressly permitted on the terms set out in the Code. Nor is this case about advertising by doctors generally since the challenge only deals with "information on discount rates for indicated medical services". Further, the Council and its Ethics Committee have specialist and professional knowledge drawing from a wide range of experience, and is well-equipped to design rules governing the issue of practice promotion. Accordingly, the Council should be given a wide margin of appreciation, and the "manifestly without reasonable foundation" standard of review is applicable in the present case.

(2) Applying that standard of review, the Impugned Restriction is plainly a proportionate limitation on the freedom of

expression which advances a number of important legitimate aims in the public interest, namely:

(a) The "**Public Confidence Aim**" - the proliferation of advertisements soliciting or canvassing for patients is likely to lead to a situation where the provision of medical care will be regarded as a mere commercial activity. The need to preserve the integrity and standing of the profession outweighs considerations of private gains and profit.

(b) The "**Quality Service Aim**" – the Council also wishes to avoid opening the floodgates to promotional activities such as loyalty programs and discount programs etc, which may detract from practitioners' focus on the quality of their services.

(c) The "**Protection of the Vulnerable Aim**" – the excessive or inappropriate use of promotional and marketing tactics, including the offering of financial inducements eg discounts, may persuade members of the public to undergo medical services which may be inappropriate or unnecessary for them.

EXHAUSTION OF ALTERNATIVE REMEDIES

42. It is well established that, generally speaking, an applicant for judicial review must first exhaust alternative remedies before seeking judicial review. It is only in "extraordinary or highly exceptional circumstances" that the court will allow a departure from this general rule (*Stock Exchange of Hong Kong v New World Development* (2006) 9 HKCFAR 234, at §115).

43. Mr Pao submits that the Inquiry is an alternative forum which is both available and suitable for resolving the issues raised by Dr Leung in this application. In this regard, if an issue on whether a relevant provision of the Code is inconsistent with a fundamental right guaranteed by the Basic Law or the Hong Kong Bill of Rights is properly raised in an inquiry, an inquiry panel is able to examine whether that provision is in conflict with the Basic Law or the Hong Kong Bill of Rights, and interpret it in a manner consistently with those instruments: see, for example, *Re Chung Ho Yin Andrews*, at §32-35 and 44 (MC 18/428, 18/453 and MC 18/255, 20 April 2021).

44. On the other hand, Mr Chan argues that the Inquiry is not a suitable venue for resolving the issues raised in this application, because:

(1) The present application concerns the constitutionality of the Impugned Restriction and may result in a declaration of unconstitutionality and/or remedial interpretation of the Impugned Restriction. It is the constitutional duty of the court and the court alone to exercise judicial power and examine the constitutionality of a policy/legislative provision/regulation. On the other hand, the Council, as an administrative body, does not have such power, expertise and jurisdiction to declare the Impugned Restriction unconstitutional.

(2) The scope of the Impugned Restriction is a matter of general concern to the medical profession, and the issue is likely to come up again in future. In the event that the court exercises its power to read down the Impugned Restriction, the Council may follow the court's interpretation in future

> cases. If the Council accepts the court's interpretation but considers the Impugned Restriction as so interpreted cannot fully advance the objectives behind the Code, it can take steps to amend, modify or fine-tune the Code.[4]

45. In respect of (1) above, I accept that it is the constitutional duty of the court to exercise judicial power and examine the constitutionality of a policy/legislative provision/regulation. I also accept that the court is a more suitable or appropriate forum for the determination of an issue such as whether the Impugned Restriction constitutes a disproportionate restriction of the freedom of expression of doctors. It does not, however, follow that such determination by the court must take place before the matter is considered by the Council, or by a judge at first instance exercising the court's supervisory jurisdiction in judicial review. In this regard, it should be noted that under s 26(1A) of the Ordinance, a registered medical practitioner who is aggrieved by an order made by an inquiry panel under section 21 may appeal to the Court of Appeal. Thus, should Dr Leung fail before the Inquiry Panel on the constitutional issue raised in this application, he can appeal to the Court of Appeal, which plainly will be in a position to give a more authoritative determination of this issue. In *New World Development*, at §116, Ribeiro PJ quoted with approval the following passage in the judgment of Power VP in *Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319:

> "Where in the case of a domestic body like the Stock Exchange the appellate procedure may, or may not, ensure justice for the party aggrieved by the lower tribunal's decision, then, generally

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[4] See §46 of the Skeleton Submissions for the Applicant.

> speaking, the court should not be asked to second-guess the appellate tribunal's decision. In the absence of exceptional circumstances requiring immediate intervention by the court, the aggrieved party should be told to wait and see what happens before the appellate tribunal. If that tribunal can, and does, quash the decision of the lower tribunal, that will be an end of the matter. If the appellate tribunal affirms the decision of the lower tribunal, the aggrieved party can then apply for a judicial review; but he will succeed only if, taking the procedure (original and appellate) as a whole, it can be seen that the aggrieved party has still not been fairly treated."

46. The case of *BH v Director of Immigration* [2015] 4 HKC 107 relied upon by Mr Chan is distinguishable because that case concerned the proper interpretation of the Director's Dependant Visa Policy which was applied by him on a daily basis, whereas the present case concerns a much more limited question, namely, whether doctors should be permitted to promote their business by the dissemination of service information which aims to solicit or canvass for patients in respect of "clinically indicated medical procedure". More importantly, the "alternative remedy" in that case was an application for review of the Director's decision to the Chief Executive in Council under s 53 of the Immigration Ordinance (Cap 115), from whom there was no appeal to the Court of Appeal. In all likelihood, the question of the true interpretation of the relevant aspect of the Dependant Visa Policy would end up as an application for judicial review in any event.

47. In respect of (2) above, I bear in mind that Dr Leung is putting forward the present application as a "systemic challenge" to the constitutionality of the Impugned Restriction[5]. As Dr Leung is at pains to point out in his 2nd Affirmation, at §16, he is not asking for the court's

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[5] See §61 of the Form 86.

"*determination of the pending inquiry. Rather, the Court is asked to consider one (and only one) legal question, namely, whether the Impugned Restriction, which fails to draw a distinction between dissemination of information aiming to solicit and/or canvass for patients to undertake non-indicated or unnecessary medical services and dissemination of information aiming to solicit and/or canvass for patients to undertake indicated (or "clinically indicated" in Prof Lau's words) medical services but imposes a blanket prohibition, amounts to disproportionate restriction of the freedom of expression of the doctors.*" This having been said, having regard to the history of this matter and the timing of this application (made on 16 November 2020 shortly after the Council gave written notice of the hearing of Inquiry on 8 September 2020), there cannot be any real doubt that the present application was prompted by the Inquiry, and was intended by Dr Leung to assist him to answer the disciplinary charge against him. There is no evidence, or suggestion, that Dr Leung intends to launch any new promotion of any clinically indicated medical procedure which may be prohibited by Section 5.2.1.2(d). In these circumstances, I do not consider the fact that Dr Leung puts forward the present application as a systemic challenge to the constitutionality of the Impugned Restriction to be a good or sufficient reason to excuse Dr Leung's failure to exhaust available alternative remedies (ie the Inquiry).

48. In all, I agree with Mr Pao that the court should not entertain the present application for judicial review on the ground that Dr Leung has failed to exhaust available alternative remedies.

DELAY

49. Under Order 53, r 4(1) of the Rules of the High Court, Cap 4A, an application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made. Section 5.2.1.2(d), the subject matter of challenge in this case, came into force in October 2008. Nevertheless, the Applicant argues that there is no delay because the Impugned Restriction has "ongoing effect" of disproportionately restricting the freedom of expression of doctors[6]. This argument is contrary to principle and is rejected (see *Leung v Secretary for Justice* [2006] 4 HKLRD 211, at §38 *per* Ma CJHC (as he then was)). In that case, which concerned a challenge to the constitutionality of certain provisions in the Crimes Ordinance (Cap 200), in particular s 118C thereof relating to homosexual buggery with or by man under 21, the applicant said that he felt the desire for sex when he reached the age of 16 (in 2000), and it was held that from that point of view, the three-month period started to run from then and there had accordingly been undue delay. In this case, Dr Leung has chosen to challenge Section 5.2.1.2(d) instead of, for example, the PIC's decision to refer the Complaint against him to the Inquiry Panel for inquiry. He has framed the present application as a systemic challenge to the constitutionality of the Impugned Restriction, and dissociate it from the Inquiry. In such circumstances, I consider it to be plain that Dr Leung has delayed in making the present application.

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[6] See of §61 of the Form 86.

50. Dr Leung argues, alternatively, that the court should exercise its discretion to grant him an extension of time to make the application. Where there has been delay in applying for leave to apply for judicial review, the court's approach in deciding whether to grant an extension of time is well established (see *AW v Director of Immigration* [2016] 2 HKC 393). The court should take into account the following non-exhaustive list of factors: (i) length of delay, (ii) explanation for the delay, (iii) merits of the substantive application, (iv) prejudice, and (v) whether any questions of general public importance are raised in the application.

Length of delay

51. The delay in this case is in the region of 12 years, which is an extraordinary long period of delay. Even if (contrary to my view) the three-month period should be treated as starting to run from the time when Dr Leung was informed of the PIC's decision to refer the Complaint against him to the Inquiry Panel for inquiry on 10 February 2020, the delay would still be a substantial period of over 6 months.

Explanation for the delay

52. Dr Leung has offered no explanation for the delay in this case. In reality, it must be obvious that the delay is due to the fact that Dr Leung was prompted to mount the present challenge by the disciplinary charge against him. That cannot, however, be a good explanation for the delay in the context of the present systemic challenge to Section 5.2.1.2(d).

Merits of the substantive application

53. For the purpose of determining whether an extension of time to apply for leave to apply for judicial review should be granted, it is not necessary for the court to reach a final view on the merits of the substantive application. All that is required is for the court to form a provisional view on the merits.

54. As this court pointed out in *Wong Wing Wah v Collector of Stamp Revenue* [2021] HKCFI 11, at §21, in the context of an out-of-time application for leave to apply for judicial review, it is not sufficient for the applicant to demonstrate merely that the intended application for judicial review is reasonably arguable and has a realistic prospect of success. That would be the minimum threshold which any applicant for leave to apply for judicial review has to overcome. It is not, however, possible to lay down a precise standard or threshold in relation to the merits of an intended application for judicial review which an applicant must satisfy or pass before he may be granted an extension of time to apply for leave to apply for judicial review. The court should look at the matter holistically, and take into account, amongst other things, the nature of the challenge, the questions raised, as well as the length of/explanation for the delay.

55. It is not in dispute that the freedom of expression extends to commercial speeches or advertisements. In *Dr Kwok-Hay Kwong*, Reyes J held that the constitutionally protected freedom of expression is applicable to information provided by a doctor relating to his expertise, experience and professional services to the public. Restriction of such

freedom requires justification. At §§114-120 of his judgment in HCAL 46/2006 (11 August 2006), Reyes J stated the following applicable principles:

> "[115] First, Articles 27 and 39 of the Basic Law and Article 16 of the HKBORO confer a *prima facie* right to publish information about the expertise and experience of medical practitioners which is true, accurate, verifiable and not misleading.
>
> [116] Second, this right is justified by the public's legitimate interest is receiving such information to enable it to make informed choices about available medical services and treatments.
>
> [117] Third, restrictions on doctors' freedom of expression on matters of practice are permissible to advance the legitimate interest of protecting the public from misleading information and promoting professionalism among doctors.
>
> [118] Fourth, the proportionality principle requires however that any restriction on doctors' freedom of expression is carefully considered so that:-
>
> (1) it is no more than what is necessary to accomplish the legitimate aim of protecting the public and promoting professionalism; and,
>
> (2) it does not unnecessarily constrain the communication of information and ideas which the public has a legitimate interest in receiving in order to make informed choices about medical services and treatments.
>
> [119] Fifth, constraints on a doctor's freedom of expression may be difficult to justify as proportionate where the restriction is imposed in relation to:-
>
> (1) commenting in the press or other media on matters of legitimate public interest; or,
>
> (2) communicating true, accurate and verifiable factual information about a doctor's practice which the public has an interest in receiving and which is not dependent on any subjective

judgment so that there is no risk of the information being misleading.

[120] Sixth, the fact that the communication of information which the public has a legitimate interest in receiving may incidentally also lead to a doctor's practice being promoted or publicised will not by itself normally justify prohibition of the communication."

56. Reyes J's judgment was confirmed by the Court of Appeal ([2008] 3 HKLRD 524). The following statements of principle appear in the judgment of Ma CJHC (as he then was):

"[21] … Where a constitutionally guaranteed right has been shown to be relevant, the burden is on the decision maker to justify any restriction on that right…

[22] In the determination of the issue of justification, the court will, in practical terms, also have to accept the fact that proper respect must be accorded to the expertise of the decision maker. This is a manifestation of the limited role of the court in judicial review proceedings and acknowledges the pertinent fact that courts do not possess the necessary expertise or knowledge that the decision maker has. This approach is sometimes referred to as the margin of appreciation or deference that a court must allow to a decision maker when judicially reviewing decisions. It is an aspect that Mr Beloff very much relies on in the present case. He points out, rightly, that the courts have consistently recognized that medical regulatory bodies (such as the Respondent) are the best placed to determine the boundaries of medical professional conduct.

[23] Many authorities in Hong Kong, from the United Kingdom and from the European Court of Human Rights, unnecessary to enumerate full, make out this principle. The following points, however, emerging from the judgment of Reyes J in the court below, have to be borne firmly in mind when considering arguments based on margin of appreciation:-

(1) While the starting point is that the court will of course give due deference to the views of the decision maker, it is the court that has the ultimate responsibility to determine whether

constitutionally guaranteed rights have been infringed, grappling as it does with questions of proportionality. This is a matter of law and it is not for the decision maker to make this determination.

(2) Accordingly, the decision maker must provide cogent reasons to justify any interference with a constitutionally guaranteed right for the court to scrutinize.

(3) The burden is on the decision maker to justify; it is not for the applicant to prove that the restriction is not justifiable or proportionate.

[29] The freedom of expression includes the right to advertise and this is so even where the intention is for personal financial gain: see the decision of the European Court of Human Rights in *Casado Coca v Spain* (1994) 18 EHRR 1, at 20 (paragraph 35), a decision concerning the rights of lawyers to advertise.

[30] Developing this theme of personal financial gain, Mr Beloff emphasized at the outset of his submissions that where commercial gain was involved (and practice promotion was in reality for this purpose), less justification was required for restrictions than would otherwise be the case where more serious aspects of the freedom of expression were a stake. The right of free expression would in such cases be at the lower or even lowest end of the spectrum of this protected right. He relied on a passage in the speech of Lord Steyn in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, at 126F-127A…

[31] For my part, I can accept this passage as a general proposition. There are, however, other factors to be considered in the present case other than just commercial gain for doctors. To start with, I would repeat the point that (certainly as far as the first restriction is concerned) all the applicant seeks is to be able to provide the same objective, accurate and basic information in various printed media as is now permissible to be provided to the public under the existing rules.

[32] Next, it is important also to recognize the following facets of advertising which I believe to be relevant considerations in the present case:-

(1) The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made. This was described in the decision of the US Supreme Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Incorporated* (1976) 425 US 748, at 770 (footnote 24) as 'the flow of truthful and legitimate commercial information'. In his judgment, Reyes J referred to a number of authorities that made out this basic proposition, among them, the decisions of the Supreme Court of Canada in *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 71 DLR (4th) 68, at 79c and 81g and in *RJR MacDonald* at 80g; and of the European Court of Human Right in *Stambuck v Germany* (2003) 37 EHRR 845, at 954 (paragraph 39).

(2) The provision of relevant material to enable informed choices to be made includes information about latest medical developments, services or treatments. *Stambuck* provides a good example of this. There, an ophthalmologist gave an interview to a journalist about an eye laser operation technique. He was fined in professional disciplinary proceedings as being in breach of the provisions against advertising. The European Court of Human Rights, however, held that this fine constituted a violation of the freedom of expression guaranteed under Article 10 of the European Convention on Human Rights (the equivalent to Article 16 of the Bill of Rights). The court referred to the provision of information to the public on a matter of general medical interest as being desirable: at 855 (paragraph 46).

[33] In contrast to these what may be called the advantages of advertising just highlighted, it is, however, also important to bear in mind the need to protect the public from the disadvantages of advertising. Misleading medical advertising must of course be guarded against. In *Rocket*, McLachlin J referred (at 81g) to the danger of 'misleading the public or undercutting professionalism'. In *Stambuck*, the European Court of Human Rights said, 'nevertheless, it [advertising] may sometimes be restricted, especially to prevent unfair

competition and untruthful or misleading advertising'. There were references made in both cases to the need to limit commercialism to enable high standards of professionalism to be maintained.

[34] The body that imposes restrictions (in our case the Respondent) must therefore carefully balance the interests of the person who seeks the right to exercise the freedom of expression (such as the applicant) against other aspects of the public interest. Where the public interest is in favour of allowing advertising, the fact that the person who places the advertisement will incidentally benefit is no reason to justify restrictions. I should also add this. In the context of medical advertising, there is in addition the important consideration that the 'public' which is exposed to advertising will include particularly vulnerable members of society, namely, the sick and infirm. The interests of these persons must be particularly borne in mind. The balancing exercise may not always be easy to perform, and in any given case, the scales may be tipped one way or the other by the importance of any factor in the circumstances."

57. In the same case, Stock JA (as he then was) stated as follows:

"[70] What is or is not a proportionate restriction upon any fundamental right is always a matter of context. That is because the competing values and interests at stake in any one case will be different from those in another. The interests at stake in this case are profound, and require, in my opinion, a particularly sensitive approach, such that the courts should be slow before disturbing a mature judgment of those entrusted and equipped by experience to strike the balance. The interests of patients and potential patients are the overwhelming consideration. What we are concerned with, as indeed are the doctors, is the protection of the public in a realm in which that public is vulnerable. That is a fact that does not, in my judgment, change with the passage of time. It is the standing of the profession and the assumed expertise of each member that renders the patient or potential patient highly susceptible to persuasion; and in this regard, professionally correct in their approach that most

medical practitioners no doubt are, it must be accepted that there may be some, a small minority no doubt, who may be tempted to push information about their services beyond accurate bounds. Doctors do not dispense standardized products but, rather, they 'render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising': *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 U.S. 748 (1976) at 773, n.25 and there is a duty upon, let alone a right in, the medical profession to guard against commercialisation and exploitation. If the profession did not itself do so, the State no doubt would. There is in other words a powerful interest 'in restricting the advertising of health-care services to those which are truthful, informative and helpful to the potential consumer in making an intelligent decision': *Talsky* 68 Ill. 2d at 585, referred to in *Desnick v The Department of Professional Regulation* 665 N.E. 2d 1346 in which, at 1356, was emphasized the fact that 'the State has substantial interest in maintaining professional standards and preventing undue influence, overreaching and the invasion of its citizens' privacy,' with the added reminder, citing *In re American Medical Association* 94 F.T.C. 701, 1034-35, that 'Physicians … have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment.'

[71] With such considerations at play, restrictions on advertising by doctors will not be difficult to justify. But there is a countervailing consideration, with the same interests in view, namely, the right of members of the public to receive information with which to make an informed choice on a matter of such individual importance. The question then becomes one of balance: how to provide an informed choice whilst at the same time protecting the most vulnerable from influence that may be detrimental; detrimental where it is misleading, or lures the individual from a secure and competent existing relationship, or provides false hope, or confuses in its language or by competing claims, or because 'the doctor most successful at achieving publicity may not be the most appropriate to consult' (*R v General Medical Council ex parte Colman* [1990] 1 All E R 489 at 484) or because the advent of advertising itself may

> force others into what has been called (*Semler v Oregon State Board of Dental Examiners* 294 U.S. 608 (1935)) 'unseemly rivalry which would enlarge the opportunities of the unscrupulous.' Put thus, it is easy to understand why the courts tread carefully where regulatory judgments have been made by experts in a field outwith the court's own expertise. Nonetheless the court's function is to determine legality and whilst the profession's evaluation as to where the proper balance lies will be accorded significant weight, the professional body is required to show that it has gone no further than is necessary to achieve the legitimate objective. That does not mean that it has to show that it has taken the *least* intrusive route but rather that it has chosen from a range of solutions which, whilst commensurate with the legitimate objective, infringes upon the right as little as is reasonably possible: *Attorney General of Hong Kong v Lee Kwong-kut* [1993] A.C. 951 at 972."

58. It is not in dispute that the burden is on the Council to justify the Impugned Restriction. For this purpose, 4 questions are involved, namely:

(1) whether the impugned measure pursues a legitimate aim;

(2) if so, whether it is rationally connected with advancing that aim;

(3) whether the measure is no more than (reasonably) necessary for that purpose; and

(4) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroad made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

See *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at §§134 and 135.

59. Mr Chan argues that the Impugned Restriction constitutes an unconstitutional restriction on the freedom of expression of doctors:

(1) Of the 3 legitimate aims advanced by the Council to justify the Impugned Restriction, he submits that the court should not accept the Quality Service Aim at face value because of a lack of evidential basis in support, and the Public Confidence Aim can hardly be accepted as a justification in the absence of cogent evidence.

(2) In respect of the Protection of the Vulnerable Aim, Mr Chan accepts that it is a legitimate aim. He argues, however, that in determining whether the Impugned Restriction is no more than reasonably necessary to achieve that aim, a narrow margin of discretion should be allowed to the Council because:

(a) At one stage, the Council, after consultation and deliberation, considered it appropriate to remove from the Code the restriction against canvassing for patients (in the 2006 Version of the Code), but the Impugned Restriction was re-introduced to the Code in around 2008 without deliberation of the implications of the Impugned Restriction on the freedom of expression nor was there any discussion on the striking of proper balance between various interests (as can be seen from the minutes of the relevant Ethics Committee meeting and Council meeting).

(b) At a meeting of the Council held on 13 February 2019, some members of the Council recognised that Section 5 of the Code was not yet in full compliance with the Court of Appeal's judgment in *Dr Kwok-Hay Kwong*,

and while a review of Section 5 was being conducted, there were diversified views as to how to strike a balance between regulation and the freedom of expression of doctors. It is apparent that the Ethics Committee at the material time failed to reach any consensus regarding relaxation of certain restrictions on information dissemination and/or practice promotion and striking the proper balance between the need for regulation and the freedom of expression of doctors. It cannot be said that the Council was (and is) itself convinced that the restrictions on information dissemination and/or practice promotion in the Code go no further than are necessary.

(c) As observed by Reyes J in *Dr Kwok-Hay Kwong*, at §133, it is not sufficient to meet a constitutional challenge for the Council simply to say that the Court should defer to its considered opinion, as what is at stake here is not solely a question of expertise in medicine but also a legal issue, namely, whether a constitutional right may be validly abridged. The reasoning applies *a fortiori* when there is no evidence that the Council has considered and/or properly considered the implications of the Impugned Restriction when revising the Code in 2008.

(d) The specific justifications now relied upon by the Council were raised for the first time in Professor Lau's 1st Affirmation. There is no evidence adduced that the Ethics Committee and/or Council took into account these considerations when

introducing the Impugned Restriction in 2008. While the court may take these justifications into account when determining whether the Impugned Restriction is proportionate, the Council should not be "afforded the same margin of appreciation in relation to justifications and material supporting them which it did not take into account when imposing the relevant restriction, and which it only developed in response to litigation", in reliance on *R (Uber London Ltd) v Transport for London* [2018] RTR 33, at §41.

(3) Mr Chan further argues that the Impugned Restriction is more than reasonably necessary to achieve the Protection of the Vulnerable Aim and is thus disproportionate, for the following reasons -

(a) The restriction is drafted in the broadest terms and amounts to a blanket prohibition against dissemination of price information such as discount rates notwithstanding it being accurate, and applies irrespective of whether the information provided is misleading and/or luring the patients to undertake unnecessary services.

(b) A blanket prohibition is not warranted as the Council's concerns would have been allayed by other requirements on practice promotion and/or information dissemination in Section 5 and a blanket ban of advertising on discount rates and/or accurate price information is disproportionate.

(c) Provision of information of discount rates and/or accurate price information of (clinically) indicated

service is not objectionable and should not be prohibited.

(d) While doctors overseas (eg in Australia and Canada) would be under a similar overriding moral duty to save life and relieve suffering, no similar blanket or complete prohibition of advertising is imposed by the regulatory bodies and/or professional associations of physicians and surgeons in those jurisdictions.

60. In my view, it is clear that the Public Confidence Aim, Quality Service Aim and Protection of the Vulnerable Aim are all legitimate aims, and that the Impugned Restriction is rationally connected with advancing those aims. The real question is whether the Impugned Restriction is no more than reasonably necessary to achieve them. If it is, I consider that a reasonable balance has been struck between the societal benefits of the encroachment and the inroad made into the constitutionally protected freedom of expression of doctors. In particular, the pursuit of the societal interest does not result in an unacceptably harsh burden on them.

61. On the question of the standard (or intensity) of review, the court adopts a multi-faceted approach and takes into account, amongst other things, (i) the significance of the right involved, (ii) the extent of the interference with the right by the impugned measure, (iii) the nature of the measure, and (iv) the identity of the decision-maker. On the facts of this case, I consider that the court should adopt a relatively low standard of review in the continuous spectrum of reasonableness, for the following reasons:

(1) The present case concerns commercial speech/advertisement which, as a matter of principle, is less important than free political speech, and less justification is required for restriction of the right to freedom of speech in the former type of cases (see *Dr Kwok-Hay Kwong* [2008] 3 HKLRD 524, at §§30-31 *per* Ma CJHC; *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, at §75 *per* Bokhary PJ; *Television Broadcast Ltd v Communications Authority* [2020] HKCFI 3180, at §123 *per* Au JA; *R (Matthias Rath BV) v Advertising Standards Authority Ltd* [2001] HRLR 22, at §28 *per* Turner J; *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 71 DLR (4th) 68, at pp 15-16 *per* McLachlin J).

(2) The interference with the freedom of speech of doctors in this case is a limited one, and relates only to dissemination of service information which aims to "solicit or canvass for patients". There are plainly permissible avenues under the Code for a doctor to publish accurate, verifiable and objective pricing information in respect of his professional services.

(3) A generous margin of appreciation or discretion should be accorded to the Council which, in view of its composition including many experienced medical practitioners representing a wide spectrum of the medical profession, is particularly well placed to determine the line to be drawn between permissible and impermissible professional conduct, which does not admit of a simple right or wrong view (see *Chan Hei Ling Helen v Medical Council of Hong Kong* [2009] 4 HKLRD 174, at §§47, 57-58 *per* Le Pichon JA;

Dr Kwok-Hay Kwong [2008] 3 HKLRD 524, at §22 *per* Ma CJHC and §71 *per* Stock JA).

62. I do not accept Mr Chan's submission that the Council should be given a narrow margin of discretion in this case because of the matters referred to §59(2)(a) and (b) above. As can be seen from the above discussion relating to the history of the current Section 5.2.1.2(d) of the Code, the prohibition against advertising and canvassing for patients by doctors is a long standing one. While there has undoubtedly been a gradual relaxation of the prohibition, the consistent view of the Council has, by and large, been that doctors should not be permitted to disseminate information for the purpose of soliciting or canvassing for patients save in closely defined circumstances. Dr Leung relies on some hearsay evidence to the effect that some members of the Council at a meeting held on 13 February 2019 expressed the view that its guidelines on practice promotion were not yet in full compliance with the Court of Appeal's judgment in *Dr Kwok-Hay Kwong*[7]. Dr Leung has not disclosed the source of his information, and I am not prepared to give weight to such hearsay evidence. In any event, the fact that there might not have been complete uniformity of views within the Council on whether its guidelines on practice promotion sufficiently complied with the Court of Appeal's judgment in *Dr Kwok-Hay Kwong* does not affect the general view of the Council that doctors should not permitted to publish service information with the aim of soliciting or canvassing for clients save in specific circumstances as stipulated in the Code. The suggestion that under the 2006 Version of the Code, the prohibition

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[7] See §§6-8 of Dr Leung's 2nd Affirmation.

against "canvassing" was removed from the Code is only half of the story. While the word "canvassing" might not have appeared in that version of the Code, it is clear that practice promotion by a doctor was not permitted under Section 5.2.2.2 save that he/she might disseminate service information in limited circumstances as prescribed in Sections 5.2.3 and 5.2.4.

63. I am also unable to accept Mr Chan's submission that the Council should be given a narrow margin of discretion in this case because the specific justifications now relied upon by the Council were only raised for the first time in Professor Lau's 1st Affirmation. The 3 legitimate aims for restriction of dissemination of service information by doctors now relied upon by the Council, namely, the Public Confidence Aim, Quality Service Aim and Protection of the Vulnerable Aim, are, I believe, sufficiently expressed in Section 5.1.3 and should not be regarded as *post hoc* reasoning:

> "Persons seeking medical service for themselves or their families can nevertheless be particularly vulnerable to persuasive influence, and patients are entitled to protection from misleading advertisements. Practice promotion of doctors' medical services as if the provision of medical care were no more than a commercial activity is likely both to undermine public trust in the medical profession and, over time, to diminish the standard of medical care."

This provision also appeared in the earlier, 2006 version, of the Code (as Section 5.1.3). For this reason, the principle in *Uber London Ltd* referred to in§59(2)(d) above does not apply in this case.

64. On the question of whether the Impugned Restriction is more than reasonably necessary to achieve the Public Confidence Aim,

Quality Service Aim and/or Protection of the Vulnerable Aim, I have carefully considered the competing arguments of Mr Chan[8] and Mr Pao[9], which I do not propose to repeat in this judgment. As earlier mentioned, it is not necessary for me to reach a final view on this issue. It suffices for me to say that while I consider Dr Leung's contention to be reasonably arguable, I am provisionally of the view that Mr Pao's submissions are more cogent and convincing. The crux of Dr Leung's complaint lies in the blanket nature of the Impugned Restriction, which prohibits a doctor from providing his service information to the public or patients without drawing any distinction between medical procedures which are said to be "clinically indicated" and those which are "non-clinically indicated" (or "unnecessary"). It seems to me, however, that the Council is entitled to lay down a clear line as to what is or is not permissible conduct for the guidance of doctors. As I understand it, there is/are no specific type(s) of medical procedures which can be said to be clinically indicated for the whole population. Neither is/are there any section(s) of the public for whom a specific medical procedure is clinically indicated. Whether any specific medical procedure is clinically indicated for a particular person can only be determined after an individual assessment by an appropriate medical practitioner of all relevant circumstances pertaining to that person, including his/her medical condition and history, family history and clinical symptoms, if any. As such, I consider that the concept of "clinically indicated medical procedure" is inherently unsuitable to be used as a criterion for crafting an exception to the general prohibition against the provision of service information which aims to solicit or canvass for patients by a

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[8] See Sections D2 and D3 of the Skeleton Submissions for the Applicant.

[9] See Section F of the Skeleton Submissions of the Council.

doctor. I have considered whether I ought to further explain my provisional view in this judgment. Having reached the conclusion that the constitutional question may have to be considered in future legal proceedings by the Court of Appeal with the benefit of full facts found by the Inquiry Panel, I do not consider that it would be helpful, or appropriate, for me to do so. In any event, I do not consider the merits of the substantive application to be so strong that this factor should carry a decisive influence on the question of whether an extension of time to apply for leave to apply for judicial review should be granted in this case.

Prejudice

65. In view of the fact that the current Section 5.2.1.2(d) has been in the Code since 2008 and presumably have guided the conduct of medical practitioners and the Council since that time, I consider it to be clear that Dr Leung's delay in seeking to challenge the Impugned Restriction would cause prejudice to the Council. On the other hand, Dr Leung will not be left without remedy if extension of time to apply for leave to apply for judicial review is refused, because he can still challenge the constitutionality of Section 5.2.1.2(d) in the Inquiry and, if necessary, before the Court of Appeal.

Question of general public importance

66. I accept that the question of the validity of Section 5.2.1.2(d) is a matter of general importance to medical practitioners, and indirectly to the public. However, as earlier mentioned, this question can be determined in the disciplinary process, including a possible appeal to the Court of Appeal. For the avoidance of doubt, I should make it clear that

the court expresses no view on whether Dr Leung has a good defence to the disciplinary charge on the facts (based on the matters raised in paragraphs 5 to 8 of Howse Williams' letter dated 26 October 2019 or otherwise).

67. Balancing all relevant considerations, I do not consider this to be a proper case to grant an extension of time to Dr Leung to apply for leave to apply for judicial review.

DISPOSITION

68. Leave to apply for judicial review is refused. The parties are agreed that costs should follow the event. Accordingly, an order is made that Dr Leung shall pay the costs of the Council, to be taxed if not agreed.

(Anderson Chow)
Justice of Appeal

Mr Johannes Chan, SC and Ms Allison Wong, instructed by Howse William, for the Applicant

Mr Jin Pao, SC instructed by Department of Justice and Mr Mark Chan, DPGC, for the Putative Respondent