Medical Practitioners Disciplinary Tribunal

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DECISION NO: 63/98/24C

IN THE MATTER of the Medical Practitioners Act 1995 (the Act)

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against **JULIAN MEREDITH CLIVE WHITE** medical practitioner of Cambridge

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr P J Cartwright (Chair)

Dr J C Cullen, Mr G Searancke, Dr A D Stewart,

Dr A F N Sutherland (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing at Hamilton on 13, 14, 15 October 1998 and 12, 13, 14 December 1998

APPEARANCES: Mr M F McClelland and Ms J Elliott for the Complaints Assessment Committee ("the CAC").

Mr A J Knowsley and Mr K M Eruera for Dr White.

1. THE CHARGE:

1.1 **DR** White faces one amended charge of disgraceful conduct in a professional respect. Initially the amended charge comprised five particulars.

1.2 **AT** the commencement of the hearing Mr Knowsley asked the Tribunal to make a ruling as to whether the CAC could amend the charge without the Tribunal having to make an Order. In effect Mr Knowsley asked the Tribunal to make an Order that powers exist for the CAC to amend the charge. Mr Knowsley explained that he considers no such power exists, and therefore he objected on behalf of Dr White to the amended charge. However Mr Knowsley made it clear that no objection was taken to the substance of the charge, as amended, and that he was ready and able to proceed accordingly. In as many words Mr Knowsley confirmed that the amendment did not take Dr White by surprise or prejudice the conduct of his case.

1.3 **AFTER** having retired to discuss the application briefly, the Chair indicated the Tribunal was of the view that it was not necessary for a formal Order to be made by it. The Chair explained that medical disciplinary proceedings are civil in nature. In accordance with established

practice, parties to such proceedings have the right to amend them at any time, although subject of course to any objection by the other side, particularly in terms of needing more time to prepare. Consequently the Order sought by Mr Knowsley was declined. Thereby the Tribunal endorsed the indicative approach taken by the Chair when the matter was first raised by Mr Knowsley some two weeks prior to the hearing.

1.4 **THE** Tribunal itself has the power to amend a charge during a hearing pursuant to Clause 14 of the First Schedule of the Act. Pursuant to that power the Tribunal further amended the charge, by the addition of a sixth particular, during the course of the hearing. Details of all six particulars of the twice amended charge appear in the "Background" section of the Decision which follows.

2. ADMISSIBILITY OF EVIDENCE:

2.1 **THE** Tribunal is required to observe the rules of natural justice at each hearing (clause 5 of the First Schedule).

2.2 **CLAUSE** 6(1) of the First Schedule makes specific provision in respect of evidence:

"Subject to Clause 5(3) of this Schedule, the Tribunal may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not it would be admissible in a court of law"

2.3 **THE** Evidence Amendment Act (No. 2) 1980 provides in section 7:

"In any civil proceeding where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence"

2.4 **WHERE** an oral statement made by a person tending to establish a fact is tendered it will only be admissible if:

(i) the proceeding is civil;

(ii) direct oral evidence of the fact would be admissible;

(iii) the maker of the oral statement is unavailable.

2.5 **IT** is common ground that disciplinary proceedings under the 1995 Act are civil in nature. This was established in *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 129, 155; *Auckland District Law Society v Leary* (Auckland, M1571/84, 12 November 1985).

In *Guy v Medical Council of New Zealand* [1995] NZAR 67, Tipping J held that:

"Proceedings before the Medical Council are not criminal or even quasi criminal in character. They are designed primarily to protect the public from incompetent and improper conduct on the part of medical practitioners. The powers given to the Medical Council are exercised primarily in the interests of the public and the profession itself and are only incidentally penal in nature."

2.6 **MRS** A (the subject of the charge against Dr White) died on 9 June 1997. In accordance with the provisions of section 7 of the Evidence Amendment Act (No. 2) 1980, she is therefore unavailable to give evidence. It is as a result of section 7 and the Tribunal's own very broad powers that it is able to receive evidence of conversations various witnesses have had with Mrs A.

3. CODE OF ETHICS:

THE New Zealand Medical Association's Code of Ethics, Clause 5, provides:

"Respect for Patient

5. Ensure that all conduct in the practice of the profession is above reproach, and that neither physical, emotional nor financial advantage is taken of any patient."

4. BACKGROUND:

4.1 **MRS** A purchased the property at xx, xx in August 1966. It is situated some xx of the main street of xx in a residential area with easy walking access to all relevant services. In a valuation prepared in July 1986 it was described as occupying a valuable section which could be subdivided or cross-leased for more intensive development.

4.2 **MRS** A first met Dr White and B in 1988 when a friendship developed. Mrs A also became a patient of Dr White at about the same time.

Particular 1:

"Breached ethical and professional standards by entering into or being a part to an Agreement dated 7th December 1990 to purchase the property of the patient A."

Particular 5:

"Breached ethical and professional standards by continuing to treat his patient, A, having entered into or having been a party to an Agreement dated 7th December 1990 to purchase the property of his patient, A."

4.3 **MRS** A had allowed her home at xx to be mortgaged to provide security for a loan to her nephew, Mr C. In 1990 because of Mr C's default in repaying the loan secured by the mortgage, the mortgagee bank threatened to sell the property at xx. At this time Mrs A was 80 years old.

4.4 **MRS** A entered into an agreement with Dr White which provided that:

- She would sell her property at xx to Dr White's Family Trust for $130,000.00.
- The sum of $76,000.00 (the installment) was paid to Mrs A and she was required to repay the mortgage.

- The balance of the purchase price ($54,000.00) as to be paid on Mrs A's death or when she permanently vacated the property.
- Interest at the rate of 16.75% per annum on the sum of $76,000.00 was to be offset against the balance of the purchase price ($54,000.00) until the balance was reduced to nil.
- Mrs A was entitled to live in the house rent free until the date of her death
- A caveat could be registered against the title to protect the purchaser's interest.
- In her Will Mrs A was to forgive the balance owing at the date of her death or in the event of her leaving the property permanently.

4.5 **IN** effect Mrs A sold her property to Dr White's Family Trust in exchange for the right to occupy the property for the rest of her life. It was a long term agreement. She was given legal advice by Mr D, a senior solicitor at xx, on 21 November 1990.

4.6 **THE** agreement for sale and purchase was executed on 7 December 1990.

4.7 **PRIOR** to the agreement being entered into between the parties Dr White telephoned Mr Dean Williams (surgeon from Hamilton, at the time Chairman of the Medical Practitioners Disciplinary Committee). He advised Dr White that the proposed agreement raised a number of ethical issues, but that if both sets of lawyers found the agreement acceptable and it went ahead, that it would be inappropriate for him to continue as Mrs A's doctor.

4.8 **AFTER** completion of the agreement for sale and purchase Mrs A did see Dr E but after a comparatively short time Dr White became her doctor again and continued in this role virtually up until her death on 9 June 1997.

Particular 6:

"Breached ethical and professional standards by entering into, or being a party to, unsecured borrowing of approximately $27,000.00, about the end of 1991, or the beginning of 1992, from A, a person who was or, up until recently, had been a patient of his."

4.9 **THERE** seems to be no dispute that Mrs A made an undocumented loan of approximately $27,000.00 to the White Family Trust. From copies of documents filed in the proceedings it seems clear enough that approximately $27,000.00 was used by the White Family Trust to purchase a property at xx. This is certainly consistent with a settlement statement dated 28 October 1991 (Dr White Exhibit Q) which records:

"Monies received from self - $26,900.00"

4.10 **AT** issue is whether Dr White was aware of the loan at the time it was made.

4.11 **THE** Tribunal will be required to consider how likely Dr White's claim is that as a trustee he had no idea whatsoever where the money for the Trust's purchase of xx came from.

Particular 2:

"Breached ethical and professional standards by continuing to treat A as a patient between the months of March and April 1997 at a time when he was engaged with financial negotiations with the said A."

Particular 3:

"Breached ethical and professional standards by benefiting either directly or indirectly under an all obligations mortgage executed by A on the 15th day of April 1997 under which the amount recoverable was limited to $100,000.00 to secure a loan in favour of the Duke Street Health & xx Limited as borrower."

Particular 4:

"Breached ethical and professional standards by engaging in financial negotiations over the period March/April 1997 with A a person who was or up until recently had been a patient of his."

4.12 **AS** noted earlier, after a break in the professional relationship, Dr White continued to be Mrs A's doctor through to 1997 at which time Mrs A was 87 years old.

4.13 **ON** 26 February 1997 Dr White asked Dr F to see Mrs A at Dr White's residence. Mrs A was staying there at the time. Dr F located a massive tumour in Mrs A's right lower abdomen, being some 8-10 cms in diameter. It was easy to detect and had all the qualities of a cancerous growth. Mrs A did not know the seriousness of her condition and Dr F told her that she required urgent referral to hospital.

4.14 **AS** a result of a telephone request by Dr White to take over a lady who he described as a close family friend and grandmother figure to his family, Dr G saw Mrs A on 14 April 1997. Dr White had also told Dr G that he had had financial dealings with Mrs A and his solicitor had advised him that he could no longer see her as a patient.

4.15 **DR** G saw Mrs A at his surgery. Ms xx (xx) was present during the consultation. Dr G examined her and found a large right-sided abdominal mass of which Mrs A was aware; he tried to encourage her to see a specialist but Mrs A was reluctant as she did not want surgery or chemotherapy.

4.16 **DURING** the period when the terms of the mortgage were negotiated (March/April 1997), Dr White's Family Trust was a 50% shareholder in xx (the company), and Mr H, a xx, was the

other 50% shareholder. Over the relevant period and up to 20 October 1997 Dr White was a Director of the company. Dr F purchased a half share in the goodwill of Dr White's practice in October 1996 and became a shareholder in the company in November 1997. The company owned the premises from which the xx operated and these were subject to a mortgage to the ANZ Bank.

4.17 **AS** part of his xx property settlement with B Dr White was required to sell the matrimonial home at xx. The ANZ Bank held a mortgage over this property as well, securing its loan to the company. As a result of selling xx Dr White had to arrange replacement security to secure the borrowings and obligations of the company.

4.18 **A** suggestion was made that the property at xx be used as security, but in dispute is whether Dr White approached Mrs A with the suggestion, or whether Mrs A herself made an offer to Dr White that the xx property be used as security.

4.19 **MR** I of xx saw Mrs A on 4 April 1997. He explained to her the ramifications of signing the mortgage:

- She would become liable to the ANZ Bank for the borrowings of the company and the Bank could call upon her personally to pay amounts up to a maximum of $100,000.00.
- By mortgaging the property she risked losing her occupation rights.

4.20 **AT** the time Mrs A was 87 and in poor health. She did not want to be *"put in a position where they could put me out"*. Mr I formed the impression that she had been persuaded to

sign the mortgage before she came to the interview without understanding the ramifications. Mr I explained three alternatives to her:

- Decline to sign the mortgage thereby protecting her rights of occupation.
- Register a lease for life against the title to the property followed by the transfer of title to Dr White's Family Trust with the result that any mortgage would be subject to the lease for life.
- Sign the mortgage, thereby putting her occupation rights at risk as well as becoming liable under the mortgage.

4.21 **MR** I advised Mrs A that in his view she should decline to execute the mortgage and that if she chose to sign the mortgage it was very much contrary to this advice.

4.22 **IN** the end Mrs A decided on the second alternative, i.e. registration of the lease for life, and Mr I advised Dr White's solicitors accordingly.

4.23 **IT** is claimed that within two hours of advising Dr White's solicitors Mrs A telephoned Mr I and told him she had decided not to take his advice and that she wished to sign the mortgage. Mr I suspected that Mrs A was being pressured by Dr White and asked her over the telephone whether Dr White was present with her at the time; she told Mr I that he was. Mr I advised that the matter should be left until the following week, and that Mrs A should think further about it over the weekend.

4.24 **BECAUSE** of Mr I's concerns he wrote to Mrs A on 9 April 1997 setting out those concerns and pointing out the principal consequences of signing the mortgage.

4.25 **MRS** A saw Mr K, independent solicitor, on 14 April 1997. She signed a document prepared by Mr K in which she acknowledged that she had received independent legal advice from Mr K and that she was aware of the ramifications of executing the mortgage.

4.26 **ON** the same day, but prior to seeing Mr K, Mrs A saw Dr G for the first time and the document she executed records:

> *"(f) Dr G has provided an independent Doctor's Certificate to confirm my mental capacity and I am aware that Mr K had requested this before seeing me."*

4.27 **MR** H, a shareholder in the company, was asked to agree to the new replacement security but he refused as he was not happy that Mrs A's property should be used as security.

4.28 **MRS** A duly executed the mortgage on 15 April 1997.

4.29 **MRS** A died at xx Hospital and Rest Home on 9 June 1997.

5. PROCESS:

5.1 **A** two step process is involved in considering the charge laid by the CAC against Dr White. First the Tribunal must determine in relation to the charge, and in relation to each particular of the charge, including the particular framed by the Tribunal itself at the end of the CAC case (Particular 6), whether the facts alleged have been proved to the required standard.

5.2 **IT** is well established in professional disciplinary cases that the civil, rather than the criminal, standard of proof is required, namely proof to the satisfaction of the Tribunal, in this case the Medical Practitioners Disciplinary Tribunal on the balance of probabilities. At the same time,

however, the cases recognise that the degree of satisfaction which is called for will vary according to the gravity of the allegations.

5.3 **IN** *Brake v Preliminary Proceedings Committee* (Full Court, Auckland, HC 169/95, 8 August 1996) the full Court put it this way (p 8):

"The standard of proof is not the criminal standard. The Preliminary Proceedings Committee is required to prove the charge to the civil onus, that is, proof on the balance of probabilities. But the authorities have recognised that the degree of satisfaction for which the civil standard of proof calls, will vary according to the gravity of the facts to be proved: ***Ongley v Medical Council of New Zealand*** *[1984] 4 NZAR 369, 375-6. The charges against the appellant were grave. The elements of the charge must therefore be proved to a standard commensurate with that gravity."*

5.4 **SECONDLY**, if proved, the Tribunal must go on to determine whether the conduct established by the proven facts amounts to disgraceful conduct in a professional respect.

5.5 **THE** Tribunal will now proceed to a separate consideration of each particular of the charge. This will be done by considering particulars 1, 5 and 6 separately, and particulars 2, 3 and 4 together.

6. PARTICULAR 1:

"Breached ethical and professional standards by entering into or being a party to an agreement dated 7th December 1990 to purchase the property of the patient A."

6.1 **THE** defence to this first particular of the charge relied substantially on the evidence of Mr D, the senior solicitor employed by xx who provided Mrs A with independent advice at the time, Dr White himself, Mr Williams, the Chairman of the Medical Practitioners Disciplinary Committee, and a chartered accountant who provided hindsight evidence as to the financial implications of the transaction from Dr White's point of view.

6.2 **MR** D was not called to confirm his evidence in respect of which a brief is before the Tribunal. In his closing submissions Mr Knowsley referred to the uncontested evidence of Mr D who was not cross-examined, and therefore that his evidence has to be accepted by the prosecution. In our view Mr D's evidence could be viewed as a two-edged sword. Certainly that evidence points to the seemingly happy frame of mind in which Mrs A entered into the 1990 transaction with Dr White. However Mr D's evidence, from a prosecution point of view, points to a transaction the financial implications of which were heavily weighted in favour of Dr White.

6.3 **IT** was Mr D's recollection that Mrs A thought highly of Dr White. From his dealings with Mrs A it was Mr D's evidence that she appeared to be happy with the deal and understood all of the implications.

6.4 **HOWEVER** other evidence contained in Mr D's brief (and a file note record of the transaction made by Mr D in 1990 which is attached to his brief), does not favour Dr White's defence of this particular.

6.5 **IN** his file note Mr D described the transaction as:

> *"[a] proposal [which] represents an extremely good deal from Dr White's point of view and Mrs A is well aware of this."*

6.6 **MR** D went on to explain in his file note that from his point of view he would have preferred it if the property had been sold outright to Dr White with him paying $75,000.00 on the settlement date to clear the mortgage, with the balance being secured by way of first mortgage in favour of Mrs A. Mr D noted there would have been interest payable under the mortgage,

but so long as Mrs A resided in the property the rent payable by her would have been equivalent to the interest payable by Dr White under the mortgage. Mr D observed that at least under this arrangement Mrs A would have had some control over the balance of the monies owing, i.e., that she would not have been obliged to forgive Dr White for this sum on her death.

6.7 **MR** D also recorded in his file note:

"The proposal put by xx [Dr White's solicitor at the time] *gives her no option as to the balance of the monies and certainly presents Dr White with a very cheap property."*

6.8 **IT** is said in defence of this particular that as a young GP Dr White had done all that could be expected of him by ringing Mr Williams and by ensuring that Mrs A received independent legal advice. While this may be so generally, in our view it does not provide a defence in the circumstances of this case.

6.9 **MR** Williams explained that he could not recall exactly what the circumstances of Dr White's call were, although he recalled it was advice of a medical ethics nature on a problem with which he was faced. What is clear is that the advice sought of Mr Williams preceded discussion and agreement being reached on the precise terms of the 1990 Agreement for Sale and Purchase. In accepting Dr White's explanation of the circumstances of the telephone advice he sought, Mr Williams explained he would have given advice along the lines that the situation was fraught with danger for Dr White, that people might claim he was taking advantage of the patient, and that if he did enter into a contract, he should ensure it was all done legally, with both parties receiving independent legal advice.

6.10 **IN** our view the fact that Mrs A obtained independent legal advice accounts for little when regard is had to the circumstances in which that advice was sought, particularly as Mrs A thought she had no option but to agree to Dr White's terms.

6.11 **IN** his evidence Dr White was at pains to explain that it was Mrs A, then aged 80, who suggested to him, a person she had known for no more than two years, that he take over her mortgage using her house as security. To this he pointed out that he was still her doctor and that there were therefore ethical problems. However as her only friend, despite the fact she had lived in Cambridge for some 24 years, Dr White said he felt *"morally obliged"* to help her out.

6.12 **DR** White's suggestion that the 1990 transaction was Mrs A's proposition rather than his, is in our view not supported by the contemporaneous documents or the terms of the agreement itself.

6.13 **IN** Dr White's solicitor's letter of 20 November 1990 the proposal is very much described as Dr White's proposal (*"we propose .... we further propose"*). Mr D's file note is in similar terms when it talks about *"xx's proposal"*, *"The proposal put by xx gives her no option"* and *"... she has little option but to accept Dr White's proposal"*. In cross-examination Dr White attempted to explain these contemporaneous records away as being *"lawyers talk"*.

6.14 **WE** are satisfied not only was it Dr White's proposal, but plainly that Mrs A's solicitor did not consider she had any negotiating position. He recorded in his file note that he *"would have preferred"* the property being sold outright to Dr White but, at the end of the day she had little option but to accept the proposal as submitted.

6.15 **WE** note that Mrs A may have had another option at one stage. Evidence was given on behalf of the CAC by L who was an office bearer of xx Lodge in xx in 1990. Mr L explained Mrs A was a xx widow and that he offered to make an approach to the Grand Lodge for funding so that she would not lose her home. Mr L explained he made that offer to Dr White on Mrs A's behalf. Mr L explained the principle of any Lodge assistance would have been the provision of a capital sum interest free with a security over the property which would be released on the death of the recipient.

6.16 **IN** cross-examination by Mr Knowsley, Mr L confirmed he could definitely and absolutely remember explaining the offer he had made to Dr White as outlined to the Tribunal in his evidence. Mr L refuted Mr Knowsley's suggestion, because Dr White was not a Lodge member, that he may not have understood the possibilities of

xx Lodge financial assistance. Mr L replied *"He [Dr White] was left under no illusions whatsoever. My offer to her through him was turned down. He said I'll take care of that, or I want to take care of it, put it that way"*.

6.17 **ALSO** noted at this point is the evidence given by M, a retired xx of Cambridge, on behalf of Dr White. Mr M explained he was the xx Lodge Secretary in 1991, 1992 and 1993. He explained, as a fairly senior member of the Lodge, that he would have expected to hear of any agreement by the Lodge to take over Mrs A's mortgage. Mr M said he certainly never heard of any formal application for assistance being made to the xx Lodge by or on behalf of Mrs A.

6.18 **ANY** apparent conflict in the evidence of these two witnesses is, in our view, able to be resolved. Mr L was at pains to emphasise that certainly no formal application for assistance to Mrs A was considered by the xx Lodge. From the Tribunal's point of view the importance of the evidence given by Mr L, which we accept, is that there was the possibility of financial assistance from the xx Lodge which was not investigated further by Dr White.

6.19 **THE** imbalance in bargaining positions between Mrs A and Dr White is reflected in the extremely advantageous terms to Dr White in the 1990 agreement. This was acknowledged and recorded by Mr D.

6.20 **THESE** distinct commercial advantages stand in stark contrast to Dr White's claim that the transaction was to help a friend, and that the financial sense of it did not matter to him. It seems to us the simple truth is that because Mrs A had no option (or at least thought she had no option), she had to accept terms which were extraordinary and to her disadvantage.

6.21 **IT** seems to be suggested as part of Dr White's defence to this particular, because he did not make a profit on the sale of the property in 1997, that he cannot have taken financial advantage of Mrs A in December 1990. For Dr White it was the evidence of his Chartered Accountant since 1994, N, that the actual costs to Dr White of the funds advanced by him to enable the purchase to proceed in 1990 exceeded the return made on the subsequent sale of the property in 1997. Plainly this is not correct. When assessing whether through the 1990 agreement, Dr White was taking financial advantage of his patient, that assessment must be made at the date the agreement was entered into. In other words, as at December 1990, did the terms of the agreement favour or advantage Dr White? The fact that Mrs A lived longer than expected is not relevant to the Tribunal's determination of this particular. We accept Mr McClelland's submission that a hindsight test is not appropriate. The test must be established at the time the agreement was entered into in 1990.

6.22 **THE** advantages to Dr White and corresponding disadvantages to Mrs A are found in the following terms and conditions of the 1990 agreement:

- The fixed interest rate was 16.75% which was described by Mr I as being *"a very high non-reviewable interest rate factor"*, and is to be compared with a rate of just 16% being offered by Westpac to Mrs A's nephew whose credit rating must have been highly suspect.

  To see how unfair this fixed interest rate was to Mrs A, the Tribunal need only look at the interest rate referred to in the chartered accountant's evidence on an overdraft facility. In November 1991 the rate was 16.75% from where it progressively dropped to 12.85% in March 1994 and then increased progressively again to 16.50% by the time the $54,000.00 outstanding balance had been paid off (at March 1995).

- As tenant, Mrs A was required to pay $244.00 per week *"in rent"* plus a half share of outgoings including insurance, rates and maintenance.
- The interest payments i.e. *"rent"* were to be offset against the outstanding balance which, it transpired, was paid off in four years and three months. In cross-examination Dr White claimed he was not aware of this provision.
- Any outstanding balance of $54,000.00 was to be either forgiven on Mrs A's death or her permanent vacation of the property. Again Dr White claims he was not aware of this provision.

6.23 **IN** an attempt to disassociate himself from what, in our view, are clearly highly favourable terms to him, Dr White claimed that he was not aware of the terms of the agreement. The Tribunal considers such a claim is unlikely in the event.

6.24 **ONE** aspect of the evidence given by B warrants mention. In cross-examination Mr Knowsley put it to Ms B that her talk about Dr White calculating how much profit he was going to make

following acquisition of Mrs A's property, was a fabrication. This was disputed by Ms B, whose evidence on this point we accept.

6.25 **THERE** was evidence from three witnesses that Mrs A both entertained misgivings about the 1990 transaction and, as well, probably did not understand fully the financial implications of it. Ms B spoke of Mrs A often talking about the money she and Dr White *"owed"* her for her house, particularly in the context that *"she thought she had been screwed because of the significant difference between the Government Valuation and the purchase price."* Concerning probable misunderstanding on Mrs A's part as to the financial implications of the 1990 transaction, it was Ms O's evidence that Mrs A *"believed that Dr White still owed her about $50,000.00 for her house."* Ms O explained in her evidence in chief that Mrs A was clearly very annoyed that she had let herself get involved in a situation where she had allowed Dr White to purchase her property for $130,000.00 but where he had only paid up $76,000.00. Ms O said *"A could not understand where the rest of the money went"*. This aspect of the evidence given by Ms O was corroborated by the evidence of P, a xx whom Mrs A appointed her attorney under a Power of Attorney on 29 May 1997.

6.26 **MR** P explained he first met Mrs A approximately two years prior to her death on 9 June 1997, after responding to a request from Dr White to deliver xx to Mrs A from his xx, which he said he did on several occasions and he also delivered some xx to her. On the first occasion of delivering xx to Mrs A, Mr P explained that Mrs A insisted that he come in and have lunch with her. On this occasion, without any prompting from him, Mr P recounted Mrs A proceeding to tell him about her life and her dealings with Dr White and her property. He said *"She told me that Dr White had taken over her mortgage. She also mentioned at the*

time that the balance of $50,000.00 had not been paid by Dr White and that she did not know where it had gone". In response to a question from the Chair Mr P confirmed that Mrs A's apparent uncertainty as to the balance of $50,000.00 pointed to a genuine misunderstanding on her part as to at least one aspect of the 1990 agreement.

6.27 **ALTHOUGH** Mr Knowsley was able in cross-examination to identify some inconsistencies in the evidence of Ms O and of another witness, Ms P, the corroborative evidence given by Mr P stands uncontradicted, and is accepted by us.

6.28 **FINALLY** there is the puzzling possibility that after proper inquiry and appropriate legal assistance, Mrs A may well have been able to extricate herself from her financial predicament without any involvement of Dr White. In questioning by Mr Cullen it was agreed by Dr White that on the evidence, Mrs A would have been eligible for a Housing Corporation loan of not more that $45,000.00, and in addition there was the sum of $26,000.00 which Mrs A advanced (with or without Dr White's knowledge) to his Family Trust in 1991. Additionally Mrs A had finances within fixed bank deposits approximating $26,000.00 when she died. To Mr Cullen Dr White acknowledged he may have been misled as to Mrs A's assets at the relevant time but said that *"I didn't pry into A's financial affairs at all because she was a private person, I trusted her basically"*.

6.29 **MR** Knowsley exhorted the Tribunal to treat with caution the evidence that Mrs A was confused that $50,000.00 was still outstanding from the original transaction. Mr Knowsley submitted, because terminal cancer had been diagnosed a short time before Mrs A died, and because she was on Morphine, it is quite understandable from a medical point of view that she

was confused as to the balance of $50,000.00 owing under the long term agreement for sale and purchase. We are bound to say, on the evidence, that probably Mrs A never fully understood the terms of the 1990 agreement. We consider it is superficial to argue that it was only on account of her ill-health towards the end of her life that she reverted to a state of confusion in terms of her understanding of the 1990 agreement.

6.30 **IN** brief summary of the evidence we find particular 1 of the charge has been established. Basically the 1990 agreement was Dr White's proposal. Although the agreement facilitated repayment of an overdue mortgage, the terms of the agreement were weighted heavily in Dr White's favour. It is clear to us that Mrs A did not fully understand the agreement, particularly the manner in which her equity in her property was extinguished over a comparatively brief period of four years and three months. Furthermore, despite Dr White's disavowal, he cannot be excused on the basis that he was not aware of the terms of the agreement.

7. PARTICULAR 5:

"Breached ethical and professional standards by continuing to treat his patient A having entered into or having been a party to an agreement dated 7th December 1990 to purchase the property of his patient A."

7.1 **IT** was Dr White's evidence that Mrs A started to see his associate, Dr E, around about the time the agreement dated 7th December 1990 was completed. Dr White explained before Mrs A started seeing Dr E he had a discussion with him about her changing. Dr White said he told Dr E that Mrs A was becoming too close a friend and that was the reason he wanted her to change. Dr White cautioned that he did not tell Dr E the real reasons behind him having to see Mrs A, *"because A did not want anyone to know about her financial arrangements"*.

7.2 **IN** the years that followed Dr White said that Mrs A, whom he described as *"a stubborn old lady"*, did not really adhere to her part of the verbal agreement between them about her changing doctors.

7.3 **AFTER** a time Dr White explained that because Mrs A found it difficult to like Dr E as her doctor, and as she did not see eye to eye with him on some things, that she returned to his care. Over the years Dr White said Mrs A gradually forgot the agreement to see Dr E and was seeing him again instead.

7.4 **THE** agreed bundle of documents contains a printout of Mrs A's medical records. From these records it appears that she became a patient of Dr White with a first consultation on 27 June 1988 and that that doctor/patient relationship continued through until there is a record of her consulting Dr E on 30 November 1990. Excluding four further consultations on Dr White (3/12/90, 29/4/91, 22/7/91 and 5/9/91) which he dismissed as being in respect of repeat medications, and therefore not counting, the medical records printout indicates that Mrs A continued to be a patient of Dr E throughout 1991 and up until 5 May 1992 when there is a record of her consulting Dr White for a *"pain in left arm"*. Thereafter through and until 20 February 1997 the medical records indicate that Mrs A remained a patient of Dr White.

7.5 **MR** Knowsley disputed Mr McClelland's submission that for the period of some 14 months only from December 1990 Mrs A remained a patient of Dr E. We consider Mr Knowsley's description of this submission as a *"most damning misrepresentation"* to be an overstatement of the position. If Mr McClelland was to have ascribed a period of some 20 months for subsistence of the doctor/patient relationship between Dr E and Mrs A, that would have been more accurate.

7.6 **FROM** the medical records it seems clear enough that Mrs A became a patient of Dr White again with effect from the 5 May 1992 consultation. From that date until at least 20 February 1997 the medical records indicate that Mrs A consistently remained a patient of Dr White.

7.7 **IT** was submitted by Mr McClelland, a submission we uphold, that it provides no defence to Dr White to this particular by showing that for a period, in our view 20 months, that Dr E, rather than Dr White generally (but not without exception), treated Mrs A. The hollowness of this argument is demonstrated by the fact that Dr White started treating Mrs A again on 5 May 1992 and that under the terms of the agreement it was not until some three years later that Mrs A had in effect paid off the outstanding balance owed by Dr White.

7.8 **NOR**, as was further submitted by Mr McClelland, does Dr White's claim that over the years Mrs A gradually forgot the agreement to see Dr E and was seeing him again instead, provide him with any defence. It was not a question of years. The records show that Dr White was acting as Mrs A's doctor within 20 months of entering the agreement. At all times it must be remembered that the Agreement for Sale and Purchase was a long term arrangement, the obligations under which had not been fulfilled when Dr White resumed treating Mrs A.

7.9 **AND** nor does Dr White's claim that he felt unethical refusing to see her provide him with a defence. As Professor Gillett said in re-examination by Mr McClelland, it is the doctor's duty to bring the doctor/patient relationship to an end:

"... so the doctor has to be quite firm and signal to the patient that the professional relationship has been transcended that he is not able under those circumstances to provide detached professional care, which is what every patient needs, and that therefore he must step aside. That's the only way to secure both of them against any prejudice of their interests in the future."

7.10 **DESPITE** the advice of Mr Williams, Dr White continued as Mrs A's doctor for many years with all potential for influence over her that his role as a doctor carried. Under the terms of the 1990 agreement Dr White, as Mrs A's doctor, remained in a position where he stood to benefit from Mrs A's death or her displacement from the property. Throughout this period Dr White had a very real interest in the speedy death of his patient and, as observed by Professor Gillett, this is not conducive to single-minded care in the best interests of the patient.

7.11 **DR** White's reference to and description of the strong emotional bond that Mrs A developed towards him does not provide a defence or justification. As Professor Gillett said in evidence:

"I must say that is quite a worrying fact in and of itself, to allow that kind of relationship to grow and remain as the sole medical adviser of a patient, it seems to me is to ask for trouble. Its exactly these reasons which cause us to advise doctors not to treat their own families or close associates. ... It would heighten both the potential for exploitation and the potential for injudicious and partial conduct on behalf of both parties, and it is exactly those complications and their untoward effects on professional distance and judgment that we have to be very careful about."

7.12 **WE** are satisfied Dr White was well aware of the risks when he continued to treat Mrs A. He was aware of the very serious ethical issues which arose out of him being a party to the 1990 agreement. Despite his protestations to the contrary, there is merit in Mr McClelland's submission that Dr White knew that the way the agreement was worded advantaged him and that he could benefit from Mrs A's early death. However, despite Mr Williams advice and his own knowledge that he could be acting unethically and unprofessionally, he was prepared to take the risk. In doing so he misconducted himself at the highest level.

7.13 **EXPRESSLY** allowing for a period of some 20 months from December 1990 until May 1992 during which Mrs A was generally under the care of Dr E, we find that the facts alleged in particular 5 of the charge have been proved to the required standard.

8. PARTICULAR 6:

"Breached ethical and professional standards by entering into, or being a party to unsecured borrowing of approximately $27,000.00 about the end of 1991, or the beginning of 1992, from A, a person who was or, up until recently, had been a patient of his."

8.1 **THE** Tribunal is faced with a direct conflict on the evidence in respect of the $27,000.00 unsecured loan.

8.2 **THERE** is no dispute that Mrs A made an unsecured undocumented loan of approximately $27,000.00 to assist the White Family Trust in purchasing a section at xx, xx.

8.3 **THE** Tribunal must consider how likely Dr White's claim is that as a trustee he had no idea whatsoever where the money for the Trust's purchase of xx came from. Mr McClelland submitted:

"To suggest that he did not know where the money came from is asking the Tribunal to accept that the entrepreneurial Dr White is totally naï ve in matters concerning the Trust".

8.4 **IT** was B's evidence that Dr White negotiated the arrangement with Mrs A who had savings in the bank which she was being taxed on because of the surcharge. Ms B claimed it was agreed that she and Dr White would borrow the money and then A could be taxed less in respect of the surcharge but would not lose out on the amount of superannuation she received. In her brief of evidence Ms B explained that she and Dr White agreed to repay Mrs A at the current interest rate with payments of $220.00 in cash on the first day of each month. Ms B further explained Dr White ensured that they met these monthly payments by taking non-receipted cash straight from the till at the *xx*. Ms B said she used to take the money around to Mrs A at her home when the payments fell due. Post-xx Ms B said her understanding was that

Dr White told P, his xx, to ensure that the money was given to Mrs A.

8.5 **THE** evidence of O and P confirmed Ms B's account that each month on Dr White's direction the sum of $220.00 in cash was paid to Mrs A, such money coming from non-receipted cash from the *xx*.

8.6 **THEIR** evidence is also supported by Mr P who described how on 3 June 1997 Mrs A had told him that Dr White owed her that sum (as well as a bed) and that as her attorney he had to make sure he recovered the money, saying *"He knows he owes me"*. Mr P said Mrs A explained Dr White had told her never to tell anyone about the loan because the IRD did not know about it.

8.7 **MR** P's evidence was that when he raised this with Dr White he was *"speechless"* and in respect of the installments of $220.00 he said *"Yes, yes I spoke to her about it - I'll go around and find out from A what I owe her. How does she want the money."*

8.8 **HAVING** assessed all the evidence Mr McClelland submitted it is for the Tribunal to determine whether the CAC witnesses were fabricating their evidence in this respect. In our view this submission is an over-simplification of the issue under focus.

8.9 **THE** inquiry is specifically directed to whether the borrowing of approximately $27,000.00 (Tribunal's emphasis) was undertaken by Dr White through or by his Family Trust. The loan repayments arrangement may offer some evidence of subsequent knowledge on the part of Dr White, but not necessarily that he was a party to the original borrowing. It is necessary to examine the defence evidence concerning this particular, carefully and in some detail.

8.10 **IN** his evidence in chief Dr White explained he did not know anything about the loan of $26,000.00 until Mrs A told xx and himself about the money in April 1997 during one of her brief stays at their house in this period. He thought it was the weekend prior to he and xx going to Australia (19-20 April). Dr White said Mrs A was embarrassed for not having told him sooner but said she had promised B that she wouldn't. Referring to the statement he received for the purchase of the section at xx, Dr White noted the funds were split into $11,500.00 and $26,900.00 but the latter payment made no mention that it was a loan from Mrs A. As the Trust's bank account had $3,700.00 being deposited into it every month, Dr White said he thought there was sufficient funds in the account to pay the entire purchase price of $40,000.00.

8.11 **IN** his supplementary brief Dr White said on hearing about the loan he was not very happy with Mrs A, but that he had told her he would continue paying her the interest that Ms B had been paying her monthly, and that he insisted the full amount of the loan needed to be repaid to her immediately. However Mrs A was insistent that she did not want the loan repaid.

8.12 **IN** cross-examination Dr White clarified that he was unaware of the precise source of the funds for purchase of the section in xx because *"I asked xx if we had enough money to pay for it and she said yes and we bought it"*. Dr White was adamant that he had no knowledge of the source of the funds used to purchase this section other than in a very general and non-precise way.

8.13 **IN** answer to a question from Mr Cullen, Dr White stated:

"The money ended up in the Trust without my knowledge ... What A told me in February 1997 .... I don't think A knew where the money was going - xx put the money without my knowledge into the Trust."

8.14 **IN** a supplementary brief xx referred to an occasion during February 1997 when Mrs A came to stay at Peake Road with Dr White and herself when she was not very well. On one particular day Ms xx said she overheard Dr White and Mrs A *"talking about some loan that involved B"* and that *"A wanted the loan to just be forgotten and given to the family and used for things like the education of the children"*.

8.15 **Q**, previously a xx who said she helped Ms B look after xx from 1992 to July 1995, gave evidence for Dr White. On the subject of the loan it was Ms Q's evidence that early in 1995 she remembered Ms B mentioning to her that she had borrowed money from Mrs A. Although Ms B did not say how much she had borrowed, Ms Q said she did say she was not to mention the loan to Dr White.

8.16 **DURING** one of several visits by Mrs A to the home of Dr White and Ms B (pre-separation), Ms Q said Mrs A also mentioned she had loaned B money, although she did not say how much she had loaned but *"she did tell me not to tell Meredith"*. Ms Q concluded she had never heard anything which had led her to believe that Dr White knew about the loan made by Mrs A to B.

8.17 **EVIDENCE** was given for Dr White by R, a patient who did odd jobs around Cambridge prior to being employed as a xx. It was Mr R's evidence that in the latter part of 1996 he asked Dr White if he had any work which he could do. Dr White arranged for him to go and see Mrs A, whom he had not met before being introduced to her by Dr White. Mr R said he was hired by Mrs A to do gardening on a casual basis around her home, usually for 2-3 hours a couple of times per week. After the wages for his work accumulated to about $500.00 he

asked Mrs A one day for the money owed. She said she didn't have the money to pay him but that B had borrowed some money off her and was going to pay her some money soon and that when she did he (Mr R) would be paid from that money. Mr R said Mrs A told him that he must not approach Dr White for the money because Dr White did not know anything about the money that she had loaned B.

8.18 **EVIDENCE** was also given for Dr White by S, a retired Cambridge xx, who had been a neighbour of Mrs A and had known her in xx for about 10 years prior to her death. He said he had also known Mrs A during the war in 1941-1942. Mr S gave evidence on a variety of matters concerning the charge against Dr White.

8.19 **CONCERNING** the loan of $26,000.00-$27,000.00, having read paragraphs 20 and 21 of the brief of evidence of B concerning the matter, Mr S explained:

"I do not believe that what B says is the truth. I say this because a couple of years ago A told me about the $26,000.00 loan. .... A told me very clearly that she had loaned the $26,000.00 to B without Meredith knowing about it and she did not want Meredith to find out about it."

8.20 **IN** cross-examination P conceded to Mr Knowsley, concerning loan repayments of $220.00 per month, that *"so there were no instructions to you from Dr White to do with this money .... Not directly to me"*.

8.21 **IN** answer to a question from Mr Cullen, the White Family Trust's accountant explained it was possible for a trustee not to know the precise source of funds used for a financial transaction. He clarified, in effect, that individual trustees may not be involved in day to day affairs of Trust business and may rely on receipt of a set of Annual Accounts for an overview of annual Trust transactions.

8.22 **CROSS-EXAMINATION** of Ms B on the subject of the undocumented loan of $26,000 or $27,000.00 at the resumed hearing in December did not offer us much re-assurance that Dr White was knowledgeable about the loan when made originally. Confirming to Mr Knowsley that she had read the supplementary brief of Ms Q, Ms B explained she could not recall ever telling Ms Q that she had either borrowed money from Mrs A or that she had told her that she should not mention the loan to Dr White. The tenor of this evidence was unconvincing.

8.23 **HAVING** made a careful assessment of the evidence, the Tribunal has not been persuaded that the facts alleged in particular 6 of the charge have been proved to the required standard. Accordingly the Tribunal finds in favour of Dr White in respect of particular 6 of the charge. Although there is merit in Mr McClelland's submission that it is difficult to comprehend Dr White could be so naï ve in matters concerning the Trust, the Tribunal has concluded, by reference to the weight of the evidence adduced on behalf of Dr White, that he should be given the benefit of any doubt.

9. RELIABILITY OF WITNESSES:

9.1 **ON** many of the issues raised by the charge, especially those in particulars 2, 3 and 4 which will be discussed in the section of the Decision immediately following, the Tribunal is faced with markedly differing accounts from witnesses and documents from the CAC on the one hand and Dr White and his witnesses on the other.

9.2 **IT** is entirely for the Tribunal to resolve those differences or conflicts. It is not a matter for the witnesses who have given evidence on behalf of Dr White to determine the credibility of the CAC witnesses. For example, the statement by Q that:

"Meredith was a very hard working, truthful and honest person. B on the other hand was a complete liar. She was on another planet so far as to telling the truth was concerned. I would describe her as a regular liar"

is not determinative of credibility.

9.3 **IN** closing Mr Knowsley submitted there are numerous examples of the unreliability of the prosecution evidence, particularly the evidence given by O, and P, Mr L, Mr H, Mr I and B. It was Mr Knowsley's submission on behalf of Dr White that the Tribunal should prefer the evidence of people like Q, R, S, Dr G, Mr D, T, K and all the other defence witnesses including Dr White and xx.

9.4 **AN** integral part of the defence advanced on behalf of Dr White has been a challenge to the reliability of many of the CAC's witnesses. In short it was argued that many of the CAC witnesses are part of a grand conspiracy to drive Dr White out of Cambridge.

9.5 **APPARENTLY** as part of the conspiracy theory, several CAC witnesses were questioned about their friendship with B and whether or not they took part in a meeting held on the Saturday before the hearing commenced in October. We agree with Mr McClelland that the sinister connotations which the defence tried to attach to that meeting appear to be without substance. Mr McClelland's explanation, which we accept, is that that meeting was held at the CAC's request so that the witnesses could consider the statements which had only two days before been made available on behalf of Dr White.

9.6 **THERE** can be no denying that B and Dr White have been involved in xx; nor that both Dr F and Mr H have separately been involved in disputes with Dr White over business matters which

have resulted in various Court proceedings being issued. These are matters which the Tribunal has taken into account when considering reliability.

9.7 **THE** transcript shows that both P and O were cross-examined at considerable length about apparent inconsistencies in several diary entries made by them. Certainly some inconsistencies in the diary entries were exposed by Mr Knowsley in cross-examination. Notwithstanding we are of the view that the general thrust of the evidence given by O and P, and for that matter P, was reliable, and that any inconsistencies tell very much against a conspiracy theory.

10. PARTICULAR 2:

"Breached ethical and professional standards by continuing to treat A as a patient between the months of March and April 1997 at a time when he was engaged with financial negotiations with the said A."

PARTICULAR 3:

"Breached ethical and professional standards by benefiting either directly or indirectly under an all obligations mortgage executed by A on the 15th day of April 1997 under which the amount recoverable was limited to $100,000.00 to secure a loan in favour of the xx as borrower."

PARTICULAR 4:

"Breached ethical and professional standards by engaging in financial negotiations over the period March - April 1997 with A a person who was or up until recently had been a patient of his."

10.1 **IT** is appropriate that particulars 2 and 4 be dealt with together followed by particular 3. In composite summary the allegation is that Dr White breached ethical and professional standards by:

(a) engaging in financial negotiations over the period March/April 1997 with Mrs A who was or up until recently had been his patient; and

(b) benefiting either directly or indirectly under an all obligations mortgage executed by Mrs A on 15 April 1997 under which the amount recoverable was limited to $100,000.00 to secure a loan in favour of xx as borrower; and

(c) continuing to treat Mrs A as a patient between the months of March and April 1997 at a time when he was engaged in financial negotiations with Mrs A.

10.2 **DR** White's evidence was that Mrs A remained in his care until 22 January 1997 and then she was in his shared care with Dr F until 20 February and from then until 14 April 1997 (when Dr G took over) Mrs A was in Dr F's sole care.

10.3 **THE** Tribunal is faced with various contradictory reasons advanced by Dr White for stopping to act as Mrs A's doctor.

10.4 **ONE** reason advanced was that Dr White had become too close to her and when he learned that she had cancer on 30 January and because he would end up caring for her he knew *"that she would have to change doctors"*.

10.5 **ANOTHER** apparent reason is that on learning that she had cancer (January 1997) Dr White sought advice from his solicitor, Mr xx. That advice was because of Mrs A's illness the trust's rights under the 1990 agreement would become exercisable when she died or vacated the property, and therefore he should not continue to treat her and should arrange for another doctor to take over.

10.6 **SIMILAR** advice was given by Mr xx at the end of February 1997 when he said he again *"became aware that Mrs A had cancer which was likely to be terminal ..."*.

10.7 **WHEN** explaining to Dr G on or about 14 April 1997 why he wanted him to take over Mrs A's care, Dr White mentioned that he had financial dealings with her and that he had been advised by his solicitor to no longer see her as a patient.

10.8 **HOWEVER** despite all the above Dr White suggests that:

"The main reason that I tried get A to change doctors in 1997 was that I had recently started a new doctor in the practice, Dr F, and I saw an opportunity to get A to follow the original advice of Dr Dean Williams to change from me."

10.9 **THE** confusing and contradictory nature of the evidence as to the timing of and the reasons why Dr White explained he could not continue as Mrs A's doctor, themselves highlight the unsatisfactory nature of his explanation of the events leading up to the execution of the mortgage.

10.10 **IN** support of the shared care theory, Dr White states that Dr F saw Mrs A on 22 January 1997 when shared care commenced from that time, and that Dr F ordered an abdominal ultrasound scan on 28 January 1997. In cross-examination Dr White went even further in attributing a doctor/patient relationship by Dr F to Mrs A when he explained *"... From about 20 January to 14 April Dr F had exclusive care ... yep, that's correct, he was the doctor"*.

10.11 **IN** terms of a formal hand-over of responsibility from himself to Dr F, it was explained by Dr White in cross-examination that a computer entry made by him on 20 February 1997 was evidence of the hand-over arrangement.

10.12 **AT** this point it is noted that there was a considerable amount of evidence concerning a computer entry made by Dr White on 20 February 1997 and whether subsequently, alleged to be during May 1997, Dr White tampered with the earlier entry to make it read differently.

10.13 **WE** do not propose to go into any detail concerning the allegations of O, P and Dr F that Dr White changed the entry made on 20 February 1997 to make it appear that it was on this date that he told Mrs A she had to become Dr F's patient. Evidence was given on behalf of Dr White by Dr Stewart, a fulltime medical software developer since 1990, that it was extremely unlikely that the data could have been tampered with in any way as claimed. Suffice for us to conclude, although it is difficult to understand how three witnesses could be genuinely mistaken over the entry in question, that Dr Stewart's evidence, as an expert witness in computer software development, will be preferred in this instance. It matters little that we are unable to reconcile the evidence concerning the computer entry, because otherwise the evidence against Dr White is compelling so far as concerns our findings in respect of particulars 2, 3 and 4 of the charge.

10.14 **DR** F denied ever seeing Mrs A on 22 January. In this regard the Tribunal has noted the evidence of Mr S, the xx friend of Mrs A. He reported seeing Dr F's car at Mrs A's place in late January 1997. Mr S also gave evidence of Mrs A telling him that *"she did not have much faith in her new GP, F"*.

10.15 **THE** Tribunal prefers the evidence of Dr F that he answered a one-off summons from Dr White to see Mrs A on 26 February 1997. Mr Knowsley's cross-examination of Dr F concentrated on areas of disagreement between him and Dr White, in particular the business disagreement which developed following Dr F's purchase of a share of the goodwill in Dr White's medical

practice. Under cross-examination Dr F confirmed having been engaged in a discussion by Dr White concerning Mrs A *"a few days prior to 26 February"* when he said he was asked by Dr White to give an opinion on her condition, and on the 26th of February when he saw her. Dr F flatly denied having seen Mrs A before 26 February as a doctor. As to taking over Mrs A's care he said *"... at no stage was it mentioned I should take over her care as her doctor. I was asked to see her and give an opinion on her medical condition"*.

10.16 **THE** Tribunal is satisfied that Dr F's version of his engagement by Dr White to give a second or independent opinion concerning Mrs A's medical condition, is to be preferred to the version proffered by Dr White, that Dr F became Mrs A's sole GP from 26 February 1997. In preferring Dr F's evidence the Tribunal gained no impression that Dr F was being other than completely frank and straight forward in the answers he gave under cross-examination and questions by members of the Tribunal. Specifically Dr F denied having ever visited Mrs A at her home. He said he didn't even know where her house was. So far as Mr S seeing his car at Mrs A's house is concerned, Dr F said he believed that Mr S must have been mistaken.

10.17 **THE** Tribunal is also satisfied that Dr F did not requisition an ultrasound scan for Mrs A around about the time of his consultation. The contemporaneous records show that the scan was ordered by Dr White and the report was addressed to him. Dr White's explanation for this in his evidence was that he did order the scan because it was *"convenient"*.

10.18 **IN** total contradiction of the shared care theory is that over that month period it is only Dr White's entries that appear in the medical notes.

10.19 **AFTER** 26 February 1997, the date on which Dr White claims Dr F assumed full responsibility for Mrs A, and despite the fact that there are no medical notes for Mrs A for the period 24 February to 14 April 1997 (when Dr G took over), the contemporaneous documents show that Dr White was in fact her doctor over this period. On 25 February Dr White prescribed Halcion for Mrs A. Asked by Mr McClelland if the prescription bore his signature, Dr White replied *"I can't remember writing it"*. On 26 February 1997 Dr White wrote out a prescription for Mrs A. On 28 February 1997 Dr White requested blood tests. Dr White signed a specialist approved (Mr xx) prescription on 10 April 1997 for Mrs A (for Dipflam) which was uplifted by xx. On 17 April 1997 Dr White prescribed himself Halcion which subsequently was found in Mrs A's possession on her admission to xx Hospital. In his evidence Dr White attempted to explain these contemporaneous records away as all being part of the *"grand conspiracy"*. and *"to continue the illusion that A had not changed doctors"*.

10.20 **IT** is said by Dr White that this lonely woman with no friends did not want anyone in Cambridge to know that she had cancer; she did not want people to know that she had changed doctors; and she was most concerned that P and O would gossip about this.

10.21 **THIS** explanation is unconvincing. It does not stand up to scrutiny. It overlooks the fact that both P and O had completely unrestricted access at any time to Mrs A's medical notes which, as early as 22 January 1997 and thereafter, included references highly suggestive of cancer, including a reference to a report confirming cancer. Mrs A would have been aware that the staff would have access to her notes.

10.22 **IF** there were concerns in early 1997 about P gossiping about confidential patient information, it seems extraordinary that Dr White had described her in a reference given at her request as

a *"good employee"*. It is also difficult to reconcile this explanation with the fact that Mrs A subsequently asked P to become her xx and appointed her husband as xx and the fact that it was P and O who were present at Mrs A's death. Dr White and xx seek to explain this away as confusion on Mrs A's part.

10.23 **THERE** are other contemporaneous records and statements which also indicate that Dr White continued in his role as Mrs A's doctor after 20 February 1997 and past the period when the mortgage was negotiated.

10.24 **HAVING** met with Mrs A on 4 April 1997 and taken her instructions in respect of the mortgage, Mr I wrote to Mrs A referring to *"the doctor/patient relationship which exists between you"*. Why else would a solicitor with Mr I's experience describe their relationship in such terms unless Mrs A had told him that Dr White was her doctor.

10.25 **AN** Income Support Needs Assessment Form completed on 30 May 1997 identifies Dr White as being Mrs A's doctor.

10.26 **MRS** U, previously xx of xx at the relevant time, stated in evidence that Mrs A had told her that Dr White was her doctor but that he had asked her to go and see Dr G and that she had transferred to Dr G because Dr White had *"xx and he doesn't want her to know what her income and earnings are"*. Mrs U explained this made absolutely no sense to her at all, except it was obvious to her that Mrs A did not want anyone to think that Dr White was her doctor.

10.27 **WHILE** at xx Mrs U said she saw Mrs A every day at least once or twice. The only thing she ever said to her in response to her question *"Are you alright?"* was *"I'm worried but I promised not to tell"*.

10.28 **ANOTHER** witness outside the conspiracy theory, V, who was on duty at xx when Mrs A was admitted on 5 May 1997, said Dr White stopped her and explained *"Could you please take good care of Mrs A because she's my favourite patient and a friend ..."*.

10.29 **MS** V also explained that Mrs A told her Dr White was her doctor *"but that he was not supposed to be now"*.

10.30 **FOR** the purposes of particular 2 we find that Dr White did continue to treat Mrs A as a patient between March and April 1997 when he was clearly engaged in financial negotiations with her. We accept Dr F's evidence, (and in so doing we reject the evidence advanced by and on behalf of Dr White), that he did not become Mrs A's GP, and that his only involvement with her was on a one-off basis for the purpose of the consultation which took place on 26 February 1997. Additionally the Tribunal is satisfied, and so finds, that the evidence quite clearly shows, and it was even admitted by Dr White himself, that he did act as Mrs A's doctor up until 20 February 1997, so for the purpose of particular 4 this is sufficient. In summary, having made a careful assessment of all the evidence, the Tribunal is satisfied, to the required standard, and so finds, that particulars 2 and 4 of the charge have been established. It remains for us to examine particular 3.

10.31 **FOR** particular 3 it is necessary to show that Dr White benefited either directly or indirectly under the mortgage executed by Mrs A. At the time the mortgage was executed the Family Trust was a 50% shareholder in the xx. Dr White was a Director of the company.

10.32 **THE** company owned the premises at xx from which Dr F, Mr H and Dr White practiced separately.

10.33 **THE** xx premises were subject to a mortgage to the ANZ Bank. The ANZ Bank also had a mortgage over the xx property in respect of the same loan.

10.34 **WITH** the sale of the xx property on 27 March 1997 it became necessary to obtain alternative security and, as Dr White said, the bank put him under pressure giving him a deadline by which to secure his part of the mortgage to the Centre.

10.35 **IF** alternative security could not be found then the loan from the ANZ Bank was at risk, which would then have put the company's ownership of the xx premises at risk. This in turn would have put Dr White's occupation of those premises at risk. Therefore by arranging alternative security Dr White benefited. Although denying the mortgage was his proposal, an aspect of particular 3 which we will discuss shortly, under cross-examination Dr White conceded to Mr McClelland, for him to approach an 87 year old woman whom he had been treating for seven years to ask her to sign a mortgage on his behalf *"... would be terrible, it wouldn't be appropriate"*.

10.36 **WE** consider the answer given by Dr White in cross-examination as to whether he received a benefit by virtue of Mrs A signing the mortgage can be construed affirmatively. Mr McClelland asked Dr White *"Do you understand, or do you agree that by entering into this mortgage you were receiving a clear advantage - she was helping you out?"* Dr White replied *"She was"*.

10.37 **FINALLY** it remains for us to examine the background circumstances in which Dr White had Mrs A sign the mortgage, because we consider they may exacerbate his culpability under particular 3 of the charge.

10.38 **DR** White seeks to minimise his culpability in respect of the mortgage by explaining that Mrs A had asked him whether he would like to use her house as security, and that as he had rescued her financially in 1990, it was now her chance to help him out, and that it was the least she could do: *"She was hell bent on helping me"*.

10.39 **UNFORTUNATELY** Dr White's version of events is not supported, and is contradicted by the independent contemporaneous documents which clearly show it was Dr White who in fact approached Mrs A for assistance.

10.40 **IN** the letter from Dr White's solicitor dated 27 March 1997 (Mr xx) it is stated that:

"... Mr White has had discussions with A regarding her home ..."

and that

"Mr White asks that your client execute a mortgage in favour of the ANZ Bank to enable him to be provided with funding of $100,000.00"

10.41 **DR** White seeks to explain this away as being *"... the way the lawyers write letters"*.

10.42 **IN** his letter of 9 April 1997 to Mrs A recording their meeting Mr I stated:

"It is my understanding from you that in recent weeks Dr White had approached you to agree to mortgage the property in a situation where Dr White has sold a property as a result of xx and is required to give the ANZ substituted security."

and;

"The fact that Dr White approached you direct at all to request that you mortgage the property thereby exposing yourself to risk is ..."

10.43 **IN** cross-examination Dr White disputed that it was him who had asked Mrs A to give the mortgage, and that Mr I had got it wrong in this regard.

10.44 **ADDITIONALLY** we rely on the evidence of P and O when they describe how Mrs A told them that Dr White had approached her for the mortgage. As explained earlier in the Decision, certain inconsistencies in the diary notes evidence of these two witnesses does not, in our view, serve to discredit the overall thrust of the evidence of these two witnesses as to Mrs A's mental state in the twilight of her life. More disturbingly, and despite Dr White's protestations to the contrary, there is clear independent evidence and contemporaneous records to show that he brought some pressure to bear upon Mrs A.

10.45 **THE** relevant sequence of events was that Mrs A sought advice from Mr I on 4 April 1997. Having explained to her the risks of signing the mortgage (i.e. that she would become liable to the ANZ Bank for the borrowings of the xx and that if there was any default the bank would have the right to sell her property and force her to vacate it, she agreed to the second of three options which provided for the registration of a lease for life against the title to the property.

Dr White claims *"maybe this guy bulldozed his way through this old lady, thought he knew best"*. But within two hours of passing that advice onto Dr White's solicitors, Mrs A telephoned Mr I and told him she had agreed to execute the mortgage despite his advice. Mrs A confirmed at the time that Dr White was present when she made this telephone call. Dr White, as indeed he must, denies this.

10.46 DR White's denial is in stark contrast with the independent contemporaneous record of that event. In his letter of 9 April 1997 to Mrs A Mr I placed on record for her benefit:

"Within two hours of relaying that information to Dr White's solicitors you telephoned to advise that you had now decided not to take my advice and that you wished to sign the mortgage. It transpired that the telephone call was made with Dr White present at your house. I suggested to you that the matter be left until this current week and that you should think further about it over the weekend. Apparently the suggestion which I made to register a lease for life prior to the ANZ Bank mortgage has not been pursued."

10.47 ARRANGEMENTS by Mr xx in his capacity as Dr White's solicitor were made for Mrs A to obtain independent legal advice from Mr K and he or Dr White's solicitor required an independent medical certificate as to Mrs A's competence which was obtained from Dr G on 14 April 1997 (being the first time he saw her).

10.48 MR I stated in evidence that anybody asking another person to provide security over that person's property for a loan that is not theirs is putting the owner of the property in an awkward position that they should not be put in . Mr I was in no doubt that Dr White was forcing Mrs A to execute the mortgage. As he put it:

"His mere presence with her do you say that means that he's forcing her into the mortgage .... undoubtedly. His mere presence when she rings .... it has to be seen against the background which is 2 hours before that telephone call she had been in my office we had had a lengthy discussion, I had given her options, one of which was a middle ground option which we decided to pursue, I relayed that to the White Trust's solicitor in Cambridge, the next thing that happened was 2 hours later she's on the phone to me

quite adamant that she was going to sign the mortgage and was obviously on a completely different tack than the one she had discussed in my office. And to you that means that Dr White must have been forcing her into it ..... I wasn't in too much doubt about that."

10.49 **MR** I's evidence before the Tribunal is entirely consistent with the statement in his letter of 9 April 1997 that:

"While you may have agreed to give the mortgage, I consider that there is neither legal nor moral obligation on you to carry out that agreement, firstly, for the reason that the promise was extracted from you under some degree of moral pressure ...."

10.50 **IN** the course of their meeting Mrs A had told Mr I that she did not want to be *"put in a position where they could put me out"*. This was certainly consistent with Mr D's file note in November 1990 that she did not want the property to be mortgaged. Mrs A told Mr I that Dr White would be angry if she did not sign the mortgage when she said she would. Mr I formed the impression that she did not fully understand the risk that she was putting herself in by signing the mortgage, and he certainly did not expect a woman of her age to understand that risk. Mr I made the comment *"Mrs A ringing me in Dr White's presence led me to the view that he "had her arm up her back""*.

10.51 **THIS** independent and contemporaneous evidence fully corroborates the evidence of P, O and P that Mrs A had told them that Dr White had forced her into signing the mortgage, that xx had slammed the phone down and ordered her to ring Mr I.

10.52 **FOR** the purposes of particular 2, 3 and 4 the CAC is not required to establish that Mrs A was actually pressured into executing the mortgage. However having found from clear independent evidence and contemporaneous records that Dr White brought some pressure to bear on Mrs

A, in our view this simply aggravates or increases the degree of culpability on Dr White's part.

10.53 **WE** find particular 3 of the charge established to the required standard, that Dr White breached ethical and professional standards by benefiting either directly or indirectly under an all obligations mortgage executed by Mrs A on 15 April 1997 under which the amount recoverable was limited to $100,000.00 to secure a loan in favour of the xx borrower.

11. DISGRACEFUL CONDUCT IN A PROFESSIONAL RESPECT:

11.1 **IN** determining whether or not the facts which are proved amount to disgraceful conduct in a professional respect, the Tribunal must ask itself whether Dr White has acted, or failed to act in a manner "*which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency*".

11.2 **DISGRACEFUL** conduct in a professional respect is conduct deserving of the strongest reprobation. It may include conduct connected with the profession in which Dr White has fallen short, by omission or commission, of the standards of conduct expected amongst registered medical practitioners. Such falling short as is established must be grave.

11.3 **THE** full Court considered the test for disgraceful conduct in *Brake v Preliminary Proceedings Committee* (Auckland, HC 169/95, 8 August 1996) and held (p 7):

"*The test for "disgraceful conduct in a professional respect" was said by the Privy Council in* ***Allison v The General Council of Medical Education Registration*** *to be met:*

> *If it is shown that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.*

It is apparent from this test, and from the later cases in which it has been adopted, that it is an objective test to be judged by the standards of the profession at the relevant time ...

In considering whether conduct falls within that category, regard should be had to the three levels of misconduct referred to in the Act, namely disgraceful conduct in a professional respect, s58(1)(b); professional misconduct, s43(2); and unbecoming conduct s42B(2). Obviously, for conduct to be disgraceful, it must be considered significantly more culpable than professional misconduct, that is, conduct that would reasonably be regarded by a practitioner's colleagues as constituting unprofessional conduct, or as it was put in ***Pillau v Messiter****, a deliberate departure from acceptable standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."*

11.4 **THE** charge against Dr White comprises a number of particulars which the CAC submits separately amount to disgraceful conduct. The CAC further submits that when two or more of the particulars are considered cumulatively they also amount to disgraceful conduct. As the Court of Appeal said in *Duncan v the Medical Practitioners Disciplinary Committee* [1986] 1NZLR 513:

"When there is a comprehensive charge as well, the Council should go on to consider it after determining the separate charges. Having made the findings on the separate charges, they should arrive at a conclusion as to the overall gravity of the conduct of which they found the practitioner guilty."

11.5 **IT** is the CAC's submission that in this case, when the Tribunal stands back to consider the overall gravity of Dr White's conduct, it will have no difficulty describing it as disgraceful conduct in a professional respect.

11.6 **CLAUSE** 5 of the Code of Ethics of the New Zealand Medical Association, while helpful, is not determinative of the charge against Dr White. The requirement that *"all conduct in the practice of the profession is above reproach"*, is a very subjective test, and is difficult to apply in the objective manner demanded. The added requirement, that none of the specified

advantages are taken of any patient, must be interpreted conjunctively. Strict rules of statutory interpretation need not apply in interpreting the Code of Ethics.

11.7 **FOR** our determination that Dr White's conduct is disgraceful conduct in a professional respect, considerable reliance is placed on the evidence of Professor Gillett. Mr Knowsley succeeded in cross-examination in diluting the impact of some of Professor Gillett's evidence concerning the behaviour of Dr White. However we conclude that Professor Gillett did not resile in any substantial way from the evidence which he gave in condemnation of Dr White's conduct.

11.8 **A** brief word about Professor Gillett's background and credentials is appropriate. His present position is neurosurgeon at Dunedin Hospital, Acting Head of Department for Neurosurgery and Professor in Biomedical Ethics and Philosophy at the University of Otago. After gaining an FRACS in 1982, Professor Gillett enrolled at the University of Oxford where he gained a D.Phil degree in 1986. Following this he took up a Fellowship by Examination at Magdalen College, Oxford, where his research was on medical ethics and the relation between the understanding of mind and contemporary neuroscience.

11.9 **PROFESSOR** Gillett's evidence was given after reading a majority of the draft briefs of evidence of the CAC witnesses, Dr White's response to the CAC and the defence evidence. His evidence came from the perspective of the ethical issues relating to relationships between doctors and their patients, more particularly in respect of business or physical transactions between them.

11.10 **WE** consider that a best understanding of Professor Gillett's evidence may be gained by placing it within the context of the two principal planks of Dr White's defence to the charge.

11.11 **BOTH** Dr White and Mr Knowsley sought to emphasise the benignity of the motives of the former, first in saving Mrs A from a mortgagee sale, and secondly in accepting her offer to mortgage the house to the ANZ Bank for his benefit. Mr Knowsley explained, from the evidence from numerous of the defence witnesses, that the association between Mrs A and Dr White was much more than just a doctor/patient relationship, that there was genuine love and affection between them. Professor Gillett conceded, if satisfied as to benignity of motive on Dr White's part, that it could be open to describe his conduct as less than disgraceful. However Professor Gillett then went on to explain, having allowed a *"love and affection"*-type relationship to develop was, in itself, quite a worrying aspect, especially if the doctor remained the sole medical adviser of the patient. We agree with Professor Gillett this is asking for trouble, and is the very reason why doctors are cautioned against treating their own families or close associates.

11.12 **WE** think it should be clear, from our separate discussions of each particular of the charge, that we were far from satisfied as to the benignity of Dr White's motives. Consequently we consider that any benefit of doubt as to whether the conduct in question was disgraceful, is not available to Dr White.

11.13 **ANOTHER** important aspect is that it is the duty of the doctor to bring the professional relationship to an end. Obviously the patient does not wish to hurt the doctor by suggesting there is something unsatisfactory about the relationship. Therefore the doctor must be firm and

signal effectively to the patient that the professional relationship has been transcended, and that under those circumstances he is unable to continue providing detached professional care. In our view that is the only way to protect both patient and doctor against any prejudice of their interests in the future. Unfortunately Dr White clearly defaulted in this important respect. Apart from a comparatively brief period when Mrs A became a patient of Dr E, effectively she remained a patient of Dr White for almost the remainder of her life.

11.14 **THE** second substantial plank of Dr White's defence, in respect of which Mr Knowsley sought concession from Professor Gillett, was that he ensured Mrs A was provided with independent legal advice in respect of both financial transactions. Professor Gillett agreed that these were sensible precautions in the circumstances. However our interpretation of the very strong message from Professor Gillett, with which we agree, without reservation, is that there is an ethical and professional caveat against financial dealings between doctor and patient, very much in the same way that there is a similar caveat against sexual relationships between doctors and patients.

11.15 **IT** is important to understand that sexual relations between doctors and patients carry a presumption of exploitation, and therefore are much more strictly ruled against than normal relationships between other people, primarily because of the difficulty in obtaining firm evidence of emotional entanglement and coercion. In our view that means that the existence of a potential financial advantage to the doctor, even without cast iron proof of evidence of intention to obtain an advantage, is prejudicial to the way we must look at that doctor/patient relationship. Because of the nature of our dealings with one and other, it is almost impossible to chart with precision the personal dynamics of a relationship between two people. Precisely because of these

difficulties of establishing definite evidence of exactly how the arrangement came about, means in the sexual area the profession has established relatively absolute standards. It must follow it seems to us, the Tribunal, that in the area of financial dealings there must be a correspondingly high index of suspicion which, to someone looking from outside, and perhaps used to dealing with other areas of the law, may seem overly judgmental. For these reasons we consider, in the event of a financial transaction occurring between doctor and patient, that the resultant threshold of suspicion mandates effective formal cessation of that relationship forthwith. In this case resumption of the doctor/patient relationship between the parties during the currency of the 1990 financial transaction, in our view rendered it fatally flawed.

11.16 **WE** think the fact that independent legal advice was obtained, was over-emphasised. We say this because, leaving completely aside evidence of the doctor/patient relationship between the parties, the need for independent legal advice would still have been paramount. The unusual nature of the two transactions, particularly the 1990 agreement, even without incursion of the doctor/patient relationship, made procurement of independent legal advice essential. That such was obtained in this case did not accommodate the ethical and professional influences inherent in the doctor/patient relationship. Therefore we must reject Mr Knowsley's closing submission, that there was no impropriety in the substance of the two transactions under focus. Maybe the independent legal advice accommodated the form of the transactions, but certainly not, in our view, their substance. We consider it is entirely proper for us to make this determination. As was so wisely observed by Mr Williams in responding to a question from the Chair:

"Ethical matters are different from legal matters. Something within us is repelled by certain actions which may be legal, but which we know are not right, and I think that's the [Tribunal's] *unenviable duty to determine what is acceptable for a medical practitioner as opposed to an ordinary person. I suspect if Dr White had entered into the same agreement, but not as a medical practitioner, it may have been considered that the result, if advantageous to him, was good luck, or smart practice, and the world would let it go*

by and accept it. As a medical practitioner, caring for that patient, our rules are different and I think that's your decision, not mine."

11.17 **OF** particular concern to us is that Dr White, even so recently as the fourth day of the hearing, 12 December 1998, appeared not to comprehend the enormity of his dealings with Mrs A. In answering a question put in cross-examination, as to whether he agreed in any doctor/patient relationship there is a power imbalance favouring the doctor, the reply of Dr White, was *"I don't agree I think it depends on the patient and the doctor"*.

11.18 **THE** Tribunal accepts with approval Professor Gillett's concurrence with the comment made by Mr I in his letter of 9 April 1997, that Dr White's direct approach to Mrs A to enter into the mortgage, was disgraceful and outside the bounds of what he would regard as proper in a doctor/patient relationship.

11.19 **IN** a long-standing medical arrangement between a doctor and a vulnerable particularly lonely, elderly or chronically infirm patient, there is bound to be an influence of the doctor over the patient such that in any arrangement where both have an interest, apart from the professional relationship, there is a persuasive possibility of exploitation by the doctor. This does not cease with the signing over of care to another doctor, particularly where the original doctor continues to have an active role in the care and treatment of the patient concerned. Even if the latter is not the case, the influence must be reckoned to continue for some time after the cessation of any official professional arrangement. This makes it unethical and unprofessional for a doctor to enter into any arrangements with a patient from which that doctor stands to make a substantial benefit.

11.20 **WITHOUT** reservation we accept Professor Gillett's evidence, that a doctor should not enter into any financial arrangement with any patient above and beyond the fees he is entitled to charge for his professional services. The reason for this is that the doctor must take a detached professional view of the patient's problems and have an unalloyed motive to benefit the patient as far as it lies within his professional ability to do so.

12. RESULT:

12.1 **HAVING** made adverse findings against Dr White in respect of five out of a total of six particulars, the Tribunal determines that the overall gravity of his conduct warrants a determination that his behaviour is disgraceful conduct in a professional respect. Considered cumulatively and in their totality the particulars of the charge amount to disgraceful conduct.

12.2 **ORDERS** made by the Tribunal in Decision number 45/98/24C to protect the identity of Dr White and other parties shall continue pending issue of a supplementary Decision on penalties. In this respect submissions are requested of counsel. The timetable is for Mr McClelland to file his submissions by **Thursday 11 March 1999** followed by submissions from Mr Knowsley no later than **Thursday 25 March 1999**.

DATED at Auckland this 24th day of February 1999

.....

P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal