IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2021-085-000782
[2022] NZDC 4582

UNDER	SECTION 106 (1)(d) of the HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003
IN THE MATTER OF	an appeal against a decision of the Respondent to interim suspend the appellant's practising certificate
BETWEEN	MATTHEW HENTY SHELTON of Wellington, Registered Medical Practitioner Appellant
AND	THE MEDICAL COUNCIL OF NEW ZEALAND, an authority appointed in respect of the practice of medicine under Schedule 2 of the Health Practitioners Competence Assurance Act 2003 Respondent

Hearing:	23 and 24 February 2022
Further evidence and/or submissions:	14, 28 and 29 March 2022
Appearances:	Mr M McClelland QC and Ms R Daley for the Appellant Mr S Mount QC and Mr S Waalkens for the Respondent
Judgment:	31 March 2022

RESERVED JUDGMENT OF JUDGE S M HARROP ON APPEAL AGAINST INTERIM SUSPENSION OF PRACTISING CERTIFICATE

Introduction

[1] Dr Matthew Shelton is a registered medical practitioner who practised as a general practitioner at Plimmerton Medical Centre until 25 August 2021. On 10 September 2021 Dr Shelton advised that he was not intending to return to practice for the foreseeable future. On 10 November 2021, with effect from 26 November 2021 the Medical Council of New Zealand (the Council) suspended him from practice on an interim basis pursuant to s 69 of the Health Practitioners Competence Assurance Act 2003 (the Act). That step was based on the Council's awareness of the Health and Disability Commissioner (HDC) having commenced an investigation under the Health and Disability Commissioner Act 1994 (the HDC Act) into Dr Shelton's treatment of 11 patients.

[2] Dr Shelton opposes the Covid-19 vaccination programme and has taken a vocal stance on the issue publicly. Prior to ceasing practice, he expressed anti-Covid-vaccination views to patients and discouraged a number of them from getting vaccinated, including high-risk and vulnerable patients.[1] He also made public statements in the popular media, on social media and at public gatherings advocating against Covid-vaccination.

[3] The HDC described his actions as constituting "a significant risk of harm to the public" and began its investigation. The Royal New Zealand College of General Practitioners (RNZCGP) was "extremely concerned" about Dr Shelton giving advice to patients that was "not based on evidence and scientific facts". It began an investigation into a breach of the College Rules.[2] The medical director of Dr Shelton's Plimmerton PHO[3] was concerned that Dr Shelton was "putting patients at risk and …. undermining public health messaging around the importance of vaccination" in a way that "does not sit in line with professional standards". This led the PHO to terminate Dr Shelton's contract.

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1 I am for convenience adopting here the opening submissions of Mr Mount QC for the Council which, of course, set out the Council view but for present purposes provide a useful introduction.

2 I understand that following the Council's decision to suspend Dr Shelton's practising certificate this investigation has been deactivated.

3 Primary Health Organisation.

[4] The Council's decision to interim suspend Dr Shelton's practising certificate on 10 November 2021 was made pending the outcome of the HDC investigation. Subsequently, the Council has also begun its own process, which may lead to a Professional Conduct Committee (PCC) being established to investigate breaches of professional standards by Dr Shelton. That process only began approximately a week before the hearing before me.

[5] Dr Shelton appeals against the interim suspension decision. In summary his position is:

(a) The decision was wrong in fact and law;

(b) In reaching its decision the Council took into account matters which were outside the scope of the HDC investigation upon which Dr Shelton's suspension was based;

(c) The Council failed to carry out any or adequate risk assessment prior to determining whether to exercise its discretion under s 69(2)(a) of the Act to suspend Dr Shelton;

(d) The Council erred in determining that Dr Shelton's expression of his honestly-held views cast doubt as to the appropriateness of his conduct in his professional capacity;

(e) The Council failed to specify or particularise the risk of harm that it considered that Dr Shelton's conduct posed to the public;

(f) Neither Dr Shelton, his conduct, nor his practice pose a risk of harm to the public and there is no evidence that this is the case;

(g) The Council failed to adequately consider the less restrictive options available to it to mitigate its concerns regarding Dr Shelton's conduct, including seeking his agreement to an undertaking, engaging with him as to the appropriate terms of such an undertaking or the inclusion of conditions on his scope of practice;

(h) The Council failed to provide proper reasons for its decision as it was lawfully obliged to do; and

(i) In reaching its decision to suspend Dr Shelton, the Council failed to have regard to the New Zealand Bill of Rights Act 1990 (NZBORA). In particular, it failed to exercise its statutory discretion in a manner consistent with Dr Shelton's right to freedom of expression pursuant to s 14 and it also failed to consider whether its decision to suspend Dr Shelton was a justifiable limitation on that right in terms of s 5 of NZBORA.

What this appeal is about

[6] In brief, the issues I need to determine on this appeal are whether or not Dr Shelton has satisfied me that the Council was wrong to conclude under s 69(1)(b) of the Act there was doubt about the appropriateness of Dr Shelton's conduct in his professional capacity and, if he cannot do so, whether the Council was wrong to find under s 69(2) that suspension was the fair, reasonable and proportionate interim response, pending completion of the HDC investigation and any subsequent disciplinary action.

What this appeal is not about

[7] Dr Shelton currently faces allegations which will be assessed by the HDC in the course of its investigation. This judgment will not assess those allegations or Dr Shelton's response to them, nor will it discuss what ultimately may be considered by the Council an appropriate interim measure, in the event of a PCC being established to investigate any breaches of professional standards by Dr Shelton. This judgment will also not assess the correctness or otherwise of the New Zealand Government's response to the Covid-19 pandemic and in particular its roll-out of the Pfizer vaccine as a primary response, nor will it assess the validity of Dr Shelton's views about the efficacy of that vaccine.

Section 69 of the Health Practitioners Competence Assurance Act 2003

[8] The Council's discretion under s 69(2)(a) of the Act to interim suspend Dr Shelton's practising certificate, which it has exercised here, arises only if the criteria in s 69(1) are established. This provides:

> (1) This section applies if a practitioner is alleged to have engaged in conduct that—
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> (a) is relevant to—
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> (i) a criminal proceeding that is pending against the practitioner; or
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> (ii) an investigation about the practitioner that is pending under the Health and Disability Commissioner Act 1994 or under this Act; and
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> (b) in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner's conduct in his or her professional capacity.

[9] There is no dispute that Dr Shelton is alleged to have engaged in conduct that is relevant to an investigation about him that is pending under the HDC Act, so the threshold in s 69(1)(a) is established.

[10] Dr Shelton however disputes that s 69(1)(b) is satisfied. He contends the Council was not justified in concluding that his conduct cast doubt on the appropriateness of his conduct in his professional capacity. This is the first of two issues I will need to determine in this judgment: Was the threshold for interim suspension to be considered met?

Statutory context

[11] Section 69 does not exist in a vacuum. The principal purpose of the Act is: [4]

> "To protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions".

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4 Section 3(1).

[12] The Act endeavours to achieve that purpose by providing, among other things, for a "consistent accountability regime" for all health professions.[5]

[13] The Council is the statutory authority responsible for the registration and oversight of medical practitioners in New Zealand. Its functions include receiving "information from any person about the practice, conduct or competence of health practitioners, and, if it is appropriate to do so, act on that information".[6]

[14] The requirements and process for registration are set out in ss 11 to 25 of the Act. Once a doctor is registered, that registration continues until it is cancelled, although a doctor's practising certificate may be suspended on various grounds.

[15] Part 4 of the Act deals with complaints about, and the discipline of, health practitioners, with particular reference to Professional Conduct Committees (PCCs) and the Health Practitioners Disciplinary Tribunal (the Tribunal).

[16] Part 5 of the Act deals with appeals from specified adverse decisions of the relevant authority such as the Council's interim suspension decision in this case.

[17] Section 109 provides that an appeal is by way of rehearing with the court having the power to confirm, reverse, or modify the decision or order appealed against and the ability to make any other decision or order that the Council could have made. Under s 111, instead of determining an appeal the court may direct reconsideration by the Council of the whole or any part of the decision or order under appeal.

[18] Section 108 of the Act provides that a "decision or order against which an appeal is lodged under this Part continues in force unless the District Court or the High Court orders otherwise."

[19] I accept Mr Mount's submission, with which I did not understand Mr McClelland to disagree, that the relevant factors in exercising the s 69 discretion whether or not to suspend a practising certificate on an interim basis include the need

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5 Section 3(2)(a).
6 Section 118(f).

for public protection, maintaining public confidence in the medical system by the maintenance of professional standards and the need for proportionality.[7] Of course the decision to suspend must also be reached fairly and taking into account any submissions made by the health practitioner. Section 69(3) of the Act provides:

> (3) The authority may not make an order under subsection (2) unless it has first—
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> (a) informed the health practitioner concerned why it may make an order under that subsection in respect of the health practitioner; and
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> (b) given the health practitioner a reasonable opportunity to make written submissions and be heard on the question, either personally or by his or her representative.

[20] I accept Mr Mount's submission that there is an inherent tension between the public safety purpose of the power to suspend or impose conditions while an investigation is on foot, and the private rights of a health practitioner who is otherwise qualified and entitled to practise and earn a living.

[21] Parliament has, at least to an extent, addressed this tension by introducing some safeguards for a practitioner within s 69. In addition to s 69(3), s 69(4) provides:

> (4) The authority must order the revocation of an order under subsection (2) as soon as practicable after—
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> (a) the authority is satisfied that the appropriateness of the practitioner's conduct in his or her professional capacity is no longer in doubt; or
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> (b) the criminal proceeding on which the practitioner's suspension is based is disposed of otherwise than by his or her conviction; or
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> (c) if the criminal proceeding on which the practitioner's suspension is based results in his or her conviction, the authority is satisfied that no disciplinary action is to be taken or continued in respect of that conviction under the Health and Disability Commissioner Act 1994 or under this Act; or
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> (d) if the investigation on which the practitioner's suspension is based has been completed, the authority is satisfied that the practitioner will not be charged as a result of the investigation.

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7 *Lim v Medical Council* [2016] NZHC 485 at [28] and [29].

[22] Despite this, I understand the reality is that if the interim suspension is not overturned on this appeal, Dr Shelton will in effect be pre-emptively prohibited from practising his profession for a potentially lengthy period. Particularly if the HDC investigation were to lead to charges being laid before the Tribunal, the period of interim suspension may exceed two years. I proceed therefore on the basis, notwithstanding the protections within s 69, that Dr Shelton is at risk of being unable to practise his profession for a lengthy period which may exceed any penalty ultimately imposed by the Tribunal even if charges are laid and proved. Self-evidently this throws into sharp focus the need for careful assessment of whether, even assuming the threshold for suspension is established, interim suspension for such a lengthy period is a fair, reasonable and proportionate response to Dr Shelton's conduct.

Approach on appeal

[23] I have already outlined the powers of the court on appeal but it is critical to assess and record what is the appropriate approach by the court on an appeal of this kind. There is no dispute that the well-settled applicable principles are those set out by the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar:* [8]

> "Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion."

[24] The Supreme Court also said:[9]

> "The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes

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8 [2008] 2 NZLR 141 at [16].

9 At [5].

> no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case."

[25] These general principles need to be applied to the particular circumstances of this appeal. I accept Mr Mount's submission that, albeit it was an appeal challenging Council decisions on misconduct and penalty, I ought to follow the approach set out by Whata J in *Vohora v The Professional Conduct Committee*:[10]

> "On that basis I will proceed by examining whether or not the Tribunal was wrong about its decisions on misconduct and on penalty based on my assessment of the merits. Nevertheless, it remains for the appellant to show why the Tribunal got those decisions wrong. **On matters pertaining to professional context and standards, I will need to be persuaded why it is I should depart from a panel including experts on the particular areas of concern.** In short, the appellant must show why those experts got their evaluation wrong." (emphasis added)

[26] In *Moncrief-Spittle v Regional Facilities Auckland Limited*[11] the Court of Appeal dealt with a challenge to the cancellation of a public meeting at a council venue. The decision was challenged by the appellants who wanted to attend the meeting or see it go ahead despite the controversial views of the proposed speakers which were considered likely to give rise to violent protest.

[27] The Court of Appeal upheld the High Court decision that the cancellation by the council organisation was a justified limitation on the appellants' rights of freedom of expression and freedom of peaceful assembly under the NZBORA.

[28] In doing so the Court of Appeal referred to the respondents' submissions on the question of how the courts should respond to complaints about the effect of executive decisions on human rights. It appears to have upheld those submissions.

[29] The Court referred to *R (Lord Carlile of Berriew) v Secretary of State for the Home Department.*[12] That case involved a challenge to the decision of the Home Secretary, on the advice of the Foreign Office, to exclude an Iranian dissident from the

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10 [2012] 2 NZLR 668 at [33].
11 [2021] NZCA 142.
12 [2014] UKSC 60.

United Kingdom with the result that she was unable to accept speaking engagements to address issues of human rights and democracy. Lord Neuberger said:[13]

> "… where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision. …
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> … even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality."

[30] While the Supreme Court of the United Kingdom was dealing with a very different context from the present, I see myself, as a lay person in medical matters, as needing to give significant respect, in coming to my own decision, to the assessment of the Council on two matters. First, as to whether or not Dr Shelton's actions have cast doubt on the appropriateness of his conduct, in the sense of putting the health and safety of the members of the public at risk, and secondly as to whether suspension of his practising certificate is a justifiable interim measure, since that is a question of the appropriate response to the risk that the Council, with its combined expertise, has determined is present. [14]

[31] As I have emphasised, it is not my task in this judgment to assess the correctness of the countervailing views about the efficacy of the Covid-19 vaccine roll-out in New Zealand. I proceed on the basis that the competing views are genuinely held. In particular I proceed on the basis that Dr Shelton puts forward his views

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13 At 67 and 68.

14 The Council is constituted under the Act and currently consists of 11 members who are a mix of doctors and lay people.

believing that he is properly contributing to what he sees as a legitimate debate, in the exercise of both what he sees as his professional duty to his patients and his right of freedom of expression. From his perspective, he seeks to provide his patients with information to allow them to make a fully-informed choice whether to get vaccinated.

[32] That said, the assessment of the issues in this case cannot depend on the genuineness or correctness of the motives of the medical practitioner whose conduct has allegedly put public health at risk.

[33] As Lord Neuberger put it in *R v Secretary of State for the Home Department*:[15]

> "… I find it very hard to envisage any circumstances where a judge's decision to quash an executive decision to restrict a Convention right because its exercise might endanger the national interest, could turn on an assessment of the motives of the person responsible for the danger to the national interest … the issue in this case concerns the nature, likelihood and impact of the reaction of the Iranian authorities and people to the admission of Mrs Rajavi into this country, not the legitimacy or defensibility of the reasons for that reaction."

[34] Applying that principle to the present case, the question I have to assess is not whether or not Dr Shelton may be genuine and correct in his advice and statements, or otherwise generally entitled to make them, but whether the Council was right in its assessment of the risks to public health in New Zealand of his making those statements.

Dr Shelton and his alleged conduct

[35] Against that background, and prior to considering the issues I need to determine, I set out Dr Shelton's history as a doctor and his alleged conduct which led the Council to take the steps it did, together with his more recently expressed views on the situation.[16]

[36] Dr Shelton graduated with an MB ChB from the University of Sheffield. He holds postgraduate qualifications and has experience in Obstetrics and Gynaecology, and Anaesthetics and Intensive Care. When he began practising in the United

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[15] [2014] UKSC 60, at 77.

[16] Because of the late filing of important evidence on behalf of the Council I gave Mr Shelton the opportunity to file an affidavit in reply and further submissions. He has filed a detailed and helpful affidavit dated 14 March 2022 to which I will refer below.

Kingdom he initially worked in general practice but subsequently spent two and half years in Anaesthetics and Intensive Care. Dr Shelton moved to New Zealand in 1994 and has been a registered medical practitioner here since then. In 2015 he became a Fellow of the RNZCGP. He also has a Fellowship with the Australasian College of Nutritional and Environmental Medicine for whom he has served as a core lecturer for ten years as well as an examiner and board and education committee member. In both 2017 and 2019 he received that College's President's Award for Distinguished Academic Service.

[37] From 2011 until August 2021 Dr Shelton was a fulltime general practitioner and partner at the Plimmerton Medical Centre, providing the full range of general practice services to his enrolled population, including throughout the Covid-19 pandemic.

[38] I now set out the essential aspects of Dr Shelton's alleged conduct, from the Council perspective.[17] I emphasise that Dr Shelton disputes many of these allegations. The investigation by the HDC will provide the opportunity for each side to have input before they are determined.

[39] The background to the interim suspension decision is a series of complaints or notifications about Dr Shelton's conduct from his patients, their families, members of the public, other doctors, the RNZCGP and the HDC. They relate to his conduct and advice in relation to the Covid-19 pandemic and in particular the Pfizer vaccine. The key points emerging from the evidence bundle are that:

(a) In July 2021, Dr Shelton told a patient with an auto-immune disease not to get the Covid-19 vaccine. The patient's specialist gave the opposite advice, emphasising the greater risk to the patient in not being vaccinated. In advising against the vaccine, Dr Shelton told the patient the number of Covid-19 cases worldwide had been overstated, that Covid-19 vaccine deaths had been understated and that the vaccine could lead to infertility.

[17] Gratefully adopting Mr Mount's summary from his submissions at paragraph 2.1 to 2.12.

(b) In May 2021 when asked by a mother whether her household should sign up for vaccination due to her son's disability, Dr Shelton *"rolled his eyes and head as far as back as possible and started a spiel on why I should not sign up and that the vaccine had not been tested enough to warrant people [getting] vaccinated"*. The complainant said that Dr Shelton's *"unprofessional behaviour .... has damaged the trust and confidence patients have had in their doctor, as well as how the public perceives the medical profession. In addition to this he has made use of work tools, accessed client database, used privileged information, only to convey his personal message .... the damage Dr Shelton has caused in the local community is mammoth ... His behaviour has compromised patients' safety and trust in their doctor"*.

(c) Dr Shelton discouraged other patients from getting the Covid-19 vaccine – for example suggesting to one patient that people who receive the vaccine could be dead within five to ten years and that over 80 people in New Zealand may have died from the vaccine;

(d) In a consultation with a patient, Dr Shelton suggested that the Prime Minister had faked her Covid-19 vaccination, or may have done so, given the risks of the vaccine;

(e) Dr Shelton used his clinic's patient database to send a text message to approximately 600 patients of the Plimmerton Medical Centre promoting the website www.nzdsos.com and discouraging the Covid-19 vaccine for fertile women and children. The message said *"Hi[], your GP Matt here. I cannot in conscience support Covid vaccination of, particularly children, and pregnant and fertile women, from my assessment of current risks and benefits, best explained at* www.nzdsos.com*. All to make their own best decision. I apologise for any distress. My views are my own, not the consensus. PMS will continue with rollout invites. Email, do not ring, to* info@plimmertonmed.nz *only if you must as this email already busy.*

With gratitude and respect for the informed decision this has to be. Do not reply by text."

(f) Dr Shelton told the public in a video posted on Facebook in or around May 2021 that eminent world experts are saying "*the vaccine rollout must be stopped immediately*", that "*we know there have been deaths and injuries in New Zealand following the vaccination and we are suspicious that these statistics are not being made publicly available"* among other statements questioning the vaccination programme;

(g) Dr Shelton told the public in a talk-back radio interview with Peter Williams in June 2021 that "*the evidence really is saying nothing less than we need to pause [the vaccine rollout]"*;

(h) Dr Shelton publicly endorsed and promoted the work of a United States doctor who has described the Covid-19 vaccine as *"a horrendous bioweapon that has been thrust on the public and [is] going to cause great personal harm which it already has – thousands of people have lost their lives …. Based on the safety data now, I can no longer recommend it …. It's not a safe product.*"

(i) Dr Shelton made a speech at the Civic Square in Wellington in September 2021, also posted a video on Facebook, where he told the public the vaccine rollout is *"nothing less than a complete demolition and deconstruction of very profound and powerful important agreements made between medicine and society since the Nuremberg declaration of 1947 when the world said …. never again will people be forcibly experimented on without their knowledge, understanding, permission"*. In the same video he described the vaccine as "Russian roulette" and emphasised *"there is a very high burden of side-effects, including death, compared again to any newly released in medication that I have ever seen and used"*.

The HDC investigation and the Council's steps

[40] On 25 August 2021 the HDC commenced an investigation into Dr Shelton's conduct under the HDC Act. That Act is focused on public health and safety and the implementation of the Code of Health and Disability Services Consumers' Rights. Under s 40 the Commissioner may investigate any action of a healthcare provider if "the action is, or appears to the Commissioner to be, in breach of the code."

[41] When the HDC exercised her power to investigate Dr Shelton on 25 August 2021, that engaged s 42 of the HDC Act. This precludes the Council from taking any disciplinary action on the "subject matter" of the HDC investigation until completion of that process. There is a mirror provision in s 70 of the Health Practitioners Competence Assurance Act 2003. These provisions do not preclude interim suspension, but they do prevent concurrent investigations on the same subject matter.

[42] The HDC notified the Council of its investigation in a formal letter dated 8 September 2021 which attached copies of the complaints made by a number of Dr Shelton's patients including in consultations and through the sending of the text message on 19 August 2021. The HDC annexed a letter she had sent to Dr Shelton dated 8 September 2021 setting out the scope of her investigation. That focuses on the appropriateness of services provided by Dr Shelton to eleven named patients in 2021, along with a broader group comprised of the patients of the Plimmerton Medical Centre.

[43] In addition to the 19 August 2021 referral, the HDC referred other complaints to the Council on 28 July and 24 September 2021. These were complaints that fell outside the HDC's mandate because they were not from consumers about the medical care they received. The HDC referred them to the Council under s 59(4) of the HDC Act on public interest/health and safety grounds:

> "(4) …. the Commissioner may, at any time, if the Commissioner considers that it is necessary or desirable in the public interest (whether for reasons of public health or public safety or for any other reason) that any matter be brought to the attention of any person or authority, refer the matter to the appropriate person or authority."

[44] On 24 September 2021 the HDC wrote to two of the complainants whose complaints fell outside the HDC mandate advising them:

> "Please be assured that our office takes this matter very seriously. While individuals have a right to their own opinions, it is the Commissioner's view that there is no place for inadequate or non evidence-based information in professional health practice. We recognise that Dr Shelton has an obligation to provide his patients with full and accurate information and that his actions in sending such messages to his patients presents a risk of increasing vaccine hesitancy."

[45] Some patients and supporters wrote to the Council in favour of Dr Shelton. For example, one wrote:

> "… stay away from interfering in the Dr Matt Sheldon (sic) issue. Dr Matt is delivering professionally correct advice to those patients he has safety concerns for. You clearly have **no** safety concerns for the young, those who are pregnant, those who wish to become pregnant, the aged, those with compromised immunity and others in the risk group. I expect zero response from you and your Council, and you are towing the lieabour/green line. What corrupt part you are playing in this corrupt agenda, of endorsing the "so called" vaccine – which is not a vaccine!!! New Zealand in decay. God Bless Dr Matt Sheldon (sic)".

[46] After the decision to suspend Dr Shelton's practising certificate with effect from 26 November 2021 he continued to advocate publicly against the Covid-19 vaccination programme, for example:

(a) Dr Shelton stood on the forecourt of Parliament on 28 January 2022 in a videotaped discussion with Sue Grey, the co-leader of the New Zealand Outdoors and Freedom Party. The video is published on the internet and a transcript was provided to the court. In it, Dr Shelton advances the possibility that the Pfizer Covid-19 vaccine in New Zealand may be contaminated with "machinery or circuitry, routers, chips, that type of thing".

(b) In a video posted to YouTube on 11 December 2021, Dr Shelton said he suspected the vaccine may be "linked to the deaths of over 250 New Zealanders," that there is no justification for masking, lockups and social distancing, and that there is "growing evidence on the ground and from peer-reviewed science that these vaccines do not prevent

infection, nor transmission, and do not make any difference in the number of Covid-19 cases".

(c) On 18 February 2022 Dr Shelton addressed the protestors occupying the grounds of Parliament and said, among other things:

(i) "We are demanding an immediate end to the injection rollout … Because the shots do contain microscopic self-assembling electronic components … to our eyes this is indisputable and around the world people are waking up to this."

(ii) There is emerging evidence that all major vaccine brands tested contained "nanotechnology gadgets largely made of graphene, a known poison to humans".

(iii) "This must be one of the biggest crimes in history".

(iv) "…. The true threat to the public hasn't been neutralised".

(v) "Wake up! There are things to be scared of."

[47] As a result of the public statements of Dr Shelton, both before and after the interim suspension imposed in relation to the HDC investigation, the Council has, as I have noted, commenced a process which may result in a second investigation, separate from the HDC investigation, into Dr Shelton's conduct by a PCC under the Act. If that eventuates, the Council will potentially have a further opportunity to impose interim measures under s 69(2) pending completion of that investigation.

[48] As I have noted, Dr Shelton disputes many of these allegations and it is not for me in this judgment to determine whether the allegations are true or not. That is for the HDC to consider. However, without providing in detail Dr Shelton's response to the particular allegations, it is important to record in overview his personal views on Covid-19 and the vaccine. He provided a personal statement to the Council on 10 September 2021 but for convenience I set out here the summary he provided in his

affidavit of 1 December 2021 in support of his application for stay of the interim suspension decision.[18]

[49] Dr Shelton said:[19]

> "Over the course of my 36 years in practise (sic), I have worked through other viral infections with similar mortality rates to Covid-19, including the influenza pandemics. Additionally, I also worked for two and half years in Anaesthetics and the ICU in the heart of the South Yorkshire coal field. I am very familiar with respiratory failure from industrial lung disease, ARDS and pneumonias.
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> I do not believe that Covid-19 is a joke or a trivial illness. While some people will only experience very mild symptoms, of course, many have also died from it. I do, however, have concerns around the various "unknowns" of Covid-19 vaccine, though I am not "anti-vax". At present, this term is being used to undermine people who are willing to question the government's public health response to Covid-19. My vaccination rates whilst a GP at Plimmerton Medical Centre were similar to my other partners in most financial quarters.
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> I have always strongly believed in a patient's right to choose for themselves, and to give or withhold consent for vaccination, a decision that must be supported either way. Whilst a GP trainee back in the 1980s in the UK, when we ourselves administered vaccinations in baby clinics, my supervisor taught me that the proper respectful consideration of patients' and parents' wishes would set the tone for a fruitful and positive relationship into the future. This truth has been reconfirmed over the years.
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> On 28 April 2021 the Council published a statement titled Covid-19 vaccine and your professional responsibility. I was very concerned when I read this. The reasons for my concern were twofold:
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> (a) First, the statement recorded the Council's "expectation" that all practitioners would take up the opportunity to be vaccinated; and
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> (b) Secondly, it recorded the Council's view that there was "no place" for medical practitioners to share any anti-vaccination messages.
>
> Of course the landscape has changed considerably since the Council issued its statement. Vaccination is now compulsory for medical practitioners who have face-to-face contact with patients due to the government's assessment of the risk that unvaccinated medical practitioners may pose to patients. However, I remain concerned the Council adopted the position that it did. Medical treatment should always be a choice and I do not think it was the Council's place as a regulator to impose the "expectation" that it did.

[18] That application was later withdrawn in return for an early hearing of the appeal.
[19] Taken from paragraphs 13-19 of his affidavit of 1 December 2021.

There must, in my view, be room to ask questions about the Covid-19 vaccine. To silence medical practitioners for disagreeing with the government's view in respect of the Covid-19 vaccine is deeply concerning. A key issue that has been tested has been my obligation and right as a medical practitioner to advise my patients of the suitability and risk-benefit ratio of a new treatment, as best I can discern it. That is what is required for informed consent.

This last year has created an intense internal struggle between my conscience, my profession and the government, one that I have shared with trusted colleagues from across the "divide". In the end, the consensus advice I have received is to do what I feel is right for my patients and me, accepting that the predominant view is that laid out by our government and endorsed by our professional bodies. It was for this reason that after I heard the government's announcement that children aged 12 to 15 years of age were to be included in the Covid-19 vaccine programme, on 19 August 2021 I hastily sent a text message to my patients to make sure they knew that I did not share the government's view regarding the vaccine. I have since provided a formal undertaking to the Council that I will not volunteer my views about the vaccine to patients again unless asked.

I did not want my patients' decision about whether to get the vaccine to be rushed, coerced or inadequate. Making sure that my patients were in a position to make an informed decision regarding the vaccine was my priority, whilst accepting some risks of comeback. Given the number of complaints that the Council and the HDC have each received about my text message, I do regret not reflecting for longer on how I might have communicated my concerns in a more private and nuanced way. In hindsight I appreciate this was distressing for some of my patients to receive. It is also unfortunate that I made a technical error when I tried to identify my patients in Plimmerton Medical Centre patient base, as my text message was also inadvertently sent to former or casual patients who were not enrolled with me. That was not my intention.

As I have stated, it is my views regarding the Covid-19 vaccine that have resulted in the Council's suspending my practising certificate. In the course of my communications with the Council, they offered me what eventually proved to be an ultimatum. The Council invited me to agree to an undertaking to completely refrain from sharing my opinions about the Covid-19 vaccine. After I declined to do so, my practising certificate was suspended. My attempts to reach a "middle ground" with the Council in respect of my ability to share my opinions proved to be futile.

I do not believe my ability to work as a medical practitioner should be completely taken away from me because of my honestly held opinions about a novel medical treatment. I have had to choose between my profession and my right to share my opinion, something I believe is deeply troubling."

[50] Returning to the procedural history, on 26 August 2021 the Council decided to propose to suspend Dr Shelton's practising certificate under s 69 of the Act and to issue a risk of harm notice under s 35 of the Act to the Accident Compensation Corporation, the Director General of Health, the HDC and Dr Shelton's employer.[20]

[51] On 8 September 2021 Dr Shelton received a letter from the HDC advising of its decision to initiate a formal investigation. The scope of its investigation was identified as:

(a) The appropriateness of the services that Dr Shelton had provided to a number of patients who had complained about the text message that he sent on 19 August 2021 and/or information he had provided regarding the Covid-19 vaccine; and

(b) The appropriateness of services Dr Shelton had provided to patients at Plimmerton Medical Centre in 2021 with regard to the provision of information about vaccination against Covid-19.

[52] On 10 September 2021, through his solicitors, Dr Shelton provided a detailed personal statement and submissions were made opposing the proposed decision to suspend his practising certificate.

[53] On 21 September 2021 the Council wrote to Dr Shelton's solicitors and confirmed that at its meeting on 16 September 2021 it had resolved *not* to suspend his practising certificate pursuant to s 69(2)(a) of the Act. The Council's reason was that having considered Dr Shelton's response and that he was not currently working, in the circumstances the potential risk of harm to the public could be appropriately managed by the terms of a comprehensive Voluntary Undertaking (VU) which Dr Shelton agreed to. The Council accordingly also decided to request that Dr Shelton enter into such a VU.

[54] The Council added that if Dr Shelton agreed to sign the VU attached to its letter it would arrange for revocation of the s 35 notice of risk of harm.

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20 There is no ability to appeal against the Council's decision to issue that notice.

[55] The draft VU attached to the Council's letter provided:

"I, **Dr Matthew Shelton,** registered medical practitioner, agree to accept, and undertake to comply with the following conditions:

Patients

a. Where during a consultation a patient seeks my view on COVID-19 or vaccination against COVID-19:

   i. I may inform the patient of the nature of my view on COVID-19 including treatment and vaccination. If I do so, I must also inform them of the extent to which it varies from conventional theories of medicine including the Government's position and the Council's position and guidance statement on COVID-19.

   ii. I must also provide the patient with the details of another doctor, nearby, who can provide them with further (conventional) advice on COVID-19 and COVID-19 vaccination.

b. I will advise any patient presenting with possible COVID-19 symptoms to be tested for COVID-19 and will provide testing services where required.

c. I will not access or use patient information, including contact details, for any other purpose than to provide information about their personal, specific ongoing medical treatment or care.

d. I will not circulate any messages to my patients that are contrary to the Council's joint guidance statement on COVID-19 via any medium whatsoever.

Employment

e. I will inform Council of any places of work, including locum or temporary work.

f. I will inform, and provide Council written evidence of having informed, all employers, places of employment, or places where I practise medicine, of this Voluntary Undertaking.

Media

g. I will refrain from communicating or making any statements in the media about COVID-19 vaccinations, or the New Zealand Government's response to the pandemic.

h. I understand that the media includes any social media, news, or video streaming platforms.

I understand that the Council will take any necessary steps to monitor my compliance with this Voluntary Undertaking, including contacting employer(s) or places of work.

> I will remain bound by the VU until Council releases me. I understand that Council may reconsider this VU at its discretion and will review it at the conclusion of the investigation by the Health and Disability Commissioner."

[56] Dr Shelton says he had no difficulty in agreeing with the terms of the VU so far as they related to his interaction with patients. However, he objected to the proposal that he completely refrain from communicating or making statements about Covid-19 or the vaccine in any public way. To Dr Shelton it seemed contradictory that he was permitted to discuss his views with his patients, albeit in accordance with the VU, but was absolutely precluded from doing so outside of that setting. He was concerned that the Council was permitting him to express his Covid vaccine views in a clinical context but preventing him saying anything on the topic outside of that setting.

[57] In his response to the Council on 27 September 2021 Dr Shelton proposed an amended VU removing the Media terms and adding a condition allowing him to withdraw the VU on 14 days' written notice to the Council. Dr Shelton indeed signed that VU and it was forwarded to the Council with his solicitors' letter.

[58] There were then discussions between Dr Shelton's solicitors and Ms Megan Neill, Deputy Registrar of the Council. As a result, Ms Neill said that she would put to the Council Dr Shelton's proposal to remove the Media terms from the VU and would provide it with his amended and signed VU. She said she was not in the position to say whether the Council's concerns could be alleviated by a VU which did not include media restrictions.

[59] Ms Neill also drafted a third form of VU which bolstered the provisions relating to patient interaction.

[60] Dr Shelton's solicitors responded to Ms Neill on 8 October 2021 confirming that he had agreed to sign the third VU.

[61] Ultimately, following a meeting on 20 October 2021 the Council wrote to Dr Shelton's solicitors advising that it now proposed to interim suspend Dr Shelton's practising certificate, essentially because it had no assurance that he would cease

expressing unbalanced views about Covid-19 or the Covid-19 vaccine, that the amended VU provided (it is unclear whether the second or third VU was being referred to) did not sufficiently mitigate the risk of his undermining New Zealand's public health response and that no practical combination of conditions could sufficiently mitigate its concerns about Dr Shelton's practice. Accordingly suspension was necessary.

[62] Dr Shelton was invited to make submissions and did so by letter of 8 November 2021. Accompanying that letter was a fourth version of the VU which from Dr Shelton's perspective was an attempt to reach some kind of middle ground with Council regarding his ability to share his views, but at the same time continue to practise. The fourth VU included the provision:

> "If I comment on or share information online or via social media on Covid-19 or vaccination that is contrary to Ministry of Health guidance, I will advise that the information differs from the views held by the majority of my New Zealand medical peers; and is contrary to Ministry of Health guidance."

[63] In formulating this provision Dr Shelton and his solicitors drew on the HDC's guidance in respect of the measles vaccine.

[64] Notwithstanding Dr Shelton's proposal and the comprehensive legal submissions made by his solicitors, the Council decided at its meeting on 10 November 2021 to interim suspend Dr Shelton's practising certificate. Although detailed reasons were given, which it is not necessary to record in full here, there was no express reference to why the fourth version of the VU would not have sufficed, nor was there any attempt to further negotiate about the terms of a VU. However, the Council did say that it had considered whether including conditions in Dr Shelton's scope of practice would suffice to address its concerns but had concluded "no practical combination of conditions can sufficiently address its concerns".

[65] In summary then, prior to reaching its suspension decision the Council expressly decided *not* to suspend Dr Shelton's practising certificate because it considered that a suitably-worded VU would address its concerns. It appears that the only reason that view changed was that the media terms became a sticking point and that Dr Shelton's attempt to reach the middle ground was not sufficient. However, had

he been willing to sign the original VU provided by the Council there is no reason to think that the Council would have ultimately seen it is necessary to suspend his practising certificate. It appears to me there was no further information received by the Council which might have changed its view towards suspension and away from the VU between mid-September and mid-November 2021.

[66] Indeed the Council, among its reasons for deciding to interim suspend Dr Shelton's practising certificate, did note:

> "Council considers that the health and safety of the public could have been mitigated by the terms of the Voluntary Undertaking (VU) requested of Dr Shelton, but notes that Dr Shelton has declined to agree to it in full. ... Council **does not consider the amendments proposed by Dr Shelton to the VU Council had requested sufficiently mitigate the risk that Dr Shelton's public comments would undermine New Zealand public health response to the Covid-19 pandemic** …. In the absence of the measures to protect the health and safety of the public that Council believed could be contained in the VU it requested, and Dr Shelton's ongoing sharing of selective and potentially harmful information about the Covid-19 public health response, Council considers the suspension of Dr Shelton's PC to be appropriate and necessary, and the only way by which it can be completely assured that the public's health and safety is protected." (emphasis added)

[67] I conclude that the Council would not have interim suspended Dr Shelton's practising certificate had he signed the VU the Council had proposed. I also conclude that had Dr Shelton made no public statements on the Covid vaccine issues the council would not have included in its proposed VU the Media conditions.

To what extent are Dr Shelton's public statements relevant to the Council's interim suspension decision?

[68] I consider this question is critical to the determination of this appeal. Although, as I have noted, there is now the possibility of an investigation being undertaken by a PCC into Dr Shelton's public statements which are not, and are not able to be, considered by the HDC investigation, there is currently no such investigation. The HDC investigation is the only current investigation. It is therefore currently the only basis on which the Council can rest its interim suspension decision.

[69] Mr Mount submitted, and I accept, that there is an important distinction between the language used in s 69 of the Act and that used in s 70. The latter prohibits the Council from launching a concurrent investigation into conduct that is "the subject of" an HDC investigation but s 69 empowers the Council to take into account conduct that is "relevant to" an HDC investigation.

[70] Because the subject matter of the HDC investigation relates to services provided to Dr Shelton's patients at Plimmerton Medical Centre, the Council is prohibited from launching a concurrent investigation into that conduct. However the HDC is not investigating - and is not empowered to investigate - Dr Shelton's public statements, media appearances and social media posts because they do not involve services being provided to patients. That is why these may ultimately become the subject of a separate investigation initiated by the Council. The HDC has said[21] it considers that Dr Shelton's social media posts and other information he has posted online are relevant to its investigation.

[71] Mr Mount submitted, and again I accept, that the public statements Dr Shelton has made both before and since the interim suspension are *relevant to* the HDC investigation. It follows that I accept, in considering the discretion to interim suspend Dr Shelton, that the Council was entitled to consider both information relating to patient consultations and his public statements.

[72] However, I accept that submission only up to a point. In my view the public statements may be taken into account in considering whether or not to interim suspend *only to the extent that those statements inform the risk to patients at the Plimmerton Medical Centre*, or somewhere else where Dr Shelton may be giving advice to his patients. I do not accept that, once it finds that the s 69(1)(a) and (b) thresholds are established in relation to the HDC investigation, the Council is able to use that as a form of "springboard" to address its wider concerns about Dr Shelton's public statements and in that way to found and justify a suspension, unless it is otherwise justified based on patient -related risks.

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[21] In its email to the Council on 21 January 2022.

[73] If the Council has wider concerns arising from Dr Shelton's public statements, as it is very clear it does, the Council has the ability to launch its own investigation into these, and this may indeed occur shortly, if it has not already since the appeal hearing. But if, prior to the existence of any such investigation, the Council were to decide to interim suspend Dr Shelton's practising certificate, it would be taking action, pre-emptively, to mitigate or address a risk that has not even reached the stage of warranting its own investigation and assessment through a PCC.

[74] Section 69 is predicated on the existence of a criminal proceeding pending against the practitioner or an investigation about the practitioner under either the Act or the HDC Act. The Council is not able to suspend a practitioner's practising certificate or include conditions in the practitioners' scope of practice unless that precondition is met.

[75] Accordingly, the true only relevance of Dr Shelton's public statements is to the extent that they may inform the risks associated with his advice to patients. Such statements may well give rise to greater concern than is apparent from the existing patient complaints themselves, in relation to his likely future advice to patients. However, what in my judgment the Council may not do is to rely on Dr Shelton's public statements as a separate justification, unrelated to the HDC investigation into patient-related concerns, for its interim suspension decision.

[76] For these reasons I accept Mr McClelland's submission that it is the scope of the HDC investigation which gives the Council jurisdiction to suspend under s 69(2)(a).[22] While I do not accept Mr McClelland's further submission that Dr Shelton's public statements are irrelevant, they are only relevant to the extent I have described. To put this another way, the Council is not able to consider any potential risk Dr Shelton poses to the wider public when determining the appropriate steps under s 69(2). It is only risks to Dr Shelton's patients that can lawfully be addressed by s 69(2) measures, pending determination of the HDC investigation.

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[22] At paragraph 67 of his written submissions dated 11 February 2022.

Was the Council correct to conclude that interim suspension of Dr Shelton's practising certificate was a fair, reasonable and proportionate response to the identified risk to his patients?

[77] Because I have reached the clear view that the answer to this question is no, I do not propose to discuss in detail whether the Council was correct to conclude that the s 69(1)(b) threshold was met i.e. that Dr Shelton's conduct, in the opinion of the Council held on reasonable grounds, cast a doubt on the appropriateness of Dr Shelton's conduct in his professional capacity.

[78] I proceed on the basis that that threshold was established because I accept the Council, with its expertise, was justified in concluding that in providing patient advice that contradicted its guidance and that of the vast majority of experts and the medical profession in New Zealand, there was doubt cast on Dr Shelton's conduct in his professional, patient-related, capacity. The threshold to consider interim measures under s 69(2) was therefore met, both in the Council's view and my own. I do not discuss it further because, even though that is a conclusion adverse to Dr Shelton which he has disputed, I am satisfied that the appeal must be allowed and the suspension overturned, for the reasons I will now discuss.

[79] Logically, any interim measure taken under s 69 must be rationally connected[23] to the risk of harm to Dr Shelton's patients which had led to the HDC investigating the matter. It must be a justifiable response purporting to address that particular risk. On that basis, the Council's attempt to include in the VU a restraint on his public speaking was unjustified and beyond the proper purview of its considerations. The Council appears itself clearly to have formed the view that, in relation to patient interactions, interim suspension was *not* necessary and that a suitably worded VU would meet its concerns. Had it taken a proper view of the extent of its legitimate considerations it would not have sought to include the media restrictions in its draft VU and, at the very least, it ought to have accepted the fourth "middle ground" version of the VU put forward by Dr Shelton.

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[23] See *R v Hansen* [2007] 3 NZLR 1.

[80] In short, I find the Council was not entitled, whether as a reason for interim suspension, or as a condition included in Dr Shelton's scope of practice or as a condition of a VU, a provision restraining public statements. That is because the investigation which led to the Council having the power to do anything was limited to patient interactions.

[81] By contrast with the level of respect I have accorded to the Council's assessment of risk to public health in reaching its decision that the s 69(1)(b) threshold was met, the question of whether the suspension decision was rationally connected to the HDC investigation which gave rise to the discretion to consider it is very much a matter for my assessment as a judge.

Conclusion

[82] I am satisfied that the Council's decision to interim suspend Dr Shelton's practising certificate was not a fair, reasonable and proportionate response to the risk to his patients which had been identified (itself much reduced because he was not at the time of the Council decision still practising). The Council was entitled to be concerned about the matters raised within the HDC investigation and to conclude that it had the power to consider suspension or the imposition of conditions but its first consideration ought to have been, as indeed it was, the completion of a VU addressing the patient-related risks.

[83] I do not find it necessary, in view of that conclusion, to discuss any of the other (extensive) evidence and submissions made. I am satisfied the appeal must be allowed and the interim suspension decision reversed.

[84] As to the appropriate order and/or directions, I seek brief submissions from counsel on the way forward. The options would seem to be either reversing the Council's interim suspension decision under s 109(3)(a) or, under s 111, directing the Council to reconsider its decision in light of this judgment and in particular suggesting that it consider again the possibility of a suitably-worded VU. Of course it is not for me to suggest, let alone dictate, the terms of any such VU.

[85] I suggest that Mr Mount and Mr McClelland confer as to the way forward and if possible file a joint memorandum within seven days of the date of this judgment suggesting the appropriate orders and directions or, if they cannot agree, separate brief memoranda within that time.

[84] In the interim, I reserve final determination of the appeal and the question of costs, which is also a matter which ought to be discussed between counsel.

[85] I thank counsel for the quality of their comprehensive written and oral submissions and the preparation of the supporting bundles of documents. I have ultimately not found it necessary to engage in this judgment with all of the evidence and the submissions made, but I have considered everything and appreciated the way the case was advanced on both sides.

S M Harrop
District Court Judge