COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE

NOTE OF CASE MEETING ON 10 OCTOBER 2005

AT 11 STRAND, LONDON, WC2

Re: Mr David James Doherty

PRESENT: Jane Wesson (Chair)

Sally Williams

Sheelagh Hillan

IN ATTENDANCE: Mike Andrews

Sandy Forest

Briony Mills (Fitness to Practise Officer)

Christine O'Neill (Legal Advisor, present for next case)

Len Murray, Baker & McKenzie, (Legal Advisor)

Cecilia Fletcher, Baker & McKenzie

In this note, the following abbreviations will apply:

Case meeting of council members	The meeting
Professional Conduct Committee	PCC
General Dental Council	GDC
Mr David James Doherty	Mr Doherty
NHS Reform and Healthcare Professions Act 2002	The Act
Serious Professional Misconduct	SPM
Truscott/Ruscillo case	The Court of Appeal decision in CRHP v (1) GMC and (2) Dr Ruscillo and CRHP v (1) NMC and (2) Steven Truscott
Solanke case	The High Court decision in CRHP v (1) GMC and (2) Dr Solanke

The PCC's decision

The meeting considered whether the decision of the PCC of the GDC on 16 September 2005, finding Mr Doherty guilty of SPM and postponing judgment for nine months, should be referred to the High Court under section 29 of the Act.

Documents

The following documents were before the meeting:

(a) Transcript of the hearing dated 16 September 2005;

(b) Exhibits before the PCC hearing;

(c) Determination of the PCC dated 16 September 2005.

(d) Lawyers' report prepared by Baker & McKenzie dated 6 October 2005.

(e) Section 29 manual.

(f) Section 29 guidance note.

Conflicts of Interest

The Chair informed the meeting that the members convened had no apparent conflicts of interest and no conflicts of interest were registered.

Matters noted by the Meeting

The meeting noted the matters set out below:

Background to the PCC's findings

1. Mr Doherty appeared before the PCC of the GDC on 16 September 2005 in relation to an allegation of SPM, relating to an application ("the Application") made in august 2003 for inclusion in the General Dental Services supplementary list at Doncaster West PCT ("the List").

2. In December 1987, Mr Doherty was convicted of various criminal offences and was sentenced to 9 months' imprisonment. The offences related to obtaining funds from the NHS for dental work which he maintained had been carried out on various patients who were non-existent and fictitious. The fraud convictions also concerned dental work where the forms submitted by him indicated that the patients were exempt from statutory charges, whereas he had already made charges to the various patients in question.

3. Mr Doherty was also convicted for fraud because of dental work that was claimed for but not in fact done. Mr Doherty was also convicted for obtaining services by deception, relating to a loan he obtained from a credit facility company for the purchase of a car, using a false driving licence. Mr Doherty was also convicted for taking a conveyance without authority, in effect, failing to return a car which he had kept for some period after the hire agreement had expired.

4. On 10 June 1998, his name was erased from the Dentists' Register following an inquiry by the PCC on 12 May 1988 arising from the above convictions. On 14 November 1990, his name was restored to the Dentists' Register. Mr Doherty had practised as an assistant and a principal since being restored to the register. Due to

a car accident, he had not worked for more than two years before he made his application to be included on the List.

5. In or about August 2003, Mr Doherty submitted the Application dated 4 August 2003 for inclusion on the List. Inclusion on the List permits a dentist to practise as an assistant dental practitioner or as a locum dentist, and can lead to inclusion on the main list, allowing a dentist to practise as a principal or associate dental practitioner. He subsequently amended the Application and submitted it again on or about 17 September 2003. In that Application, Mr Doherty signed declarations that:

- he had no criminal convictions in the United Kingdom;
- he had never been the subject of an investigation into his professional conduct by any licensing, regulatory or other body, where the outcome was adverse; and
- he had been an associate general dental practitioner in Doncaster and Nottingham from June 1986 to August 1992.

6. The heads of charge against Mr Doherty were, in summary, that the declarations he provided were incorrect, misleading and were intended to be misleading.

The PCC's findings

7. The PCC found that the declarations Mr Doherty had provided were incorrect, misleading and that he had intended to mislead. As a result, the PCC found him guilty of SPM.

Jurisdiction over postponed judgment

8. The Meeting considered firstly whether it had jurisdiction under section 29(4) of the Act to consider the case and whether it could be referred to the High Court. The Meeting noted that this was a new issue in that CHRE's jurisdiction over postponed judgments has not been tested before the Court. The Meeting took account of the decision in the *Truscott/Ruscillo* case, where although the Court considered that an acquittal was not a direction of the General Medical Council, a purposive approach was taken and the Court ruled that CHRE had jurisdiction. The meeting considered that it had jurisdiction to at least consider the case.

Public protection

9. The Meeting noted that the PCC had found Mr Doherty guilty of SPM but had considered in deciding on sanction, that to order erasure or suspension would be disproportionately severe; conversely, it considered admonition would be unduly lenient. In assessing the way in which the PCC had reached its decision to postpone judgment, the Meeting had serious concerns as to whether the PCC had adequately addressed public protection. In particular the Meeting noted the matters set out below.

Mr Doherty did not attend the PCC hearing

10. The meeting considered that Mr Doherty's absence from the PCC hearing may have been a significant factor in the PCC's decision to postpone judgment. The meeting considered that as the PCC was unable to hear direct evidence from Mr Doherty, consequently it was not able to assess the veracity of Mr Doherty's reasons for his actions. The conclusions that the PCC could draw as to Mr Doherty's credibility and

general attitude to his actions could not be assessed as it could in cases where the registrant attends. This was a key factor as the PCC needed to consider whether or not Mr Doherty had an intention to mislead, such intention which the meeting considered might have been better assessed had Mr Doherty attended the hearing. Although the PCC concluded this was Mr Doherty's intention, it appeared not to have adequately addressed the implications. The meeting was concerned that the PCC may have given Mr Doherty the benefit of the doubt on some issues because it could not question him and that this had lead to a lenient sanction. The meeting considered that the benefit conferred on Mr Doherty was seen from the fact that in its decision, the PCC urged Mr Doherty to attend the resumed hearing.

The meeting considered Mr Justice Leveson's comments in the *Solanke* case, that even though a practitioner cannot be compelled to give evidence, if they are keen to acknowledge fault and show the behaviour will not be repeated, he would expect the practitioner to be prepared to give evidence and be questioned by the regulator and the panel.

11. The meeting was also concerned that the PCC did not give a more in-depth consideration to the facts as best it could considering it could have questioned counsel and the witness, Mr Baxter.

Risk to public protection

12. The PCC's requirement that Mr Doherty should show he had carried out CPD during the period of postponement seemed to be no more than he should do anyway and did not deal at all with his dishonest behaviour. The meeting considered that what should have been addressed was whether restrictions and requirements should be placed on Mr Doherty in his day to day practice.

13. On the basis of the evidence before the meeting, it considered that the PCC had not adequately considered the risk to public protection from dishonest behaviour, particularly where this impacts on the reputation and integrity of the dental profession and the regulator's disciplinary proceedings. The meeting was concerned that the PCC should have taken more account of the risk to public protection and the reputation of the profession.

14. The meeting further considered this could have a negative impact at PCT level, if the GDC was viewed as not having taken a particularly strong line on dishonesty offences.

The PCC's reasons for its decision

15. The meeting considered that the PCC's decision had been poorly reasoned, or at the very least its reasoning had been poorly expressed.

Sanction

16. The meeting considered the PCC's decision to postpone judgment was not the appropriate sanction to impose in this case, given the nature of the offence and the public protection concerns it raised. The PCC decided not to impose erasure or suspension on the basis that either would be disproportionate because they would involve punishing Mr Doherty twice for the same offences. The meeting considered this analysis was wrong because the offence before the PCC was lying on his application form and this was not the offence for which he was previously erased, nor was it the matter considered by the Criminal Court. The meeting considered that given its remit relating specifically to public protection, it was of particular significance

that any sanction should adequately address any public protection concerns in issue, which may not necessarily be of primary concern in criminal proceedings in the first instance.

17. As a general approach, a postponed judgment cannot be an effective sanction unless the Registrant has given binding undertakings which protect the public. In the absence of appropriate binding undertakings almost inevitably the decision will raise public protection issues.

Conclusion

18. The meeting considered that this case raised public protection issues and, although recognising the jurisdiction issue is undecided, there might be reasons to refer the case. However, given that at this stage this was the first postponement of the PCC's decision, the meeting considered that it would be appropriate to use CHRE's powers to raise these matters with the GDC. The meeting authorised CHRE officers to do this in strong and clear terms.

19. The meeting therefore decided not to exercise CHRE's section 29 power to refer the case to the Court.

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JANE WESSON (Chair) **DATE**