IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: 2016 6007

DETERMINATION FOLLOWING APPLICATION TO SET ASIDE FINDING

Form 44 Rule 65(2)

*Sections 77(2) and 77(3) of the **Coroners Act 2008***

1. This is a determination following receipt of a joint application from Associate Professor George Matalanis[1] and Dr Rosanna Hage-Ali[2] (**the Application**) brought pursuant to section 77(1) of the *Coroners Act 2008* (**the Act**) to re-open the investigation and/or set aside findings made by Coroner Simon McGregor on 27 March 2020 following his investigation into the death of Ian Dunlop (**the Coroner's Findings**).

2. Mr Dunlop died at Donvale Rehabilitation Hospital on 19 December 2016. He underwent an aortic valve replacement at Warrigal Private Hospital on 5 December 2016. The surgery was performed by Associate Professor Matalanis. Dr Hage-Ali was engaged to assist in Mr Dunlop's post-operative care whilst at the Warrigal Private Hospital. Mr Dunlop's cause of death was determined to be, pericarditis post aortic valve surgery.

[1] Represented by Avant Law.
[2] Represented by Kennedys.

3. At the outset, I express my sincere condolences to Mr Dunlop's family for their loss.

Section 77 of the Act

4. Section 77 of the Act allows a person to apply to the Court for an order that some or all of the findings of a coroner after an investigation should be set aside. The section reads:

> ***77 Re-opening an investigation or setting aside a finding***
>
> *(1) A person may apply to the Coroners Court for an order that some or all of the findings of a coroner after an investigation (whether or not an inquest has been held) should be set aside.*
>
> *(2) The Coroners Court, if satisfied that there are new facts and circumstances that make it appropriate to do so, may order that—*
>
> > *(a) some or all of the findings be set aside without re-opening the investigation; or*
> >
> > *(b) some or all of the findings be set aside and the investigation be re-opened.*

5. I also note that section 8 outlines factors to consider when exercising a function under the Act (as far as possible in the circumstances). In particular, section 8(b) states that,

> *unnecessarily lengthy or protracted coronial investigations may exacerbate the distress of family, friends and others affected by the death.*

6. Section 9 also relevantly states that,

> *The coronial system should operate in a fair and efficient manner.*

The Application

7. The Application is only concerned with the Coroner's Findings as they relate to any conclusions relevant to the Applicants.

8. In particular, the Application is concerned with the Coroner's Findings which suggests that the Applicants failed to properly investigate and/or inform Donvale Rehabilitation Hospital about the possibility of Mr Dunlop having pericarditis, and in the absence of such a failure, that Mr Dunlop's death was preventable. This finding is clearly adverse to the interests of the Applicants. I note that the Applicants were interested parties to the investigation.

9. It is the Applicants' case that in making these findings, Coroner McGregor relied on the evidence of the Court's expert, Dr David Eddey, an emergency physician in preference to that of the Applicants and, an independent expert, Associate Professor Richard Chard, who was a cardiothoracic surgeon engaged by the Applicants. I note that Associate Professor Matalanis is also a cardiothoracic surgeon and Dr Hage-Ali is a cardiologist.

10. It was further put that Dr David Eddey's opinion depended on a factual assumption that Mr Dunlop's C-reactive protein (**CRP**) levels were rising on days three and four post-surgery and were therefore abnormal.

11. After the investigation was finalised, the Applicants lodged an appeal to the Supreme Court of Victoria on 24 September 2020 in relation to the Coroner's Findings. The Appeal asserted, amongst other matters, that there was no proper basis for the adverse findings against the Applicants, including that the Coroner erred in finding that Mr

Dunlop's CRP levels were rising on days three and four post-surgery and were therefore abnormal.

12. The Appeal is stayed pending the resolution of the Application.

13. On 14 October 2020, as part of the Appeal process, the Applicants received a copy of an email between Dr Eddey and Court staff dated 9 October 2020[3] where he appeared to acknowledge, following consideration of a submission made on behalf of Associate Professor Matalanis, that he may have made a factual error in relation to Mr Dunlop's CRP levels:

Nevertheless the point about day 2-3 vs 3-4 is potentially valid and I hope my interpretation doesn't cause a problem.

14. In a further email to Court staff dated 16 January 2020[4] (not referred to in the Application), I note Dr Eddey said with reference to his advice,

Which only really said that the very elevated CPR simply represented an opportunity to consider why this might be!

15. In addition, and as part of the Appeal process, the Applicants received communications between Coroner McGregor and Court staff concerning the listing of a directions hearing, which the Applicants say gave a reasonable apprehension of bias/procedural fairness in the conduct of the investigation.

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[3] Page 690.
[4] Page 704.

16. The Applicants contend that,

(a) There is new factual material that demonstrates that the factual basis for the expert opinion critical of the Applicants did not exist;

(b) That factual error, further, confirms that Dr Eddey was not an appropriately qualified expert for the investigation; and

(c) There is a concern about a reasonable apprehension of bias/procedural fairness in the conduct of the coronial investigation.

Assessment of the Application

17. The Court may set aside findings (with or without reopening an investigation) under section 77(2) of the Act if it is satisfied that there are new facts and circumstances that make it appropriate to do so.

18. With regard to the interpretation of section 77, the Applicants made reference to *Hecht v Coroners Court of Victoria*[5] where it was accepted that the expression *new facts and circumstances* has a *broad, common-sense definition* and that,

There is no warrant for importing a condition referable to either sustainability or a material alteration of a previous understanding of the facts. The question, rather, is that posed by the words of the statute – whether there are new facts and circumstances and, if so, do they justify a reopening of the investigation. It is no more and no less than those two basic propositions.

[5] [2016] VSC 635.

19. The Supreme Court in *Hecht* further noted the following from the Explanatory Memorandum for the *Coroners Bill 2008*:

The reference to new facts and circumstances encompasses facts and circumstances that are new to the investigation. These facts may have been known to people during the investigation, but they were not known to the coroner conducting the investigation.

20. I note that subsequent to *Hecht*, section 77 was amended. There is however no indication that Parliament intended to fundamentally change the test with respect to setting aside findings, as part of the amendment.

21. As noted above, the Application is based on three grounds.

22. The first ground is substantially based on the content of Dr Eddey's email referred to in paragraph 13. As already noted, the email suggests an acknowledgment by Dr Eddey that he may have made a factual error in relation to Mr Dunlop's CRP levels. Dr Eddey's email at paragraph 14 further suggests that central to his advice is *the very elevated CPR.*

23. It is apparent that Dr Eddey's uncertainty about a fundamental aspect of his advice, which came to light after the Coroner's Findings, is new to the investigation and was not known to the investigating Coroner. Further, this *new fact* appears to be central to the advice provided by Dr Eddey to the Coroner, and the subsequent adverse findings made against the Applicants.

24. On the basis of this analysis, I consider that *new facts and circumstances* have been raised as part of this application and there is justification to enliven section 77(2) of the Act.

25. Having made this determination, there is no apparent utility in considering the further grounds raised by the Applicant.

26. I am however mindful that the Application is only concerned with a discrete aspect of the Coroner's Finding, as it relates to the Applicants.

27. In those circumstances, I intend to set aside only those findings relevant to the Applicant, being those contained at paragraph 90(a) of the Coroner's Findings.

28. Accordingly, I make the following order:

Pursuant to section 77(2)(b) of the Act, I am satisfied that there are new facts and circumstances that make it appropriate to set aside the following findings and re-open the investigation only to the extent required to make findings relevant to those matters which have been set aside:

> *90. After careful consideration of the evidence before me, I am satisfied to the requisite standard that Mr Dunlop's death was preventable, in that:*
>
> *(a) Assoc. Prof. Matalanis and or Dr Hage-Ali failed to properly investigate and or inform Donvale about the possibility of Mr Dunlop having pericarditis.*[6]

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[6] For clarity: The following findings are not set aside:

90. After careful consideration of the evidence before me, I am satisfied to the requisite standard that Mr Dunlop's death was preventable, in that:

……

(b) the nursing staff at Donvale failed to follow proper procedure to escalate care, despite further objective evidence of deterioration.

Signature:

SARAH GEBERT
CORONER

Date**: 17/09/2021**

NOTE: *Under section 84 of the **Coroners Act 2008**, if the Coroners Court refuses to re-open an investigation, a person who requested the Coroners Court to set aside some or all of the findings of the coroner may appeal against the Court's determination to the Supreme Court within 3 months after the refusal by the Coroners Court.*