Neutral Citation Number: [2019] EWHC 1561 (Admin)

Case No: CO/3786/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MANCHESTER CIVIL JUSTICE CENTRE

Date: 24/06/2019
Judgment handed down at:
Royal Courts of Justice
Strand, London WC2A 2LL

Before :

MR JUSTICE KERR

- -

Between :

ALLISON BEARD **Appellant**

- and -

GENERAL OSTEOPATHIC COUNCIL **Respondent**

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- -

Mary O'Rourke QC (instructed by **BSG Solicitors LLP**) for the **Appellant**
Mark Shaw QC (instructed by **General Osteopathic Council**) for the **Respondent**
Hearing dates:10th-11th April 2019

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Approved Judgment

The Honourable Mr Justice Kerr:

Introduction

1. The appellant, Ms Beard, appeals against the decision taken by the respondent's Professional Conduct Committee (the committee) on 29 August 2018, to impose conditions of practice on Ms Beard's registration as an osteopath for a period of 12 months. The respondent (the Council) is responsible for discipline and upholding standards of conduct in the profession of osteopathy. The committee was appointed to hear and determine allegations of misconduct made against Ms Beard.

2. She appeals under section 31 of the Osteopaths Act 1993 (the Act). The appeal proceeds as a rehearing, but without oral evidence. I can dismiss or allow the appeal and if I allow it I can remit the case or substitute a different decision. But I can only allow the appeal if I find that the decision of the tribunal was wrong or unjust because of a serious procedural or other irregularity. The correct approach in law to an appeal such as this is so well known that I have sought to discourage unnecessary citation of authority.

3. Ms Beard's skeleton argument described the committee's decision as "wrong" but it is clear from the focus of the written and oral argument that the real complaint is one of injustice by reason of serious procedural irregularity, since the first and principal ground of appeal asserts apparent bias and unfairness arising from the conduct of the hearing and in particular from questions by Ms Neville, appointed as a lay member though she is a qualified solicitor.

4. The Council says the hearing was fair; the function of the committee was inquisitorial and its interventionist approach was justified; the fairness of the process must be measured looking at the proceedings as a whole. Ms Beard's solicitor representative did not complain at the time; nor did the experienced legal assessor intervene. The committee did not know until after the hearing about serious mental and physical health problems from which Ms Beard was suffering at the time.

Statutory Scheme

5. I confine my account to what is relevant for this case. The Act gives the Council the function of regulating the profession of osteopathy. Professional conduct and fitness to practise are dealt with at sections 19-28. Misconduct is widely defined in section 20. Allegations of misconduct must be investigated by an "Investigating Committee", which includes giving the osteopath the opportunity to make "observations" (section 20(8) and (9)).

6. The investigating committee must, having enquired into the case, decide whether there is a case to answer; if there is, the allegation, formulated by the investigating committee, must (so far as relevant here) be referred to the "Professional Conduct Committee" (section 20(12)). That committee then considers the matter (section 22(1)) and if it decides the allegation is well founded, must impose sanctions ranging from admonishment to removal from the register.

7. The Council must appoint "legal assessors" to advise the investigating committee and the professional conduct committee on questions of law and to have any other functions conferred by rules (section 27(1)-(3)). Legal assessors must have been qualified for at least 10 years and have "a 10 year general qualification" within section 71 of the Courts and Legal Services Act 1990.

8. Appeals are (for present purposes) governed by section 31. An appeal against a decision of the professional conduct committee lies to the High Court, where the appeal attracts the applicability of the usual provisions in CPR rule 52 in appeals from disciplinary bodies. I have already mentioned the well known tests I must apply and the powers of the High Court in such appeals.

9. I was referred to three sets of rules enacted in subordinate legislation. The General Osteopathic Council (Constitution of the Statutory Committees) Rules Order of Council 2009 (the 2009 Rules) deal with the composition and quorum of committees, including (rule 8) the professional conduct committee. Its members are lay persons and registered osteopaths. The quorum is three members, either two osteopaths and one lay person or vice versa. The chair must be a lay person (rule 9).

10. The General Osteopathic Council (Legal Assessors) Rules Order of Council 1999 (the 1999 Rules) includes provision for a legal assessor to inform the professional conduct committee "forthwith of any irregularity in the … consideration of any complaint or in the conduct of the proceedings … and advise it of his own motion where it appears to him that but for such advice, there is a possibility of a mistake of law being made" (rule 3(c)).

11. The General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000 (the 2000 Rules) make quite elaborate provision for a standard adversarial process with a right to legal representation for the osteopath before the professional conduct committee (rule 11). Either side may call witnesses (rule 12). There is provision for disclosure of documents and the presence of a legal assessor (rule 16). The hearing is normally in public (rule 17).

12. The rules set out in some detail the procedure that must be followed, under the heading "Presentation of the Case". The detail states how one would expect a conventional adversarial hearing to be conducted in accordance with procedural fairness. Rule 34 provides what would be implicit anyway: that any member of the committee or the legal assessor may with the chairman's permission question those presenting evidence or any witness called.

Facts

13. "Patient A", as I must call the complainant in this case, was born in January 1961. His background is in the armed forces and aeronautical engineering work. He is from Norfolk but moved to the Lytham St Annes area of Lancashire in about May 2016.

14. Ms Beard has qualifications in sports therapy, sports medicine and osteopathy going back to 1987. She has had a varied and long career, which until this incident was

unblemished. Until 2004, she held a lecturer post at a university in Scotland. She left that position to become an osteopath, qualifying in Brighton in 2010. The same year, she opened a sports injury clinic in Lytham St Annes and registered with the Council.

15. In July 2016, Ms Beard was going through a difficult time. She had been divorced since about 2008, following an acrimonious marriage breakdown. This had left her vulnerable. Since January 2016, she had been seeking readmission to the Jehovah's Witnesses faith, from which she had been parted for about a decade. She rejoined the faith in July 2016, just before seeing Patient A. The process was stressful and left her exhausted.

16. The committee, which subsequently heard her evidence, knew nothing of these marital and religious difficulties until the end of the case, as she did not share them with her lawyers until then. At the time she gave her evidence about seeing Patient A, the committee and her solicitor were unaware of them. They did, however, have the correspondence leading up to his formal complaint, to which I will come shortly.

17. On 18 July 2016, Patient A emailed Ms Beard asking for an appointment, preferably in the evening, because of a problem with his left foot. He attached notes of previous treatment in Norfolk. She agreed to see him the same evening at 7pm, fitting him in at the end of a busy day, which was not a clinic day. She downloaded the notes after the session, at 8.38pm.

18. Ms Beard made detailed handwritten notes of the session. She took a personal and medical history. She obtained his signature on a generic consent form, consenting to physical examination and treatment to improve his condition and relieve pain. He paid the fee of £70.

19. There are disputes about what happened during the session. The notes indicate that she made a working diagnosis of "fascial strain (plantar fascia), grade III ligament tear (?) chronic instability (medial column)". She advised rest, ice and gentle mobilisation by "ankle circling"; stabilisation, orthotics, ankle support and taping, with a follow up appointment.

20. There was a follow up appointment three days later. Patient A paid £45 for the session. The diagnosis did not change. According to Ms Beard's notes, the patient's condition had improved. There was a discussion about ultrasound and electrotherapy. Patient A was sceptical about its value and dismissed the idea. Ms Beard thought it was of value.

21. They discussed the "evidence base" (to quote from Ms Beard's notes) for ultrasound, the utility of which Patient A challenged. Ms Beard referred him to the work of an expert on the subject, Professor Tim Watson. She made handwritten notes about the second session too. There are disputes of fact relating to what was said in that session too.

22. Patient A later alleged that Ms Beard indulged in ranting, in what he described in a document as "rant 1" and "rant 2". He attributed to her remarks such as "how dare

I challenge her professional abilities" and the like. She denies, and denied in the disciplinary proceedings, that she ranted at him. Their accounts are in sharp conflict. Patient A must have done much online research, probably after the session as well as before it.

23. Early the next morning, at 12.23am, he sent a long email to Ms Beard, replete with web links to academic literature. Its subject was "Dodgy feet etc!!!!!!!". The email did not attribute any ranting to Ms Beard a few hours earlier. It is difficult to convey its tone; it was inappropriately long, opinionated, personal, over-familiar, with a false bonhomie covering an underlying aggression (as in: "… I decided the Police need not be involved and I could safely read on"; and was "a bit psychotic" when it comes to experts; "… I do think I should be permitted a little bit of paranoia!!!!!!!").

24. In the email, he attempted to debate at length the academic literature to support his condemnation of ultrasound, at least in his own case, and demanded Ms Beard's views in response. It must have made very unpleasant reading for Ms Beard; it is the sort of annoying and inappropriate missive from a client or patient that would at best irritate and at worst intimidate many professional people. He offered no further payment for her time, while demanding much of it.

25. Later the same day (Friday 22 July 2016), Ms Beard went to Liverpool to attend a convention and after that she went on a prearranged holiday, without responding to the email. She was, though, very concerned by it. On 30 July 2016, Patient A wrote a three page letter of "formal complaint" about "the quality of the treatment provided" and "your professional conduct on the day".

26. The remedy sought was a refund of all fees charged "unless you can provide me, in writing, with appropriate, independent, peer-reviewed technical evidence as to how your use of Ultrasound was appropriate to my symptoms and … a full explanation as to why you failed repeatedly to undertake a proper assessment of my foot on … 21 July 2016 … ."

27. He set a deadline of 14 days from the date of the letter. However, ten of the 14 days elapsed before Ms Beard received it, on 9 August 2016. She pointed this out in a response sent on 12 August, saying she would need until 2 September to respond fully to the issues and allegations, because of commitments to patients, and asked him not to take further action until then.

28. She also tried unsuccessfully to reach him by telephone, but he missed the call or calls. He sent an email on 9 August which crossed with Ms Beard's letter, adding the "rant" allegation not previously mentioned. The letter emphasised that "you now have a formal complaint on your hands" and while recognising that she had been on holiday "[y]ou have missed your opportunity to chat (that in itself is a subject of complaint)".

29. The tone of that email is arrogant, as if he is addressing an inferior or subordinate. He described his previous email of 22 July, inappropriately, as "a good natured prompt". Had she answered it, "you could have redeemed yourself". It shows him

to be a man who expects deference and attention as soon as he demands it. He refers to having "elicited some reaction" by making a formal complaint.

30. On 1 September 2016, Ms Beard provided her response. She denied the substance of the complaints, asserted that her treatment and conduct had been appropriate and that on 18 July there had been "elements of the treatment plan which you challenged in what I found to be an aggressive manner". She said the email of 22 July was "unwarranted and unjustified"; the letter of 30 July "verging on harassment" and a subsequent email "threatening in its tone". She wished to "formally request that you desist with this harassment" or she would have "no option than to take further action".

31. Patient A then made his complaint to the Council, dated 7 September 2016. On 10 September, he wrote a further aggressive and offensive letter to Ms Beard. He began disparagingly by asking her to note, in connection with her comment about harassment that "you, as a tradesperson, are simply selling goods and services including 'your professional abilities as an Osteopath' to customers like me". He went on to refer to the rights of consumers who purchase faulty goods or services, and the like.

32. The complaint then made its way through the Council's complaints process. An investigating committee found there was a case to answer and the case was referred to the professional conduct committee for determination in accordance with the 2000 Rules.

33. Ms Beard was required to answer five allegations, together amounting to "Unacceptable Professional Conduct". The first allegation was innocuous enough: that Patient A had attended appointments with Ms Beard on 18 and 21 July 2016. She admitted those facts.

34. The second and third allegations were more serious: that on 18 July she did not conduct an adequate assessment of his foot; did not provide a diagnosis; did not discuss or explain the treatment to him; did not obtain valid consent from him for the treatment; and used excessive force on his foot when treating him.

35. The fourth and fifth allegations were that on 21 July, she did not conduct an adequate assessment of his foot; did not provide a diagnosis; did not discuss or explain the treatment to him; did not obtain valid consent from him for the treatment; did not explain to him why ultrasound treatment was appropriate; and communicated inappropriately and unprofessionally with him by saying words set out in an appendix.

36. The words were those attributed to Ms Beard by Patient A: "How dare you challenge my professional ability?" "I am an expert in osteopathy"; "I am also a lecturer"; "What do you know about it anyway?" "I have used ultrasound very effectively in the past"; "Do you think I have time to answer such questions?" "If I answered such questions for everyone, I wouldn't have time to do any treatment"; "I have dozens of satisfied patients on which I used ultrasound"; "I am not used to my professional decisions being challenged"; "It is all very complicated and it works at a cellular level"; and "You wouldn't understand it anyway".

37. Apart from the first allegation, Ms Beard denied the charges. She and Patient A both provided witness statements. The Council and Ms Beard instructed expert osteopaths to opine on the case. They produced detailed reports, placing emphasis on the conflict of evidence between Patient A and Ms Beard, which the committee, not they, had to resolve.

38. They produced a joint statement dated 25 January 2018, the day the hearing started. They agreed that the handwritten notes relating to the two consultations supported Ms Beard's statements that she conducted an adequate assessment of Patient A's foot on 18 July 2016 and justified her diagnosis, if she made one. They could not say whether the force used was excessive.

39. In relation to the consultation on 21 July, there was no requirement to make a fresh diagnosis if one had already been made; they could not say clearly whether valid consent to ultrasound treatment was obtained; it was not clear whether that consent was sought or given. The notes indicated that ultrasound treatment was given. They could not determine whether the words attributed to Ms Beard were used.

40. The expert evidence therefore highlighted the importance of the credibility of, on the one hand, Patient A and, on the other, Ms Beard. The notes contained information such as his medical history, which could only have come from him; it was not suggested that they were forged but it was not common ground that the notes were all made contemporaneously rather than written up afterwards.

41. The hearing started on 25 January 2018. The committee comprised Mr Alastair Cannon, the lay chair; Ms Colette Neville, a lay member who is also a solicitor; and Mr Tom Bedford, who is an osteopath. The legal assessor was Ms Margaret Obi, a solicitor and now a deputy High Court judge. Ms Beard was represented by her solicitor, Mr Paul Grant; the Council, by Mr Christopher Gillespie of counsel.

42. I have a transcript and a digital tape recording of the hearing. I confine my account to what is most relevant to this appeal. As well as reading the transcript, I listened, at Ms Beard's request, to those parts of the tape recording relevant to this appeal; namely, most of the evidence of Patient A and of Ms Beard herself. Ms Mary O'Rourke QC, for Ms Beard, relies on the tone of some of the questions as well as the content.

43. Mr Gillespie opened the case for the Council. It rested almost entirely on an invitation to the committee to prefer Patient A's testimony to that of Ms Beard. He took the committee through the correspondence. Mr Gillespie then called Patient A. His account supported the charges and corresponded to an elaborate chronological tabulated document he had produced.

44. In the afternoon, he was cross-examined by Mr Grant. He straightforwardly put the case for Ms Beard, which was directly contrary to the charges and to the evidence in chief of Patient A. Some of his cross-examination occurred after the committee members had asked some brief questions; probably because the legal assessor, Ms Obi, reminded Mr Grant that he had not put the whole of his client's case to the witness.

45. While Ms Beard did not dispute that she used phrases such as "I have used ultrasound very effectively in the past" in an appropriate and not wrong manner, she denied any "rant". Mr Grant and Patient A had to disagree about that and about almost every other aspect of the allegations apart from the facts that the appointments took place and that ultrasound was proposed.

46. Patient A accepted that Ms Beard had examined one of his feet on 18 July, but not that there was any adequate examination or any diagnosis. He said the handwritten notes were largely made up and that generic consent forms such as the one he had signed were "not worth the paper they are printed on". He said he was in "no fit state to sign anything" on 18 July as he was "in absolute agony", which he blamed on Ms Beard's use of excessive force.

47. The committee's questions to Patient A were brief. In answer to Mr Bedford, he accepted that Ms Beard had written down aspects of his medical history while he was giving it. Ms Neville asked about whether, as Ms Beard asserted, he had reported an improvement following treatment on 21 July. He said that was not correct. He said he was "cagey" about booking another appointment after 21 July. The chair did not ask any questions.

48. That completed the first day of the hearing. The second day, 26 January 2018, saw Mr McClune give his evidence. He was the expert instructed by the Council. Ms Beard then gave her evidence, which took most of the day. Mr Grant took her through her CV and her views on ultrasound. He took her through her notes of the two appointments. She said some of them were written during the assessments, as Patient A was talking; other parts, after the treatment.

49. She gave her account of the two sessions, which was at odds with Patient A's. She denied the allegations he had made against her. She said that at their second meeting, while she is used to being challenged, his challenges to the use of ultrasound were "more probing than normal" and made her feel uncomfortable; "I felt like I was being interrogated". She thought he may have interpreted what she said as a "rant" but denied that such it was.

50. She said that by the end of the second appointment and the treatment she was "a bit flustered" as he was "unusual in his line of questioning" and she was "very uncomfortable and very wary" and she did accept commenting "about him being an expert on his feet". She felt he was not interested in the treatment she was proposing and that there was no point in continuing.

51. There was a ten minute break at 10.50am, before the start of her cross-examination by Mr Gillespie. He started by putting to her that she had to adapt to difficult patients. She accepted that. He took her through the two appointments and put to her that Patient A's account was correct. She disagreed with most of it.

52. He asked whether the handwritten notes were accurate since, if they were, the experts agreed that they supported her assertion that her assessment and treatment were adequate. They discussed Ms Beard being "flustered" and "alarm bells" ringing in her mind because of the way Patient A was talking. They discussed the

issue of consent to the ultrasound treatment. Ms Beard insisted she had gone through the consent procedure with him "verbally".

53. Mr Gillespie then put questions to the effect that Ms Beard had succumbed to Patient A's provocative questioning and had conducted herself unprofessionally in her answers. She responded "No. The underlying emotion that I felt was fear". Mr Gillespie steered away from that answer and did not explore it further. He returned to the subject of ultrasound.

54. He asked why Patient A's long email of 22 July had alarmed Ms Beard. She explained that it was the tone and that she was about to go on holiday. He then took her through the long complaint letter of 30 July. He concluded the cross-examination by returning to the subject of when the handwritten notes were produced; and, finally, suggesting that there had been a "personality clash" and that Ms Beard had "had enough of him and … gave him a piece of your mind"; which she denied.

55. By the end of the cross-examination, Ms Beard had been giving evidence for about 1 hour 35 minutes. The course of her evidence and, before her, Patient A's evidence was, thus far, unremarkable. Mr Gillespie's cross-examination of Ms Beard is not the subject of any complaint in this appeal. Mr Grant then re-examined Ms Beard briefly.

56. The chairman then indicated that the committee members had some questions. He called a 45 minute lunch break, which would enable them to formulate their questions. Mr Gillespie did not think it would take "a huge amount of time" and saw no difficulty finishing the evidence of Ms Beard and the other expert, Mr Butler, that afternoon.

57. On reconvening, the chairman said there were nine questions. Mr Bedford, the osteopath, went first. His questions generated no complaint in this appeal. He probed the issue of how long the first session lasted; Patient A said about half an hour while Ms Beard's evidence was that it was about an hour, of which only five to ten minutes was treatment.

58. He also brought out the disagreement over whether Patient A was on his front (as he said) or back (as Ms Beard said) during the treatment on 18 July. Then, he asked about how the timing of the second session was to be arranged, not having been fixed at the end of the first session. Finally, he asked about the observation of Ms Beard that following treatment on 21 July, Patient A's foot was less painful and more mobile.

59. The chairman then interjected, again uncontroversially, with a follow up question about whether the length of the second appointment was fixed. After consulting her diary, Ms Beard said it was fixed at 30 minutes in length and was at first fixed for 20 July, but rearranged for a day later. The chairman then invited questions from Ms Neville.

60. She started by saying she had some questions and invited Ms Beard to ask for a break if she wanted one at any time. Her initial questions followed on from Mr Bedford's and no complaint about them is made by Ms O'Rourke.

61. Ms Neville then asked about the timing of the first appointment, saying she was "trying to establish how much time you had to read the email" from Patient A, with notes attached to it. Ms Beard explained that she had seen another patient at 6pm, though the clinic was closed, and had many personal and professional issues to attend to and explained what they were.

62. Ms Neville then asked about ultrasound and the obtaining of consent to ultrasound treatment. She asked whether Ms Beard had explained the risks to Patient A. Ms Beard said she had and explained in more detail. Ms Neville asked if Ms Beard had a "usual patter that you use with patients when you are explaining about it", to which Ms Beard replied yes.

63. Pursuing the topic, Ms Neville invited her to do a sort of role play of the patter, supposing that she, Ms Neville, were a patient at the clinic. Ms Beard obliged. Ms Neville then asked about why Ms Beard had felt uncomfortable and felt interrogated and what she meant by saying the underlying emotion she had felt was fear. Ms Beard responded that she had felt bullied and had encountered bullies in her work before.

64. Ms Neville continued probing, eliciting the response that Patient A had made Ms Beard feel "inadequate". Ms Beard's voice was quavering slightly but she was able to hold back tears. Ms Neville then asked several questions comparing challenges from students in an academic context with a patient asking "in depth questions". She then suggested Ms Beard may have felt out of her depth and "a bit defensive", eliciting an admission of that.

65. Ms Neville turned to Patient A's email of 22 July 2016, asking what was alarming about the tone of it, with several further questions about its content and why it was alarming. She then changed the topic to Ms Beard's previous careers before she became an osteopath. Her tone was becoming increasingly frosty. She then asked Ms Beard to look at her CV, saying she wanted to know how long she had been using ultrasound and taking her back to 1987.

66. She then asked about Ms Beard's movements during the week of 18 July, when she went on holiday, when she came back and why she had not responded to the email of 22 July before going on holiday. The chairman interjected with a question about why the diary ended in July (it was an academic diary). Ms Beard was becoming more and more flustered and nervous but remained in control of herself. The committee's questions had lasted 42 minutes at this point.

67. Ms Neville persisted with the dates of the holiday and how long it had lasted and when Ms Beard had received the letter of 30 July. Mr Grant interjected that Ms Beard's subsequent letter stated the date of receipt was 9 August. Ms Neville ignored him and asked whether the letter was emailed or posted. Ms Beard said (repeating what she had said moments earlier, before Ms Neville's question) that she, Ms Beard, had had to collect the letter from the Post Office.

68. Ms Neville then asked detailed questions about Ms Beard's response letter of 1 September, taking her through it and asking what she meant by an "aggressive manner". Ms Beard became more upset, tried to answer, faltered and ended saying "I don't know how to answer that question". Ms Neville persisted: "I am trying to establish why you said it was an aggressive manner. What was aggressive? It is quite a strong word".

69. Ms Beard responded: "[i]ntimidatory, as in one question after another, firing questions away and not really giving the opportunity to answer things in full, cutting across me mid-sentence, not allowing me to finish my sentences, ….". She continued her answer in the same vein. Ms Neville then conferred briefly with her colleagues before asking a question about her evidence of Patient A's report of pain reduction following treatment.

70. Ms Neville then returned to her dissection of Ms Beard's response letter of 1 September, demanding to know why she had described the email of 22 July as "wholly unwarranted and unjustified" and how his complaint was "verging on harassment". Ms Beard gave a detailed answer in a subdued tone, ending with "I felt it harassment because I felt he was holding me over a barrel for this paper, this ultrasound paper that he wanted".

71. Ms Neville continued her forensic probe into the language of the correspondence and the characterisation by Ms Beard of Patient A's correspondence as verging on harassment. Ms Neville challenged Ms Beard's position and Ms Beard continued to maintain that Patient A's approach was "harassing".

72. Mr Grant intervened to point Ms Neville to the last paragraph of Patient A's letter of 30 July, where Patient A had demanded his money back unless Ms Beard could provide:

> "in writing, … appropriate, independent, peer-reviewed technical evidence as to how your use of Ultrasound was appropriate to my symptoms, and provide me, in writing, with a full explanation as to why you failed repeatedly to undertake a proper assessment of my foot on my visit of the 21 July 2016, thereby missing several injured areas on the foot and calf, all of which were identified within about 5 minutes of the start of my recent appointment with another professional Osteopath".

73. Ms Beard confirmed the reference, saying "[y]es, page 15". Ms Neville's curt response was: "[s]o perhaps if you would not mind answering the question?" She put it again: "[w]hat was it about the letter of 30 July that was verging on harassment?" Ms Beard referred to the same passage in the letter, in the last paragraph. She was becoming very upset.

74. The chairman took over the questioning, sensing (I infer from his intervention and its tone) that Ms Neville's questioning was upsetting Ms Beard, while at the same time not wanting to undermine his committee colleague by closing down her line of questioning. He continued to debate with Ms Beard at some length the issue of Patient A's use of language, giving his interpretation of Patient A's demand for his money back and discussing why it was intimidating.

75. Ms Neville then started questioning again. Her tone was abrupt and hostile. She put to Ms Beard that she had not invited Patient A back to the clinic. Ms Beard agreed that she had not. Over a series of questions during which Ms Beard was becoming more and more upset, she said she had not asked him back to the clinic because of the tone of the letters he had sent.

76. Ms Neville then put to her:

> "I'm sorry, you have just contradicted yourself because you have said to us that you would have dealt with his concerns had he come into the clinic and that you were willing to sit down and talk to him, but you were not willing to take time out of your busy practice to write a treatise on the subject …".

77. Ms Beard replied: "[t]hat is right". Ms Neville's riposte was:

> "but now you are saying you cannot explain why you did not ask him to come into the clinic because you did not like the tone of the way he was dealing with you".

78. With Ms Beard becoming increasingly upset, Ms Neville persisted, saying she would "look at this chronologically" and going back to Patient A's leaving the clinic at about 8pm on 21 July, followed by the email of 22 July. This went on over several further repetitive exchanges about the debate in correspondence, during which Ms Neville sharply rebuked Mr Grant for providing a page reference Ms Neville had asked Ms Beard for.

79. Ms Beard became unable to continue. She said:

> "Sorry, I am really struggling here to … you're asking so many questions and I'm not quite sure what your asking about."

80. Ms Beard attempted to continue her questioning but Ms Beard said: "[n]o, I think it's … this whole thing has been exhausting". She was unable to hold back tears. The legal assessor intervened and asked if she wanted a break. Ms Beard said "[y]es, please". Ms Neville said "[f]ine, that is a very good idea". Ms Beard left in tears after the chairman had ordained a 10 minute break.

81. The time was about 3.20pm, approximately 1 hour 20 minutes into the committee's questions of Ms Beard after the end of her re-examination. Mr Grant asked to speak to the legal assessor. On resuming at about 3.30pm, the chairman said that he would be asking the questions, though Ms Neville did not say she had finished her questions. I infer that either the chairman or the legal assessor, or both, did not want Ms Neville to ask any further questions.

82. I interject that there is no evidence that the legal assessor advised the committee on the point, but the 1999 Rules do not on their face (unlike some other similar rules in the professional discipline field such as those at issue in *Roylance v. GMC (No. 2)* [2000] 1 AC 311, PC) require her to inform the parties about any advice given or, if

any is given, to tell the parties what it was; though the legal assessor may retire with the committee members at any time (see rule 59 of the 2000 Rules).

83. The chairman then questioned Ms Beard for a further 34 minutes. The chairman's tone was not sharp as Ms Neville's had been. Most of his questions were about how Ms Beard produced her notes of consultations with patients, on this occasion and generally; about what she had written in her notes and when; about previous treatment Patient A had received; and about notes relating to that treatment, attached to the initial email of 18 July. He also asked about the signing of the generic consent form. Ms Beard at times became confused when answering but was able to answer.

84. The total time taken by the committee's questions was about 1 hour 45 minutes (including the ten minute break), ending at about 4.05pm; longer than her cross-examination which lasted about one and a half hours. Mr Butler, the other expert witness, was then briefly called before the end of the second day.

85. On the third day, Monday 29 January 2018, closing submissions were made. Mr Gillespie again presented Patient A as a witness of truth and Ms Beard as "rather defensive" and unreliable. He made it plain the case turned on credibility; "they agree on nothing, not even the angle or position that Patient A was lying in when he was being either assessed or treated …".

86. Mr Grant submitted that Ms Beard was truthful. Diplomatically referring to her questioning by the committee members, he said that he understood them asking "strong questions" on credibility; but "do you see how she wilted?" he asked; "[m]aybe we were all concerned when she acted that way". He described her as a gentle and contemplative person, in contrast to Patient A. She was not a person who would rant, he argued. The charges were not made out, he said; the Council had not discharged the onus on it.

87. The legal assessor then gave her advice on the law, which was uncontroversial; she did not touch on the questioning of Ms Beard. The committee deliberated in private and returned the next day, 30 January 2018. They announced that they found charges 2-5 proved in their entirety. The first allegation had already been admitted. The matter was adjourned to a date to be fixed for consideration of whether the conduct found proved amounted to "unacceptable professional conduct" (UPC).

88. Later, Mr Grant instructed Ms O'Rourke in February 2018 and obtained a transcript of the questions asked of Ms Beard. On 18 June 2018, he wrote to the Council asking for the audio tapes of the hearing and stating that a skeleton from Ms O'Rourke would be submitted to support a rather unusual application that either Ms Neville should recuse herself, or the other two members should recuse her or, if they did not, should recuse themselves. It was said there was a "clear appearance of bias or at least pre-judgment".

89. The skeleton argument was later produced and the application to recuse made orally by Ms O'Rourke on 9 July 2018. There was a different legal assessor. It is unnecessary to set out the detail of what Ms O'Rourke submitted on that occasion. Her main focus was on the questions asked of Ms Beard by Ms Neville. There was

no criticism of Mr Bedford's questions. There was some criticism of the chairman's questioning and handling of the matter. The application, opposed by the Council, failed.

90. The next day, 10 July 2018, the committee heard Mr Gillespie and Ms O'Rourke on the issue of UPC and mitigation. It is only necessary to record here that on that occasion the committee learned for the first time – sitting in private at the invitation of Ms O'Rourke - about Ms Beard's marital and religious difficulties during the period from about 2005 to 2016, culminating in the dealings between her and the elders of the Jehovah's Witnesses two days before she saw Patient A.

91. Ms O'Rourke said in mitigation that this had made her particularly vulnerable at the time. She also made other submissions in mitigation and relied on testimonials and references and on the adverse impact on Ms Beard's wellbeing of the committee's adverse findings, which Ms Beard could not understand or accept. The chairman commented that much of the factual content of the mitigation was "news to us", as indeed it had been to Ms Beard's lawyers until very shortly before the mitigation hearing.

92. The committee gave its decision on sanction in public on 29 August 2018. The full written decision on all points became available at around this time. The committee accepted Patient A's evidence and rejected Ms Beard's. Patient A's version of events was "logical, consistent and clear". His evidence was presented in a way that was "fair and measured". He was "a credible and reliable witness".

93. Ms Beard's evidence, by contrast, was "guarded and at times her responses were evasive". The committee also identified "multiple inconsistencies" and gave four examples. They found the clinical notes "not … reliable". They then went through each of the charges stating in some detail why they preferred the evidence of Patient A on each disputed point.

94. They rejected Ms Beard's evidence that she verbally explained ultrasound and accepted Patient A's argument that his consent to the treatment was not informed even though he accepted having signed the generic consent form. They found "compelling" Patient A's evidence of "ranting" by Ms Beard. They found that Ms Beard had used the words attributed to her and that her words were "used in anger and with an aggressive tone".

95. They repeated reasons already given orally for rejecting the recusal application. At paragraph 79, they defended their lengthy questioning of Ms Beard, reasoning that there were inconsistencies in her account that "had a bearing on her credibility" and that had they made "findings on [her] credibility without giving her the opportunity to address those points, that would likely have been unfair". They had not strayed outside the proper boundaries in their questions to Ms Beard.

96. The committee found that her conduct would be seen as morally blameworthy by ordinary people and was unacceptable professional conduct. They found as an aggravating feature that she had not shown insight, since she had contested the charges. She had not been candid, did not accept the findings and had not apologised to Patient A or expressed remorse.

97. They made a 12 month "conditions of practice" order. This requires practice under supervision for 12 months, followed by a "reflective" report and a review hearing at which the professional conduct committee would consider the position for the future. However, the sanction has not yet taken effect because Ms Beard then exercised her right of appeal to this court which, I am told, has the effect of suspending the effect of the decision.

Grounds of Appeal

Grounds 1-2:

98. The first ground of appeal is that the fairness of the hearing was compromised by the questioning of Ms Beard, mainly by Ms Neville but also by the chairman. The case is put as an allegation of apparent bias and "procedural and other unfairness in its conduct of the hearing" (to quote Ms O'Rourke's skeleton argument). The second ground is that the application to recuse Ms Neville, or the whole committee, should have been granted.

99. During the hearing, it became common ground that the allegation of apparent bias adds nothing to that of unfairness in the conduct of the hearing. If the questioning of Ms Beard by committee members was fair, the reasonable informed observer would necessarily be sanguine about the committee's impartiality. No other species of apparent bias was relied on; Ms O'Rourke relies solely on the committee's questions to Ms Beard.

100. Conversely - although the fairness or otherwise of the proceedings does not depend on appearances or on what an objective observer might think - if the questioning rendered the proceedings unfair, the reasonable objective and informed observer might well discern a real possibility of bias. But that perception would be superfluous because the proceedings would be unfair anyway.

101. Similarly, it was accepted by Ms O'Rourke at the hearing that the second ground of appeal adds nothing to the first. If the questioning of Ms Beard by the committee members was fair, there would be no basis for Ms Neville or the committee to stand down and they must have been right not to do so. But if the questioning rendered the proceedings unfair, the committee (or at least Ms Neville) should have stood down. So the second ground stands or falls with the first.

102. I therefore focus on whether the questioning of Ms Beard by Ms Neville and the chairman rendered the proceedings unfair; or, in the words of CPR rule 52.21(3)(b), whether the decision of the committee was unjust because of a serious procedural or other irregularity in the proceedings. I was referred to various cases by counsel, but there was no disagreement about the law and the appeal raises no new issue of law. The principles derived from the cases must be applied to the facts. I will refer to the cases I found most useful.

103. The law has long recognised a judicial duty to stay above the fray. In the second half of the last century *Yuill v. Yuill* [1945] 1 All ER 183, CA (the short passage in Lord Greene MR's judgment of the court at 185D-186A) was often cited to show

the need for judicial restraint during the questioning of witnesses but also to support the proposition that even excessive judicial intervention does not justify appellate interference unless the trial is rendered unfair by it.

104. An example of a case where that happened was *Jones v. National Coal Board* [1957] 2 QB 55, an unusual fatal accident case where both parties complained of the judge's interruptions during oral evidence. The Court of Appeal ordered a new trial. Denning LJ's famous words at 63-65, giving the judgment of the court, are worth setting out in full, not just for the poetic language:

> '… Was it not Lord Eldon L.C. who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question"?: see *Ex parte Lloyd* … and Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict": see *Yuill v. Yuill* ….
> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see *In re Enoch & Zaretzky, Bock & Co* … . So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see *Rex v. Cain* …, *Rex v. Bateman* … and *Harris v. Harris* …, by Birkett L.J. especially. and it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *Reg. v. Clewer* … . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal." [*Essays or Counsels Civil and Moral. Of Judicature.*]
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> Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may outrun our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties - nay, each of them - has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.'

105. While the essence of the judge's duty remains the same, the manner of its discharge has changed in the direction of greater judicial participation in the trial. The Supreme Court of New South Wales returned to the issue in *Galea v. Galea* (1990)

19 NSWLR 263, a case involving hard fought litigation between formerly close family members. The court found the judge's interventions robust and sometimes sarcastic and impolite but not such as to make the trial unfair.

106. The court set out six propositions subsequently cited by the Privy Council when considering the fairness of a judge's conduct of a Cayman Islands trial in *Demarco Almeida v. Opportunity Equity Partners Ltd* [2006] UKPC 44. The starting point in the latter case was the remark of Lord Walker (giving the judgment of the Board) at [2] that while "the judge's conduct of the trial is open to fairly severe criticism .. [t]he ultimate issue … is whether there was (as the Court of Appeal found) 'a fundamental failure of justice'".

107. Lord Walker observed at [94] that "attitudes to judicial intervention have changed a good deal since the trial in *Jones v. National Coal Board*…". He set out (at [94]) the six propositions of Kirby A-CJ in *Galea*, adding ([95]) that while these provided "valuable guidance", "the facts and circumstances which may render a trial unfair, either in whole or in part, are so multifarious that the principles may need to be applied flexibly in some circumstances …".

108. Lord Walker observed that the Court of Appeal had noted that counsel took no objection to the judge's interventions during the evidence of the appellant's witnesses. He said at [100]: "[i]t might be thought that it is very difficult for counsel to ask a judge to stop interrupting, and still more to ask him, in the middle of a trial, to recuse himself for misconduct …".

109. The six propositions derived from *Galea* are, in my paraphrase:

(1) the test is whether excessive intervention or pejorative comment created a real danger that the trial was unfair.

(2) There is greater latitude towards judicial intervention where the judge sits alone than when sitting with a jury.

(3) On appeal, the issue is whether the interventions indicate that a fair trial has been denied because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and "into the perils of self-persuasion".

(4) Whether the point of unfairness has been reached must be considered in the context of the whole trial and in the light of the number, length, terms and circumstances of the judge's interventions. Interventions suggesting a provisional view must be distinguished from those suggesting a final unalterable view.

(5) The point at which the interventions occur is relevant; vigorous interventions early in the trial are less readily excused than one at a later stage aimed at permitting the judge better to comprehend the issues and weigh the evidence of the witness concerned.

(6) The general rules for conduct of a trial and the respective functions of judge and advocate have not changed; but a more active judicial role in proceedings than formerly is now accepted; sometimes a silent judge may cause injustice by not alerting a party to issues concerning the judge.

110. In *Demarco Almeida* the Board, differing from the Court of Appeal of the Cayman Islands, was persuaded by a fairly narrow margin that the judge's conduct was not such as to render the trial unfair, although the judge was "seriously at fault in the way he conducted the trial" and "his interventions went some way beyond what was proper" ([103]).

111. A case that fell the other side of the line was *London Borough of Southwark v. Kofi-Adu* [2006] EWCA Civ 281, a county court possession claim in which the judge had overstepped the mark and a retrial had to be ordered. The Court of Appeal (Jonathan Parker LJ giving the judgment of the court) considered the domestic authorities, *Yuill v. Yuill* and *Jones v. National Coal Board*, recognised (at [145]) that first instance judges "rightly tend to be very much more proactive than their precedessors" and (at [146]) noted:

> … the risk identified by Lord Greene MR … does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena … may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair [italics in original].

112. In *Banerjee v. General Medical Council* [2017] EWCA Civ 78, (2917) 156 BMLR 199, the Court of Appeal upheld Walker J's decision that a panel hearing disciplinary charges against a doctor had not conducted the hearing unfairly by reason of "the number, nature, tone and content of the questions" asked by the members of the panel (per Sir Terence Etherton MR at [6] and [9]). The court accepted the parties' common position that the applicable principles were to be found in the *Demarco Almeida* case.

113. The context was that the doctor was seeking restoration to the medical register after obtaining voluntary erasure three years earlier. At the time of seeking voluntary erasure, she had said she did not intend to practise medicine again. By the time she sought restoration to the register, her position on that point had changed. She was not cross-examined by the GMC's advocate on that change of position.

114. She was, then, asked searching and challenging questions about her change of mind by the panel members, who were concerned about the issue of her probity. There was a dearth of documents before the tribunal on the issue and the doctor was not expecting to be asked about it, as the GMC had not flagged it as an issue in the application. It was not open to the panel to attach conditions to the doctor's restoration to the register.

115. The Court of Appeal agreed with the judge that "the Panel members were entitled to ask the questions they did and to seek to obtain clear and consistent answers from

Dr Banerjee against the background of their lack of documents and the absence of any cross-examination on the issue by the GMC's counsel" ([14]).

116. For Ms Beard, Ms O'Rourke submitted that Ms Neville's questioning amounted to "assuming the role of a second prosecutor and stepping into the ring"; her questions were "hostile and oppressive"; they deprived Ms Beard of the opportunity to give her evidence clearly and coherently; they amounted to "bullying". The tone and length of the questions were unfair and especially when contrasted with the fair questioning of Ms Beard by Mr Gillespie and the absence of any questions by the committee to Patient A.

117. Ms O'Rourke made no complaint about Mr Bedford's questions, but submitted that many questions asked by Ms Neville and the chairman were not relevant to the allegations or even to credibility and that they were persisted in forcefully once Ms Beard's state of distress started to become apparent. The questions were also unnecessary, since Mr Gillespie had already put the case for the Council fully, competently and fairly.

118. It was accepted by Ms O'Rourke that the committee's function was more inquisitorial than that of an ordinary court of law; the committee's role was not restricted to just "holding the ring". But, she argued, the overall test remains one of fairness of the proceedings as a whole; and the inquisitorial part of the committee's function cannot extend to descending into the arena and supplementing and reinforcing the case for the Council to an extent that calls into question the impartiality of the committee or one of its members.

119. Ms O'Rourke submitted that the unequal questioning of Ms Beard and Patient A was particularly telling in a case where the credibility of one or other of them was likely to be decisive of the case. Patient A was asked almost nothing. The committee chairman said they wished to ask "about nine questions" of Ms Beard. They then asked well over 200 questions in an inquisition lasting longer than Mr Gillespie's cross-examination.

120. In oral argument, she complained that although legally advised, this is an exclusively non-lawyer tribunal from which lawyer members are (in their capacity as lawyers) excluded (though Ms Neville happened to be one). Decisions could be by a majority and a "rogue member" could unfairly influence the other members on issues of fact, which are not the province of the legal assessor.

121. Ms O'Rourke complained that the questions about the correspondence, Ms Beard's perception of it as harassment and Ms Beard's past career were hostile, irrelevant and upsetting. It could not be said that Ms Neville was probing Ms Beard's credibility on whether the "rants" had taken place; the questions were not relevant to that issue and Ms Neville never said they were.

122. Nothing in the committee's written determination reflected the questioning by Ms Neville; the reasoning was not founded on it. Nor was Ms Beard charged with falsifying her clinical notes, though Patient A had accused her of falsifying at least some of them and had not been challenged on that point, despite the fact that the

information in the clinical notes constituting his personal and medical history could only have come from him.

123. Ms O'Rourke also complained that the chairman's continued questions after the 10 minute break, while less hostile in tone and not enough in isolation to compromise the fairness of the process as a whole, were inappropriate as they continued with the same irrelevant themes and persisted late into the afternoon even after Ms Neville's questions had driven Ms Beard from the hearing in tears.

124. It did not assist the Council, Ms O'Rourke argued, that Ms Beard was able to present her case; that her evidence was not distorted by the additional questions; that the issues in the case were tested; that Mr Grant did not intervene more forcefully or object and that, indeed, he diplomatically praised the committee; nor that the legal assessor did not ask Ms Neville to stop; nor that Mr Grant could have re-examined Ms Beard.

125. Ms Beard was intimidated and hectored, confused and distressed, Ms O'Rourke submitted. Her distress was the natural result and made her demeanour and evidence less convincing as the afternoon wore on. She could not understand why she was being asked the questions Ms Neville asked; she said so; and that was understandable because they should not have been asked and not in the tone they were asked and not at such length and with so much repetition.

126. Mr Mark Shaw QC, for the Council, placed much weight on the inquisitorial function of the committee. He referred me to Lord Clyde's speech delivering the judgment of the Board of the Privy Council in *Roylance v. GMC (No. 2)* [2000] 1 AC 311. There, one of the issues was whether the connection between the subject matter of the disciplinary proceedings and a grandchild of the disciplinary committee's chairman was such that the chairman should have stood down on the basis of apparent bias.

127. The questions asked by the chairman were found objectively fair and even-handed. The doctor had failed to show a real danger of bias (which was then the test) requiring the chairman to recuse himself. At 321D-322G, Lord Clyde referred to "a degree of latitude in the form and style of the questions which may be asked"; while "[t]he questions must of course be relevant to the issues before the inquiry", it would depend "upon the nature of the inquiry and the circumstances" whether they "advance beyond the scope of matter which has already been canvassed …".

128. Lord Clyde naturally allowed that there can be cases where an "evident bias" is apparent, such as where "sustained and persistent attempts are made to attack a witness, such that the decision-maker may seem to shed his robe as judge and take on the mantle of an advocate"; but one must "beware against any oversensitivity in assessing the significance of questions asked of witnesses by the tribunal. The matter is one of degree calling for a cautious and balanced approach".

129. Mr Shaw resisted the notion that any part of the hearing, including Ms Neville's questioning, was unfair. He said her questions formed a small proportion of the hearing; there was no application to adjourn; at only one point was a break required; Ms Neville's questions were inquisitive rather than oppressive. She did not

interrupt or silence or browbeat the witness. The exchanges came at the end of Ms Beard's evidence, not the beginning.

130. Mr Shaw attributed Ms Beard's fragile state to undisclosed health concerns she had at the time, which explained her adverse reaction to Ms Neville's questions and may explain why the committee was unimpressed by her demeanour. The committee knew nothing of these health difficulties, and only considered them at the stage of considering mitigation and sanction.

131. The protectors of Ms Beard's interests, her solicitor Mr Grant and Ms Obi, the legal assessor, were sanguine in the face of Ms Neville's questions, Mr Shaw argued. It was unlikely that Ms Obi, in particular, would overlook her duty to intervene if she perceived that an irregularity was occurring. He described their attitude at the time as a "litmus test" of the propriety of what happened. Nor did Mr Grant exercise his right to re-examine Ms Beard.

132. Focussing on Ms Neville's questions, Mr Shaw contended that they were relevant to the charges. The broader questions about Ms Beard's background and previous academic career and Ms Neville's detailed questioning about Patient A's correspondence and why Ms Beard found it intimidating, were relevant, he suggested, to whether she engaged in "rants". Ms Neville should be taken to have been testing Ms Beard's credibility on that issue when asking those broad questions, although she did not say so.

133. He suggested Ms Neville was trying to get to the bottom of the nature of the relationship between Ms Beard and Patient A, and why it went so badly wrong. He did not accept that Ms Neville's tone was aggressive or bullying. The questions were courteously put and were transparent, he said. She did not interrupt Ms Beard, who was able to give some quite lengthy replies at her own pace.

134. Mr Shaw submitted further that the length of Ms Neville's questioning (and that of the chairman after her) and the number of questions asked, was an unreliable guide to whether the unfairness of the proceedings as a whole is demonstrated by those questions. The number of questions asked should not be regarded as a "numbers game", he insisted (and Ms O'Rourke accepted). Nor does a comparison with the number of questions asked of Patient A assist Ms Beard, he said.

135. His overarching submission was that the notion of a tribunal member "descending into the arena" was inapt in the context of this *par excellence* inquisitorial jurisdiction. The committee was required to inquire into what happened and was entitled to do so applying a broad and thorough approach. The context was quite different from that of an adversarial trial process, with advocates advancing competing versions of the truth. Even if some questions were irrelevant, that did not mean the hearing was unfair.

136. I come to my reasoning and conclusions on the first ground of the appeal. I ask myself whether the decision of the committee was unjust because of a serious procedural or other irregularity in the proceedings. I start with Mr Shaw's point that the function of the committee was inquisitorial and not to referee an adversarial hearing in the manner of a contested court case.

137. In my judgment, this submission should only be accepted up to a point, in the present context, for a number of reasons. The first is that the applicable procedural rules provide for an earlier investigation stage, which is designed to establish whether there is a case to answer. It is at that stage that the matter is investigated by an investigating committee.

138. If, as in this case, there is found to be a case to answer, the procedural rules applicable to hearings before the professional conduct committee are of the standard kind for an adversarial hearing: the right to legal representation, rights to inspect documents, the right to call witnesses and to make submissions to an impartial tribunal. The applicable procedural rules closely resemble those that apply in civil proceedings and they start to apply after the case has already been investigated and charges drawn up.

139. Secondly, the function of the committee in the present case, when deciding whether the charges were made out, was to decide between contested factual versions of events. The issues were primarily of fact, not of policy or clinical judgment or appropriate standards of behaviour. The real question was who was telling the truth. The experts in their joint statement had said as much. That meant that the contest was forensic and, by its nature, adversarial in this particular case.

140. Thirdly, the Court of Appeal in *Banerjee* treated the applicable principles as those found in *Demarco Almeida*. The Court of Appeal did not say the applicable principles were different because of any qualitative difference between the nature of a disciplinary tribunal's jurisdiction and that of a court of law trying a civil claim. Thus, a judge trying a civil claim is entitled, within the bounds of fairness and impartiality, to ask questions of a witness, just as this committee was.

141. I do not regard the observations of Lord Clyde in *Roylance* cited by Mr Shaw as authority for the proposition that the applicable principles are different, and less rigorous, in the present case (or in a case such as *Banerjee*) from those applying in other types of civil, criminal or quasi-criminal proceedings, of the types considered in the various authorities that were cited to me. They all have in common the duty of the adjudicating body not to transgress the bounds of fairness in conducting the hearing.

142. The facts of *Banerjee* were completely different from those of the present case. In *Banerjee*, the advocate representing the disciplinary body, the General Medical Council, had not cross-examined the doctor at all on the point that was troubling the members of the disciplinary panel. In the present case, by contrast, Mr Gillespie had put the case of the Council to Ms Beard fully and competently. There was no gap in the evidence, as there was in *Banerjee*.

143. Next, the composition of the committee does not include a legally qualified chair. Ms Neville happened to be legally qualified, but her capacity was that of lay member. Lay members of disciplinary panels such as this are generally regarded as less likely than qualified judges or lawyers to succeed in ridding their minds of extraneous prejudicial material that ought not to contaminate their decision making.

The legal assessor may advise on what they should exclude from consideration; but like a jury, they may not do so.

144. Mr Shaw is, undoubtedly, correct to remind me that the "bar is set high", as he put it. This court will not lightly find that the questioning of a witness has compromised the fairness of the proceedings and rendered the decision unjust. However, the questioning of the accused in the present case was of particular importance and centrality to the case, because of the stark conflict between her evidence and that of her accuser, Patient A.

145. I would therefore expect particular care to ensure an even handed approach to their respective accounts. I do not mean thereby to say that the committee was necessarily bound to question Patient A to the same extent and in the same manner as Ms Beard. The brevity of the questions asked of him and the "easy ride" he got compared to Ms Beard's experience, would not of itself establish unfairness. There could be legitimate reasons why the committee felt less need to question him than Ms Beard.

146. It is, then, necessary to examine the questioning of Ms Beard to determine the merits of this first ground of appeal. The factual context must be considered. My first concern is that the committee did not appear to consider the tone and content of Patient A's correspondence and form an objective view of it. The correspondence was, undoubtedly, aggressive and bullying in its tone and content. It was obviously inappropriate and wrong for Patient A to express himself in the way he did.

147. Mr Gillespie properly understood this when he began his cross-examination by putting the fair point that every patient is different and that an osteopath must adapt and deal with patients who are difficult. But the committee, and Ms Neville in particular, did not seem to understand that Ms Beard was being badly treated by her patient even if, which was contested, his account of events was true and hers untrue.

148. I find it difficult to understand why Ms Neville thought it appropriate to take Ms Beard through the correspondence and ask her lengthy questions about why Ms Beard was upset by it. The correspondence spoke eloquently for itself. It was blindingly obvious that it would upset many persons of ordinary fortitude and that it did upset and frighten Ms Beard.

149. I do not accept Mr Shaw's submission that her distress must be attributed to undisclosed health concerns rendering her unusually sensitive. The committee was well aware of Ms Beard's distress, long before it became so acute that she could not continue the hearing. They could hardly have been unaware of her distress, given the content of Patient A's correspondence and Ms Beard's evidence about her reaction to it.

150. I find that Ms Neville's lengthy questions about Ms Beard's reaction to the correspondence, and the tone in which she asked them, contributed substantially to Ms Beard's distress without throwing any new or further light on the issues the committee had to decide.

151. The same is true of Ms Neville's lengthy excursion into Ms Beard's past career and her demand that Ms Beard should look at her CV. I accept that this was humiliating to Ms Beard and I roundly reject Mr Shaw's suggestion that an exploration of Ms Beard's career experiences and academic career was relevant to whether the "rants" took place or not. If that was what Ms Neville had in mind, she could be expected to have said so and explained why the answers to her questions on that topic had any probative value. I accept Ms O'Rourke's submission that they had none.

152. I agree with Mr Shaw that Ms Neville's questions were asked late in Ms Beard's evidence and not at the beginning and that the witness was not interrupted and was allowed to answer. I also agree that the mere number of questions asked, taken by itself, when set against the nine matters which the chairman had indicated would be considered, is far from conclusive as to whether there is any unfairness.

153. The fact that Ms Neville's questions – and those of the chairman after her - were protracted and that the committee's questioning lasted longer than Mr Gillespie's cross-examination and dragged on through the afternoon is surprising, but it is the content and tone of Ms Neville's questions that trouble me more than the length of time it took her to ask them and obtain Ms Beard's answers to them.

154. I come back to the point that the correspondence sent by Patient A attracted no criticism from the committee and no recognition from Ms Neville or the chairman that it was aggressive, inappropriate and bullying. Ms Neville's questions treated that correspondence as if it were normal and she asked Ms Beard many questions, again and again, on the subject of why Ms Beard did not regard it as normal.

155. Some of Ms Neville's questions were relevant to issues in the case, as Mr Shaw pointed out. But the failure to recognise Patient A's correspondence for what it was evinced hostility towards Ms Beard and indulgence towards Patient A. Ms Neville was allowed for too long to pursue these hostile lines of questioning, the unstated relevance of which was nil or so tenuous as to amount to vexing the witness rather than illuminating the factual issues.

156. Mr Grant tried, tactfully and with reticence, to restrain Ms Neville, as the transcript and audio recording show. Ms Neville ignored him and then required him to be silent. I reject Mr Shaw's suggestion that Mr Grant would have objected if there had been unfairness here. Lord Walker in *Demarco Almeida* at [100] referred to how difficult it is for counsel to intervene to stop impropriety while it is going on. And it is not correct that Mr Grant was content. Ms O'Rourke was instructed in February 2018 to examine the transcript because of Mr Grant's discontent.

157. Re-examination by Mr Grant on irrelevant and prejudicial material is not appropriate and would not have helped. The suggestion that it would or could or should have cured any unfairness is unrealistic, especially so late in the afternoon, with the witness upset after an unnecessarily long ordeal, and with another (expert) witness waiting to give evidence, whom Mr Grant needed to call so that he did not have to return on another day.

158. Neither the legal assessor nor the chairman stopped Ms Neville's questions in time to preserve the integrity and fairness of the hearing. Belatedly, the legal assessor

did suggest a break. I do not mean to criticise her for not doing so earlier. It is difficult for a legal assessor to interrupt a panel member (particularly a lawyer) when the situation leading to unfairness is evolving and does not arise all in one instant. I do not think it is a good argument to say that the questioning must have been fair because the legal assessor would have intervened sooner if it had not been.

159. Mr Shaw submitted that Ms Neville should be given credit for assenting to the break proposed by the legal assessor. She could hardly have done otherwise, having invited Ms Beard to ask for a break at any time and in view of Ms Beard's state of obvious distress at the point when the break was proposed, by which time she had, to use Mr Grant's word, "wilted". The transcript and the audio recording indicate that Ms Beard was too flustered to think of asking for a break of her own accord.

160. For those reasons, I am satisfied that there was a procedural irregularity. Was it serious enough to render the decision unjust? In my judgment, it was. The credibility of Ms Beard, measured against that of Patient A, was the crucial issue in the case. It was therefore of the utmost importance to the fairness of the proceedings overall that this crucial issue was treated in an even-handed and balanced manner, not marred by inappropriate protracted and hostile questioning.

161. There was a serious risk here that (as Jonathan Parker LJ put it in *Southwark v. Kofi-Adu*) one of the committee member's descent into the arena may so have hampered her ability properly to evaluate and weigh the evidence before her as to impair her judgment. I do not know what influence this had or may have had on the other members of the committee and on its decision to reject Ms Beard's evidence on the critical issue in the case. I therefore uphold the first ground of the appeal.

Grounds 3-5:

162. In view of my decision on the first ground of the appeal (to which the second adds nothing) I can deal much more briefly with the third, fourth and fifth grounds. In my judgment, none of them, taken alone, would have led me to interfere with the findings and decision of the committee. I mean no disrespect to Ms O'Rourke by characterising them as makeweight arguments. In her skeleton argument, she too dealt with them only briefly and she placed little emphasis on them in oral argument.

163. The third ground of appeal is that it was perverse of the committee to prefer the evidence of Patient A to that of Ms Beard in the light of the contemporaneous notes the latter had made, recording the two appointments of Patient A with her. Aside from the unfairness of the proceedings for the reasons I have already identified, I would have found no fault with the committee for preferring his evidence to that of Ms Beard. It is not an error of principle for a committee such as this to find that parts of an osteopath's notes were written up when in "defensive mode" after the event.

164. It is true, of course, that aspects of the medical notes were plainly reliable and correct and could not have been found to be otherwise since they recorded uncontroversially information about Patient A's personal and medical history which

could only have come from him. But that did not mean *a priori* that the notes correctly recorded the treatment given to him, nor the explanations about that treatment and whether they were adequate to make his consent to it informed consent.

165. The notes only disproved Patient A's account of events to the extent that they accurately recorded Ms Beard's account of events on disputed issues, i.e. issues other than Patient A's background, medical history and symptoms. A committee such as this one is not bound to accept medical notes at face value, as the two experts recognised in their joint statement.

166. The fourth ground of appeal is that the committee failed to provide adequate reasons for preferring the evidence of Patient A to that of Ms Beard, given the existence of the contemporaneous clinical notes and failure to provide adequate reasons for rejecting the contents of those notes. I do not accept this. The reasons that were given provided an adequate basis for rejecting the accuracy of the medical notes.

167. The written decision pointed to what the committee considered to be inconsistencies between the notes and Ms Beard's account. Reasons need not be expansive and discursive in a decision of this kind. The inconsistencies did not strike me as having the probative value the committee ascribed to them. But that is a matter for the first instance tribunal of fact, if it is performing its functions properly.

168. If this ground of appeal had stood alone I would, again, not have found sufficient merit in it to justify interfering with the committee's findings and its decision. If I had been satisfied that the judgment of the committee on the issue of credibility of Ms Beard and Patient A had been objective, fair and impartial and based on sound judgment, I would have accepted as satisfactory the reasoning in support of it.

169. The fifth ground of appeal is difficult to separate out from the third and fourth. It is said in Ms O'Rourke's skeleton argument that the committee:

> "erred in law and/or failed to give proper reasons in not explaining or reconciling the contemporaneous clinical records with the allegations it found proved – namely the Committee did not state that it found the notes had been forged or subsequently added to after the event …. Absent such a finding of note tampering or forgery the clinical notes had to be addressed in respect of each allegation found proved and if rejected that rejection demanded explanation".

170. It is, in my judgment, plain from the written decision that the committee rejected the notes made by Ms Beard shortly after the sessions with Patient A as a full and accurate record of what transpired during the two sessions. The committee was not required to go into more detail than it did to justify its finding that the notes were unreliable.

171. The decision is clearly to the effect that the notes were written up in a manner that supported Ms Beard's version of events, a version the committee rejected. It was not necessary for Ms Beard to have been charged with falsifying her notes for the

committee to find that the notes could not be relied on as an accurate account of what happened, nor that Ms Beard's account should be rejected and Patient A's preferred.

172. The grave concerns I have about the propriety of those findings arise under the first ground of the appeal, which I have already addressed. Had I not entertained those concerns, I would not have accepted that the findings should be set aside because of the inconsistency between them and the content of Ms Beard's clinical notes. This is, again, to elevate the status of the notes to that of a conclusive record that cannot be questioned.

Conclusion

173. The decision of the committee was unjust because of a serious procedural or other irregularity in the proceedings; namely, the questioning by Ms Neville, which was unfair and rendered the proceedings unfair. The chairman's intervention and questions afterwards did not cure the unfairness of the proceedings, which were irretrievably compromised. It follows that the decision cannot stand and must be set aside, together with the 12 month conditions of practice order.

174. Ms O'Rourke accepted, realistically, that I was not in a position to substitute my own decision for that of the committee. Although I have seen Patient A's correspondence (and formed a strong adverse view of it) and that of Ms Beard, I have not heard Patient A's evidence, nor Ms Beard's, other than in tape recorded form. I have not seen either of them give evidence.

175. It is therefore open to the Council, if it chooses to do so, to refer the same allegations to a differently constituted professional conduct committee. But I would expect it to hesitate long and consider very carefully whether that is appropriate. The manner in which the last hearing was conducted has caused considerable distress to Ms Beard and would cause considerable distress to a person of greater fortitude than she.

176. I recognise the public importance of patients, even very difficult patients such as this one, being free to complain about the service and treatment they receive from osteopaths. I recognise too the need for public accountability of osteopaths for the treatment they provide and for the propriety of their professional conduct. Nothing I say here should be regarded as undermining or downplaying the importance of those policy needs, underpinned as they are by the statutory scheme.

177. In the present case, the Council might well take the view that those important goals have been sufficiently achieved by the holding of the previous hearing, the airing of the parties' disagreement about what happened and the protracted ordeal to which the proceedings have subjected Ms Beard. The allegations were of misconduct not of the most serious kind, such as would warrant suspension or removal from the register.

178. The correspondence addressed to Ms Beard (who cannot shelter behind anonymity) by Patient A (who can) was, in my opinion, reprehensible and injurious to her even if the committee were right to accept his factual account and reject Ms Beard's. I

do not think adequate account of that point was taken by the committee on the last occasion. It is a factor that should be carefully weighed when deciding whether it is now appropriate to proceed to a rehearing.

179. I would like to conclude by expressing my sincere gratitude to both counsel, who argued this appeal with economy, clarity and eloquence.