Neutral Citation Number: [2020] EWHC 348 (Admin)

Case No: CO/2002/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2020

Before :

MR JUSTICE FREEDMAN

- -

Between :

DINESH KUMAR SONI	**Appellant**
- and -	
GENERAL PHARMACEUTICAL COUNCIL	**Respondent**

- -
- -

Mr Kenneth Hamer (instructed by Denning Sotomayor Limited) for the Appellant
Mr Thomas Hoskins (instructed in-house by the Respondent) for the Respondent

Hearing dates: 6 November 2019, 4 December 2019

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Freedman :

JUDGMENT

I Contents

II Introduction

1. This is an appeal from a decision of the Fitness to Practise Committee ("the Committee") of the General Pharmaceutical Council ("GPhC") which made a finding on 16 April 2019 against Mr Soni ("the Appellant"). It found that the Appellant's fitness to practise as a pharmacist was impaired and his name should be removed from the Register in accordance with Article 58(4) of the Pharmacy Order 2010. It decided to suspend his registration forthwith in accordance with article 60(2) of the Pharmacy Order.

2. There is no issue as to jurisdiction because it is accepted that the Appellant is domiciled in England as a joint owner of a property in Hounslow where he currently resides with his sister.

3. The case relates to a single visit by Patient A to the Dundee Superdrug Pharmacy on 10 October 2017 to obtain Emergency Hormonal Contraception ("EHC"), commonly called the morning after pill. The Appellant, a registered pharmacist of 23 years' experience, was the locum pharmacist on duty with lead pharmacist Fridah Nkomeshya.

4. The particulars of allegations before the Committee were as set out in paragraph 10 of the Appellant's Skeleton Argument as follows:

"The Particulars of Allegation before the Committee were as follows:

1. You were first registered as a Pharmacist on 26 July 1994.
Admitted and Found Proved

2. In or around October 2017, you worked as a locum pharmacist at Dundee Superdrug Pharmacy, Overgate Shopping Centre, Dundee, Scotland DD1 1UF ("the Pharmacy"). **Admitted and Found Proved**

3. On or about 10 October 2017, you:
(a) touched Patient A's breasts; **Found Proved**
(b) asked Patient A to remove her dress; **Found Not Proved**
(c) put your hands up Patient's A dress; **Found Proved**

(d) allowed Patient A to leave the pharmacy with Emergency Hormonal Contraception ("EHC"). **Admitted and Found Proved**

4. Your actions at allegation 3(a) and/or 3(b) and/or 3(c) above were sexually motivated. **Found Proved in relation to 3(a) and 3(c)**

In respect of the above your fitness to practise is impaired by reason of Misconduct. **Found Proved**"

III The history of the complaint and the finding of the Committee of the GPhC

5. The relevant history in this case can be summarised as follows. I have borrowed extensively from the skeleton arguments. The Appellant registered as a Pharmacist on 26 July 1994. In October 2017, he was working as a locum pharmacist at a pharmacy on the east coast of Scotland ("the Pharmacy").

6. Upon the visit of Patient A to the Pharmacy on 10 October 2017 to obtain the EHC, the Appellant and Patient A went into a private consultation room. After discussion about a medically induced abortion and its side-effects and Patient A's previous use of the morning-after pill, Patient A alleges that the Appellant physically examined her breasts and then asked her to take her dress off. She declined. Patient A alleged that the Appellant touched her breasts. The Appellant denied the allegation. He stated that his physical examination of Patient A was confined to examining her armpits, at her request, over her clothing, because she complained that her armpits were swollen. Patient A denied that there had been any examination of her armpits or that they were swollen.

7. The Appellant faced four allegations brought by his regulator, the GPhC, of which only allegations 3 and 4 are material to this appeal. They are summarised above in paragraph 4. By reason of these matters, it was alleged that the Appellant's fitness to practise was impaired by reason of misconduct. This was found proved.

8. Patient A raised a complaint on the next day, 11 October 2017: she went into the pharmacy on her way to work. Patient A was also spoken to over the telephone on the morning of 12 October 2017 by Ms Morton-Channon (the investigator of the allegations for the pharmacy).

9. The Appellant was then interviewed by Superdrug on 12 October 2017. A note was kept of this interview. He denied the allegation but, before being told of the detail thereof, described an examination of Patient A's under arm nodes which he claimed he was asked to complete.

10. A referral was made to the GPhC on 18 October 2017 by Ms Morton-Channon. The GPhC conducted an investigation into the allegation which included, on 6 November 2017, an interview with Patient A conducted by Jamie Hughes of Capsticks Solicitors LLP acting for the GPhC. The interview notes indicated that Patient A thought "*parents now getting me a lawyer"*.

11. At a hearing before the GPhC in a separate case which concluded in March 2018 the Appellant was suspended from the register for a period of 12 months. This decision

arose as a result of his having been found to have dishonestly submitted in 2015 a fake letter purporting to be from an NHS services team in order to suspend membership with the health club and thereby suspend his account with a health club and associated payment of his monthly membership fee. The Appellant contested the case before the Committee contending that his email account had been 'spoofed' which made it appear that the letter had been sent him when, he said, this was not the case. The Committee rejected the Appellant's evidence and found that he did send the letter and that he did so dishonestly. The Committee, which considered the sexual misconduct allegations, was not made aware of this pre-existing adverse finding until the sanction stage.

12. On 27 June 2018, the Appellant's representative requested that the GPhC make enquiries into Patient A's potential civil claim. The then representative for the Appellant, Mr Martin Hadley of VHS Solicitors (Mr Hamer and his solicitors did not represent the Appellant before the Committee) indicated that without further information indicating a civil claim that is related to this matter, he did not consider there was any further duty of investigation.

13. On 3 July 2018, the GPhC's representatives received a letter from Digby Brown LLP dated 25 June 2018 which stated that Patient A, their client, was to attend a hearing at the GPhC. It stated that they were instructed in connection with a civil claim against the Appellant's employer, Superdrug, and asked for details to be provided of the case upon conclusion.

14. The principal hearing was due to occur before the Committee on 4-6 July 2018 but was delayed until 26 November 2018. The letter from Digby Brown LLP was disclosed to the Appellant's representatives on 4 July 2018. It was served a second time on 5 July 2018 electronically. At no stage did the representatives of the Appellant request that the letter be included in the hearing bundle for the adjourned hearing.

15. The hearing resumed on 26 November 2018. Following Patient A's evidence, disclosure requests were made by the Appellant for the written records of Patient A's consultation and, specifically, the Appellant contended that it was recorded that she had complained of swollen armpits. According to two emails on 27 November 2018, no notes were in existence, but what was in existence was provided to the parties, namely a number of screenshots from a computer record. The Committee refused to grant further time for the disclosure of additional documents on Day 3 of the hearing because, although there was one missing tab of information concerning 'history' from the computer records and one incomplete entry about the medication, the Committee concluded they had the relevant information. Mr Hadley for the Appellant had earlier cross-examined Patient A during the Committee hearing on her having instructed a lawyer. Patient A confirmed she had instructed lawyers on her behalf. There was no re-examination nor Committee questions on this point.

16. Closing submissions were made on facts on 18 December 2018 and legal advice given to the Committee by its legal adviser. The matter was adjourned until 15-16 April 2019.

17. Allegations 3a) and 3c) and allegation 4 in relation to those allegations were found proven on 15 April 2019. Allegation 3b) was not found proven. On 16 April 2019 the Committee made an order for removal of the Appellant from the GPhC's register.

IV The developments after the finding against the Appellant

18. Following the hearing, the Appellant received two separate categories of correspondence:

    (1) Under cover of a letter dated 17 April 2019 from his professional indemnity insurers (the Pharmacists' Defence Association ("PDA")) in response to a letter from Digby Brown LLP dated 12 April 2019 enquiring as to whether the PDA would be handling any claim, the answer being in the negative. Additionally, there was a letter dated 27 April 2018 sent previously from Digby Brown to Superdrug containing a pre-action protocol claim form referring to vicarious liability for a sexual assault and to psychological injuries for which Patient A was receiving treatment at a health centre. It also said that "our client is still suffering from the effects of her injury. We invite you to participate with us in addressing her immediate needs by use of rehabilitation." It sought disclosure of the incident report of Superdrug and of documentation relating to the complaint to the GPhC.

    (2) The second, an anonymous letter dated 4 May 2019 to the GPhC (which was received by them but the envelope was not retained) copied to the Appellant's solicitors, which purports to have obtained the Appellant's details "*and the order also from [the GPhC] website*" ("the Letter"). The Letter purports to be from an author who has known Patient A for over seven years and to whom she said that "*she made up the story of the harassment as she and her boyfriend knew they could make money and another pharmacist he knows… told them so."*

19. It is now accepted that the GPhC's website prior to the Letter contained a record of the decision against the Appellant, albeit that until the time of the hearing of the appeal, it had been contended on behalf of the GPhC (supported by erroneous evidence) that there was no published decision at the time of the Letter.

20. The Letter makes the following points, namely that Patient A:

    (1) admitted to the writer that she lied in her evidence to the Committee about the alleged sexual assault;
    (2) discussed matters with her boyfriend and another pharmacist at Ninewells Hospital;
    (3) intended to bring a claim against the Appellant's employers and hopes to get £100,000;
    (4) had been coached in her evidence.

21. The Appellant submitted that the appropriate course was to deal with Ground 7 as a preliminary matter and allow the appeal and quash the determination under Article 58(5)(b) of the Pharmacy Order 2010 or remit the matter for a rehearing under Article 58(5)(d) before a fresh panel. In the event, I decided to hear the arguments about Ground 7 first, but then to move on to hear the arguments about the other Grounds. Reflecting that, I shall first of all consider Ground 7 and then the other Grounds. Before so doing, I shall set out the letter in full.

22. The Letter read as follows:

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"GENERAL PHARMACEUTICAL COUNCIL
FITNESS TO PRACTISE COMMITTEE
25 Canada Square
London E14 5LQ
4 May 2019

Dear Sirs,
I write regarding SONI, Dinesh Kumar (Registration Number 2042532). These details are from your website. I got the court address and the order also from your website.
I do not want to provide my name as I am afraid that should [Patient A] find out that I have written to you I could expose myself to physical danger because she and people known to her could hurt me. I have known her for over 7 years. For [Patient A] this is all about money which she wants paid to her by Superdrug on sexual harassment. She lied about this sexual harassment. She and her boyfriend got this idea to make easy money from the media and get the pharmacist into trouble.
[Patient A] told us she made up the story of the harassment as she and her boyfriend knew they could make money and another pharmacist he knows at Ninewells Hospital told them so. She has boasted about making a lot of money from this sexual harassment and told us the money is paid by companies for employees. She hopes to get over £100,000. All she is interested in is making money and make sure this Indian pharmacist cannot work anymore. When I asked her if the person she was accusing of sexual harassment had done anything wrong she told me no. [Patient A] said the stupid Indian had been very helpful when she had pretended about her health problems. [Patient A] has also told me that both her lawyers told her to play the victim and it would help her case if she pretended she was scared to face the pharmacist. The judge would be on her side. The lawyer from London helped her with her statement to make her case strong. [Patient A] laughingly told us that the lawyers were not interested in finding out the truth which helped her. Both her lawyers also coached her on how to present herself in the court and what to say as her London lawyer had told her some of what she had said did not match and she had to pretend to be timid, make sure she cried and that the court saw this. This horrifies me. If you know her, [Patient A] is not scared of anyone in fact if you do not agree with her she gets into slanging matches and has many times been involved in fights since I have known her. She is not timid at all. She is always short of money because she has expensive tastes and always looking for ways to make money without working very hard. When I saw [Patient A] recently she showed me a copy of the court order. I noted the name of the person who she had falsely accused and then looked on the Internet to find all the details. I see from the order the pharmacist has been removed from the register. From this I understand to mean he cannot be a pharmacist anymore. My conscience does not allow me to see a person's life destroyed by lies. This is why I have written to you. I also called the Superdrug store when I first found out from [Patient A] what she had done. The lady in the pharmacy said she would pass on my message to person in charge. I did not give my name but said I was a friend of [Patient A]. But I cannot see this has been done as this poor pharmacist was found guilty by the court.
I request you to put my letter before the judge and see justice done. I was told to also send this letter to the lawyer of the pharmacist and a copy is being posted to him as well. I got his details are from this order and from Google. His name from the order is MR MARTIN HADLEY, Counsel, instructed by VHS Fletchers, Solicitors, appeared

on behalf of Mr Soni, who was present. If this is not correct then please send a copy of my letter to the correct lawyer.
Yours faithfully,

CC: MR MARTIN HADLEY, VHS Fletchers, 111 Carrington Street, Nottingham, NG1 7FE"

Grounds of appeal

V Ground 7

(a) Application to admit the Letter for the appeal

23. There are six grounds of appeal as regards the finding of misconduct referable to the evidence before the Committee and its Decision. The seventh ground relates to the Letter which was received after the Decision was published. Ground 7 states that *"the Committee would [in all] probability have rejected the evidence of Patient A and found paragraphs 3(a), 3(c) and 4 of the Allegation not proved had they known at the time of the hearing of any of the matters contained in the letter of 4 May 2019 sent to the Council [GPhC] following the hearing."*

24. Along with Ground 7, there was an application on the part of the Appellant to admit the evidence of the Letter. The application was heard by Mr Justice Swift on 9 October 2019. The Appellant said that he wished to deploy the Letter in the appeal as the basis of his seventh ground. He made the application under *Ladd v Marshall* [1954] 1 WLR 1489 contending that the three criteria were satisfied, namely *"first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."*

25. The GPhC accepted that the first condition was made out but said that the second and third criteria were not satisfied. It submitted that since the Letter was anonymous, it was of little or no evidential value.

26. Mr Justice Swift held the following:

"6. I disagree with the submission that the second and third Ladd v Marshall criteria are not met. The fact that the letter is anonymous does reduce its evidential value. Quite obviously, the maker of the document cannot be approached for direct comment or evaluation, or to be asked further questions in relation to the information set out in the letter. However, it is perfectly possible that some steps can be taken to test the veracity of information contained in the document. One example I mentioned in the course of the hearing is that the maker of the document claims to have spoken to staff at the pharmacy at the Superdrug store in Dundee (the store where Mr Soni had worked), and to have raised his/her concerns with one of the staff at the pharmacy counter. That, at least, is one matter capable of investigation which could be relevant to the assessment of the

veracity of the claims made elsewhere in the letter. There may be other matters too.

6. I do not consider the anonymous letter can be dismissed quite so summarily as the GPC seems to suggest. This is so, in particular given the public interest at the heart of this type of regulatory disciplinary procedure – i.e., the public interest that the profession is regulated fairly, properly and, to the extent possible, accurately. My conclusion is that the Ladd v Marshall criteria are met and that it is appropriate, as a matter of fairness in these proceedings, for the anonymous letter to be admitted as evidence in the appeal."

27. Mr Justice Swift made an order in the following terms, namely that
    (1) the Appellant had permission to rely on the Letter for the purposes of the appeal;
    (2) the GPhC shall provide disclosure of copies of correspondence between the GPhC and/or its solicitors, and Patient A and/or her solicitors, copies of any attendance notes of such communications and copies of any draft of Patient A's witness statement for the disciplinary hearing and notes relating to it;
    (3) the GPhC shall serve an affidavit confirming that the above documents have been produced and setting out the steps taken to search the documents.

28. As a result of the order for disclosure, there was provided among other thing numerous documents comprising correspondence between the GPhC and Patient A of an administrative nature relating to her attendance at the various hearings. There was a statement of Ms Fleck which purported to show that the result of the hearing was not on the GPhC website prior to the Letter, but this turned out to be untrue and mistaken. There was also produced conventional correspondence between Patient A and Capsticks solicitors regarding the statement of the Appellant including consideration of revisions. It also includes reference to anxiety on the part of Patient A about her evidence e.g. as outlined in an email on 3 July 2018.

(b) The Appellant's argument

29. The arguments were developed on the appeal as follows. As drafted, the ground suggests that the Letter by itself should lead to a reversal of the decision. As developed, the argument concentrated on a submission that the Letter gave rise to a need for a remittal for a rehearing of the case.

30. The Appellant submitted that this was not a short letter, but a detailed letter. It was not simply a statement that Patient A said that her evidence was untrue, but it was connected with her civil claim. Whilst it was known that there was a civil claim and that it could be suggested that the allegation was made up for the purpose of the civil claim, it was different in the context of the Letter and a specific conversation which could be put to Patient A. Whilst it reduced its weight that it was anonymous, it did not mean that it was of no weight.

31. Further, it was submitted that whilst Mr Justice Swift had found that the Letter was admissible for the purpose of the appeal, it was difficult to see how it could be different for the appeal from a re-hearing. The relevance to the appeal, and the second and third

grounds of *Ladd v Marshall* must be predicated upon (a) the likelihood that the document would be admissible at a re-hearing of the Committee, and (b) the fact that the information in the document is apparently credible though it need not be incontrovertible. It was also submitted that there was no appeal against the decision of Mr Justice Swift as a result of which the appellate court must work on the basis that the *Ladd v Marshall* criteria had been established at least for the purpose of the appeal. Time had now expired to appeal in time, and the GPhC did not suggest that an application would be brought to appeal out of time.

32. The Appellant submitted that there should therefore be a rehearing in order to decide the issues.

(c) The GPhC's Argument

33. On behalf of the GPhC, it was submitted that the Letter carried no weight at all. It was incapable of being tested because of the anonymity. The writer could not be identified, and so the writer could not be cross-examined. It was possible that the Letter had been made up as a self-serving exercise by or on behalf of the Appellant or by some misguided third party seeking to assist him. Further, the Appellant had a previous disciplinary finding against him, namely of dishonestly submitting a fraudulent letter from an NHS institution to a health club in order to indicate that he should be entitled to curtail his gym membership as a result of a medical condition. It was said that if there was a re-hearing, then this might count against the credibility of the Appellant.

34. The GPhC also submitted that the Letter did not provide anything new because the Appellant below was aware of the civil claim and was therefore able to pursue a case that the complaint to the regulator was in order to create a result to be used in order to obtain damages. If that was not put fully to Patient A, that was a decision of the Appellant which he was not entitled to revisit.

35. The GPhC accepted that it was a matter of degree when new information would be sufficiently probative to open up a new hearing. It depended upon a comparison of the information available at the hearing in comparison with the new information. Having regard to the knowledge of the civil claim, it was submitted that the difference in degree was not so substantial to make it fair in all the circumstances to require a rehearing. It might have been different if the Letter had been signed by a person who could be identified or if the conversation with Patient A referred to in the anonymous letter had been recorded. Whilst the Letter had been admitted for the purpose of the appeal, the balance was in favour of it not being admitted for the purpose of a new hearing. The decision reached was not wrong nor was it procedurally unfair.

(d) How the new information fits into the appeal/statutory framework

36. The statutory appeal stands to be dealt with by the Court under CPR part 52. The appeal is by way of rehearing (both as regards doctors under section 40 of the Medical Act 1983 and the instant appeal under the Pharmacy Order article 58): see Practice Direction 52D, paragraph 19.1(2). It has been described as a re-hearing without

hearing again the evidence as explained by Foskett J in *Fish v GMC* [2012] EWHC 1269 (Admin) at [28]. CPR part 52.21(2) and (3) state as follows:

> *"(2) Unless it orders otherwise, the appeal court will not receive—*
> *(a) oral evidence; or*
> *(b) evidence which was not before the lower court.*
> *(3) The appeal court will allow an appeal where the decision of the lower court was—*
> *(a) wrong; or*
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*
> *…"*

In a preliminary section to grounds 1-6, the approach to be taken by an appellate court to professional regulatory appeals is set out in more detail at paragraphs 78-80 below.

37. The issue as regards ground 7 is this. It is not the case that the Letter by itself shows that the decision of the Committee was wrong. That is because the Court is unable to find that in all probability the Committee would have rejected the evidence of Patient A if it had known of the matters contained in the Letter, because it begs the question as to whether the Letter has any weight and if so what weight is to be given to it. In those circumstances, the question is whether in view of the Letter, the statutory powers under the Pharmacy Order 2010, Article 58 (5)(d) of the Pharmacy Order 2010 ought to be invoked. This allows the Court to *"remit or refer the case to the Registrar or the Fitness to Practise Committee for disposal of the matter in accordance with the relevant court's directions".*

38. I asked for assistance of the parties as to whether the reasoning of the Court of Appeal in civil proceedings in the case of *Noble v Owens* [2010] EWCA Civ 224 applied. The Court in that case decided that in the event of an appeal based on fresh evidence, absent incontrovertible evidence of fraud, it is necessary to prove a fraud prior to setting aside the judgment. It is not enough to say that there is an arguable case that the judgment was procured by a fraud, and that on that basis alone there can be a rehearing without having to decide the question of fraud. In *Noble v Owens*, the Court of Appeal ordered that the case be remitted to the lower court to decide the question of the fraud rather than requiring the appellant to commence a fresh action.

39. Following the conclusion of oral argument, and whilst in the course of preparation of a judgment, I sent to the parties a written note asking, subject to my views of the case, whether *Noble v Owens* might apply (and referring also to the recent Supreme Court case of *Takhar v Gracefield Developments Ltd* [2019] UKSC 13). In that event, I asked for submissions (subject to my overall consideration of the matter as to which I had not reached concluded views) whether the case could be remitted to decide simply whether there had been a fraud on the Committee rather than for a full rehearing. Following and as a result of that note, the parties have sent three documents to the court namely (1) a further note on behalf of the Appellant dated 12 November 2019, (2) a second supplemental skeleton argument on behalf of the GPhC dated 14 November 2019 (3) the Appellant's reply to the GPhC second supplemental skeleton argument dated 15 November 2019.

(e) Supplemented submissions of the Appellant

40. The Appellant submitted that *Noble v Owens* had no application and/or should be disapplied. Attention was drawn to the judgment of Smith LJ [27] that there may be exceptions to the general rule of requiring the issue of fraud to be tried e.g. where there will be no injustice to the claimant and there are good policy grounds for ordering a re-trial as there was in *Skone v Skone* [1971] 1 WLR 812. In that case there was a strong prima facie case of fraud on the court.

41. It was submitted that *Noble v Owens* did not apply to the present type of case, which was governed by the Pharmacy Order 2010. In any event, the public interest is at the heart of this type of regulatory disciplinary procedure. Article 58 (5)(d) of the Pharmacy Order 2010 allows the court to remit or refer the case as quoted in paragraph 37 above. Mr Hamer said that he was not aware of any case in which the court had remitted or referred to be tried an issue of whether or not a fraud had been committed in the first hearing. He submitted that such an approach would be contrary to scheme of the legislation where the role of the Fitness to Practise Committee is to determine the allegation issued by the regulator. He said that there was no provision for ordering a trial of the issue of fraud unless there was an allegation that the Registrant had obtained a judgment by fraud. He submitted that it would be difficult for the first panel or a fresh panel to try the issues raised by the Letter alone without considering the context of the case.

42. The High Court could not determine whether there had been fraud, because such matters in the scheme of the legislation should be dealt with by the specialist tribunal whose function would be usurped if the High Court were to decide the matter. Thus, the fair thing would be to have a full re-hearing before a differently constituted Committee under Article 58 of the Pharmacy Order 2010. Since the criteria in *Ladd v Marshall* had been satisfied in this case, justice required a hearing before a fresh panel so that it would come to the matter with a fresh mind.

(f) Supplemental submission of the GPhC

43. The GPhC submitted that the new evidence was at its absolute highest merely prima facie evidence. The GPhC submitted that absent fraud being admitted or the evidence being incontrovertible, the court should not allow the appeal: see *Noble v Owens* at [27] per Smith LJ, [44, 50 and 59] per Elias LJ and [71] per Sedley LJ. There is no basis to depart from the principle that fraud needs to be established and that evidence which is at highest prima facie evidence of fraud is not sufficient.

44. The GPhC submitted that Article 58 of the Pharmacy Order 2010 does not expressly permit a trial of the issue of fraud. Further, Fitness to Practise Committees are not equipped to examine the question of conduct of allegations against people other than Registrant. In the circumstances of this case that would amount to a rehearing in the central issue of the entire case. Mr Hoskins, like Mr Hamer, said that he too was not aware of a case where there has been ordered such a hearing.

45. For the GPhC, it is therefore said that even if there is new prima facie evidence of fraud, the original judgment should not be set aside because the evidence does not prove a fraud: indeed the primary submission as set out above was that the Letter fell

short of prima facie evidence. It was also said that it should not be remitted either by reference to the case as a whole or simply to the question of whether there has been a fraud. Proceedings might be brought for perjury or defamation. The interests in maintaining finality outweighed the interest of one practitioner. Thus, the case cannot properly be remitted.

(g) Discussion

46. Although the parties are diametrically opposed as to submitted outcome, their joint experience is that the court has not ordered the trial of an issue of fraud in this context and they both say that this should not occur in this case. I accept that they are correct that there are sufficient distinctions from the case of a High Court trial for the principles in *Noble v Owens* not to apply. In particular, these are public law proceedings where the key issue is whether a practitioner is a fit and proper person to practise. The matter was well put by Mr Justice Swift at paragraph 7 of his judgment in the following terms, namely *"This is so, in particular given the public interest at the heart of this type of regulatory disciplinary procedure – i.e., the public interest that the profession is regulated fairly, properly and, to the extent possible, accurately."* Thus, the key should be whether on the available evidence, the professional is fit to practise, and, if not, what is the appropriate sanction. Further, whilst the High Court as a court of first instance in a civil case may hear a case of whether there was a fraud committed on an earlier court, that is not generally what the specialist tribunal does. It makes findings about facts, considers whether there has been an impairment to fitness to practise and then considers the appropriate penalty. Thus, where a case is to be remitted to the Committee under Article 58(5)(d) of the Pharmacy Order 2010, it fits more into the statutory scheme for there to be rehearing of the case with the new evidence than to have a finding as to whether there was a fraud.

(h) Further enquiries

47. At the hearing before him, Mr Justice Swift considered enquiries which might be made around the Letter. There have been few enquiries made. The GPhC did not make any enquiries because, as it turns out wrongly, it had come to a belief that the decision was not on the website at the time of the Letter. It was therefore thought that demonstrably the letter was not genuine. It is now accepted that the decision was on the website prior to the writing of the Letter. That was demonstrated on behalf of the Appellant, so causing the GPhC to withdraw its earlier belief to the contrary.

48. There have been potential enquiries which have been identified to verify whether the Letter was true or not, which may or may not take the enquiry further. Mr Justice Swift identified that there might be an enquiry within the pharmacy as to the woman who might have taken a message from the alleged author. The GPhC in its supplemental skeleton argument [11a] refers to the same effect to *"contact Superdrug, Dundee to establish whether any phone call was received."* In addition to this, the GPhC added at [11b] to *"obtain statements from the GPhC solicitors and staff members who had contact with Patient A to determine if their actions constituted coaching as suggested."*

49. Following the hearing of 6 November 2019, the GPhC applied to introduce evidence of enquiries which it had conducted, mainly in order to refute the statement in the Letter that Patient A had alleged that she had been coached with her evidence. It is said that the Court raised in the hearing of 6 November 2019 the possibility of adjourning for further enquiries to be conducted, and it is said that the Appellant objected to this course being taken. There was no order to adjourn for this purpose. On 6 November 2019, the Court reserved its judgment, and thereafter sought assistance as regards the *Noble v Owens* question. Nevertheless, the GPhC filed evidence from David Collins dated 21 November 2019, Ann Sykes dated 18 November 2019, Jamie Hughes dated 20 November 2019, Nimi Bruce dated 14 November 2019 and Sharan Longia dated 20 November 2019. The thrust of the evidence of Mr Collins, Ms Hughes and Ms Bruce each of Capsticks Solicitors LLP for the GPhC is about the interaction with Patient A in connection with how her evidence was prepared and designed to deal with and deny the reference to coaching in the Letter. The statement of Ms Longia of the GPhC is her enquiry as to whether a call was made to the Dundee branch of Superdrug. The statement of Ms Sykes of the GPhC is about her interaction at the hearing with Patient A.

50. I do not accept that there is any good reason why this evidence was not advanced before the hearing before Mr Justice Swift. I accept also that the consequence of the late service of this evidence was that the Appellant had limited time to consider it. I have considered carefully the further witness statement of the Appellant's solicitor Sadhana Soni dated 3 December 2019 in response. In the exercise of my discretion, I shall allow the new evidence which is responsive to the admission of the Letter, but I take into account the matters contained in the witness statement of the Appellant's solicitor as to the short time to consider it before the hearing of 4 December 2019.

51. Even without this additional evidence, the allegation of coaching in the Letter appears rather far-fetched in which it is suggested that Patient A was given advice to fake emotions, apparently by solicitors. It is second-hand hearsay, information related by solicitors to Patient A to the author of the Letter. Further, the disclosure which was ordered by Mr Justice Swift do not advance any allegation of coaching. The statements of those involved in the preparation of the evidence are largely evidence of the customary way in which the authors prepare evidence, and of course is not to supportive of the allegation of coaching. There is no real prospect that at a rehearing the anonymous allegation that Patient A said that she had been coached will be taken further beyond the assertion in the anonymous Letter and denial.

(i) Law regarding anonymous/hearsay evidence

52. In the course of the hearing, there was consideration of law by the advocates, particularly after assistance was sought from the Court about *White v Nursing and Midwifery Council* [2014] EWHC 520 (Admin) and any other case. In that case, Mitting J said the following:

"11. Despite the permissive wording of Rule 34(1) the ability of the committee to admit relevant evidence, whether or not admissible in civil proceedings, is constrained by "the requirements of ... fairness" (see the analysis of what is required by Stadlen J in Ronhoeffer v GMC [2011] EWHC 1685 (Admin), which was not cited

to the committee) and the requirement on the facts for the registrant to have the opportunity to test the evidence of a significant complainant in NMC v Ogbonna [2010] EWCA Civ 216. The general approach of the Strasbourg and UK courts to anonymous and hearsay evidence in criminal proceedings can inform the committee's decision on the admission of either category of evidence. As always, the issue is fact-specific. There is no reason of principle why anonymous or hearsay evidence should not be admitted (see Doorson v Netherlands [1996] 22 EHRR 330 as to anonymity and Al-Khawaja v UK [2012] 54 EHRR 23 as to hearsay). In a criminal case the court is astute to see if adequate measures are available to balance the unfairness which the admission of the evidence would otherwise cause.

12. *In England and Wales the admission of anonymous hearsay in criminal proceedings is, in principle, prohibited (see R v Ford [2010] EWCA Crim 2250), though academic commentators have rightly observed that section 117 of the Criminal Justice Act 2003 authorises the admission of anonymous hearsay by way of business documents, so that the rule is not absolute.*

13. *In the context of disciplinary proceedings, it is difficult to conceive of circumstances in which the admission of potentially significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirement of fairness. This is not because the rule in criminal cases applies without more, but because of the underlying principle which it applies and illustrates. It cannot normally be fair for significant evidence about the attitude and conduct of a registrant to be admitted against her which she has no opportunity to test or meet by anything beyond a bare denial. Anonymity prevents her from advancing any informed reason why the informant might be critical of her attitude and conduct, but does permit cross-examination of the informant. The fact that the evidence in hearsay precludes testing by cross-examination but not by other enquiries or conflicting evidence.*

14. *In a case such as this, in which, from the evidence given by live witnesses it was clear that there were two views of the registrant's attitude and conduct amongst the staff of the departments in which they worked, removal of both means of subjecting the evidence to critical appraisal meant that the requirements of fairness could not be satisfied. The evidence of anonymous members of staff who could not have been cross-examined should not have been relied on probatively.*

15. *The evidence was admissible for a much more limited purpose to explain the circumstances in with the registrants came to be investigated and, had there been any disagreement about it which there was not, perhaps also to show that there was discontent or disharmony in the accident and emergency department. As I hope is apparent from what I have stated nothing in the principles which must be applied prohibits the introduction and reliance on anonymous hearsay in all circumstances. In particular when the equivalent of business records in a hospital context are relied upon, for example a note of a patient's record about his or her condition, it may not always be possible to identify the author, but such evidence is plainly admissible*

under Rule 31(1) because it does not infringe the requirement of fairness. It is what it purports to be: a contemporaneous note by someone doing their job of something which is apparent to them at the time. The evidence here was of an entirely different category as I have explained. Given that the committee erred in admitting the anonymous statements, it is necessary to go on to determine what impact that had on the fairness of the hearing and of the committee's findings"

53. At paragraphs 25 and 26, Mitting J declined to quash the findings of the Committee since it was apparent that it placed no weight upon the statements in reaching the decision adverse to the two appellant registrants in that case. Context is everything.

54. That decision was about the evidence against the registrant, particularly where a case was founded upon such evidence. The GPhC submitted that the twin considerations of relevance and fairness in the rule concerning the admission of evidence in rule 24 of the *General Pharmaceutical Council (Fitness to Practice and Disqualification etc. Rules) Order of Council 2010 SI 1615/2010) (*"the GPhC Rules"), apply equally to each party and all evidence. It therefore submits that the unfairness cited by Mitting J as applying to the attitude and conduct of "a registrant" should apply equally to the regulator and, indeed, fairness extends to the fair treatment of witnesses for either side. The relevant part of rule 24 reads as follows:

"(1) All questions of admissibility of evidence and law before the Committee are to be decided by the Committee (after having obtained the advice of the legal adviser, where appropriate).

(2) Subject only to the requirements of relevance and fairness, the Committee may receive—

(a)subject to paragraph (3), any documentary evidence; and

(b)where a hearing is held, any oral evidence,

whether or not such evidence would be admissible in any subsequent civil proceedings if the decision of the Committee were appealed to the relevant court."

55. Reference was also made to the subsequent case of *Thorneycroft v. Nursing and Midwifery Council [2014] EWHC 1565 (Admin),* which was decided at a similar time and summarised the relevant principles in respect of hearsay generally (as opposed to anonymous hearsay specifically) at paragraph 45 per Mr Andrew Thomas QC sitting as a deputy judge of the High Court as follows:

"*45. For the purposes of this appeal, the relevant principles which emerge from the authorities are these:*

1.1. The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before admitting the evidence.

1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.

1.3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.

1.4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that the evidence is demonstrably reliable, or alternatively that there will be some means of testing its reliability."

56. The GPhC submitted that the more comprehensive test of hearsay generally outlined in *Thorneycroft v. NMC* as well as the factually similar example of anonymous hearsay in *White v. NMC* render it unlikely that the anonymous hearsay Letter would be admitted by the Committee or, if it were, that significant weight would be attached to it.

57. In the instant case, the Appellant submitted that Patient A is capable of being cross-examined (and re-examined), and she is able, if she chooses, to rebut what is said in the Letter against her. Whether the Letter comes from the "prosecution" or the "defence" misses the point. The reason why it may be unfair to admit an anonymous complaint against a registrant is because the author of the complaint cannot be cross-examined, and Article 6(3)(d) of ECHR, which is applied in disciplinary proceedings, provides that everyone charged with a criminal offence has the right to examine or have examined witnesses against him; see *R (Bonhoeffer) v. General Medical Council* [2011] EWHC 1585 (Admin) at [85] – [89]. Patient A is not a party to the disciplinary proceedings – she is a witness – and as such the Court is not concerned directly with article 6(3)(d). However, she is capable of being cross-examined.

(j) Discussion

58. Before the hearing of the appeal, Mr Justice Swift decided that the requirements of *Ladd v Marshall* were satisfied. That was for the purpose of the hearing of the appeal, such that this Court could decide whether in the light of the Letter, the Court should allow the appeal and/or remit the case to the Committee. This was a preliminary course of action only because the Court on the appeal would be able to see the Letter in the context of the case as a whole.

59. Insofar as the Appellant's submissions treated the satisfaction of the *Ladd v Marshall* either as dispositive of the case for remitting the case to the Committee or as indicative that this is what should happen, it is important to emphasise that the Courts have expressed that the satisfaction of *Ladd v Marshall* simply provides an ability of the appellate court to consider the material: it is then necessary to consider the impact of the evidence and whether it should lead to an order to remit. In *Arundel Corporation v Khoker* [2003] EWCA Civ 491, Mummery LJ at [35] said the following:
"I have reached the conclusion that the fresh material sought to be introduced on the appeal is, in all the circumstances, credible as prima facie evidence that, contrary to the evidence given by Mr Khokher at the trial, no valid counter-notice was served. Permission should be given for it to be adduced on the appeal. It will be for the court that hears the appeal to decide what impact the evidence has on the issue and whether it is such that the issue on the counter-notice should be remitted to the county court to be re-tried."

60. There is a particular feature in respect of which caution is required on a *Ladd v Marshall* application, namely if the reception of fresh evidence would lead to a remitting the case to the Committee. It has been said that a court has to be particularly cautious about allowing in new evidence where: (a) the appellant is seeking to reverse the judgment by attacking the judge's assessment or credibility of witnesses or to obtain an order for a new trial; and (b) what is intended is to put in evidence further cross-examination of a witness (whether expert or lay) who has been cross-examined at trial: see *Riyad Bank SAL v Ahli United Bank (UK) plc* [2005] EWCA Civ 1419. This has been expressed by saying that the discretion to admit the new evidence should only be allowed if it was 'imperative in the interests of justice': see *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255.

61. In my judgment, even where the new evidence has been admitted for the purpose of an appeal, the Court still must exercise caution about ordering a rehearing or cross examination of a witness who has been cross-examined at the first hearing. This is not to go back on the *Ladd v Marshall* order, but because those considerations remain important at the stage when it considers on appeal the impact of the new evidence on the case as a whole. This was the consideration of Mummery LJ in the last sentence of paragraph 35 of that which he quoted in *Arundel Corporation v Khoker* above, namely to consider the impact of the evidence on the appeal as a whole and especially whether it is such that the matter should be remitted. This Court on the full hearing of the appeal is in a much better position to do that than a court simply deciding whether to admit the evidence. That is because this Court has been able to look at Ground 7 in the context of the case as a whole including the other grounds of appeal and extensive reference to the transcripts of the evidence before the Committee and the detailed reasoning of the Committee as well as numerous other documents before the Committee contained in several lever arch files before this Court.

62. If the Court considers that the decision was wrong or unjust because of a serious procedural or other irregularity in the proceedings before the Committee, then the appeal will be allowed, and it may be that it would be remitted. However, it is not the case that the Letter proves that the Decision was wrong nor that there was an irregularity. The question then arises as to the threshold where neither was the decision wrong on the basis of the evidence then before the tribunal nor was there was any irregularity. Is there to be a balance between the injustice of not conducting a new trial despite the new evidence as opposed to the damage to the interests of finality in having to reopen up the case? The approach which I shall adopt for the purpose of this case is of a low threshold. It is that in order for a case to be remitted, there must be a real prospect that the Committee might come to a different conclusion from the one which they reached because of the Letter and anything revealed directly or indirectly as a result of the Letter. If such a threshold is not reached, there is no point in the Committee (whether as originally constituted or with a new panel) considering the case further. It might be contended in other cases (or even this case) that sometimes the balance of fairness might be against remitting even if the above threshold had been established. I do not need to decide that: I shall rest the decision on remitting if there is a real prospect of a different conclusion caused by the Letter and anything revealed directly or indirectly as a result of the Letter.

63. However, justice does come into the matter if there is no real prospect of a different conclusion caused by the Letter and anything revealed directly or indirectly as a result of the Letter. If in those circumstances, the matter were to be remitted, that would give rise to a rehearing with the possibility of retrying by reference to matters entirely independent of the Letter. That would then be an unnecessary second hearing which is contrary to any sense of finality. Further, it would impose a difficult burden on the second Committee in having to decide the extent to which it took into account evidence of the first hearing. To that extent only, finality does have a part to play. This makes it necessary not to remit the case unless there is a real prospect that the Letter or anything revealed directly or indirectly as a result of it might lead to a different conclusion.

64. The matters which I now observe in respect of the Letter viewed against the case as a whole are as follows.

65. First, whilst the Letter is admissible, it has little weight. It is hearsay at best (some of it is second-hand hearsay: first, the lawyers to Patient A, and second, Patient A to the author of the Letter). It is not possible to cross-examine the author because of their anonymity. That is the case of course in respect of known witnesses who do not attend for cross examination. Where the author cannot even be identified, then that begs the question as to why there is anonymity, and as to the genuineness and truth of the Letter. If there were truth in the Letter, then the author would be expected to identify themselves. The reason given of being identified by Patient A, namely the fear of revenge seems hollow: if the Letter had any truth, the author could be identified by being the person who had known Patient A with whom she had spoken about the complaint. Thus, the reason for anonymity does not make any obvious sense. Further, it would also be expected that the author would have written the Letter in the first instance and not simply left some unidentified message with the store. It is not even apparent from the Letter when the alleged conversation on the phone took place, whether it was just before the Letter or earlier, even before the hearing was concluded. In addition to the inability to test the evidence in the Letter, the Letter on its face is not reliable

66. Secondly, the unreliability of the Letter is greater still because the allegation of coaching in the Letter stretches credulity. The lawyers have on the face of the Letter gone into coaching her in amateur dramatics to *"play the victim and it would help her case if she pretended she was scared of the pharmacist to make her case strong…pretend to be timid, make sure she cried and that the court says this."* There was a reference to her London lawyer and to *"both her lawyers"*: it is not clear whether both lawyers is a reference to two lawyers from Capsticks or one from London and a Scottish lawyer from the firm assisting her in her civil claim. As regards *"the London lawyer"*, it is that a lawyer involved in the disciplinary process would wish the complainant to put on a pretence of emotions before the Committee with intent to mislead. Even without the evidence of lawyers from Capsticks denying coaching and the utterly conventional documents about how the case was prepared, this scenario is barely credible.

67. Thirdly, the anonymous Letter is to be considered against a Decision of the Committee following a detailed investigation of the events in question which is coherent and compelling. This is particularly so as regards the decision to prefer the evidence that there was no discussion about swollen armpits was only in part because

of the reaction of Patient A when the question was put. It was also because this was not mentioned by the Appellant in the information provided to the GPhC two days after the consultation or in the subsequent statement. This served to undermine the account of the Appellant. The evidence about the patient's medical records ("PMR") is also damaging to the credibility of the Appellant. The Appellant referred to the fact that there was an electronic PMR which he believed he had used to record details of the symptoms. However, it did not contain any details of Patient A's symptoms. If this had been done, then the Appellant would not have failed to recall the creation of PMR for Patient A. All of this added to the picture of invention of the swollen armpits story: see the Decision at paragraphs 148-152.

68. Likewise, the Committee considered the question as to why the Appellant was discussing the risk of breast cancer with Patient A in the context of a consultation for the provision of EHC, given that this was not necessary in order to complete the required EHC pro-forma. There was no reference to other risks such as risk of a stroke. In the circumstances, the Committee came to a view that the discussion was only in order to provide a reason for an examination of Patient A's breasts for lumps. The reason for raising breast cancer is the fourth ground of appeal, and this will be considered below.

69. There is a wider context to all of this. The evidence of the Appellant about the testing of the armpits raises overriding questions. There is a question as to whether a physical examination of a patient by a pharmacist was necessary in the context of the provision of EHC. If there was a problem to investigate, there is a question as to why such examinations were not matters for a doctor. Even though contradicted, the overclothing examination of armpits on the account of the Appellant establishes a course of conduct which seems by itself to have been unnecessary, and therefore affects the account of the Appellant: see the Decision at paragraphs 156-164. This led the Committee to conclude at paragraph 193:

"*The Committee having been satisfied that there was no need for a physical examination when conducting an EHC consultation, even if Patient A did have swollen armpits as the Registrant claimed, this symptom was not contra-indicated for the dispensing of EHC. The Registrant had no need to establish if Patient A had swollen armpits and no need therefore to conduct any physical examination for that, or any other, purpose. And the Registrant on his own account dispensed EHC in any case."*

70. It was in this context that the Committee heard and adjudicated upon the conflicting evidence of about allegation 3(a), 3(b) and 3(c) above. This was a far more detailed consideration than whether the Committee preferred the assertion of Patient A that such an examination took place against the denial of the Appellant, but it was a multi-factorial consideration of the evidence as a whole.

71. Fourthly, Patient A's evidence was the subject of scrutiny when the complaint was taken shortly after the incident and when it was written up into the form a statement a month later. Her account has been tested in examination and cross-examination of the Appellant. It has not only survived scrutiny, but the conclusions of the Committee were strongly to prefer the evidence of Patient A to the evidence of the Appellant. It has been a protracted and detailed process. There is no real prospect that Patient A would change her account because of an anonymous Letter.

72. Fifthly, it is necessary to consider what would happen if there were a rehearing by reference to the new material. Mr Justice Swift considered further enquiries which might take place in order to take the matter further. Enquiries about Capsticks' preparation of the evidence of Patient A have not taken this matter further, at least to undermine the evidence of Patient A, nor have they led to trains of enquiry. Nor too have the discovered documents of which Mr Justice Swift ordered production. Nor have enquiries about a call to Superdrug referred to in the Letter. There would be an opportunity to cross-examine Patient A, and without any material other than the anonymous Letter. As stated above, there is no real prospect that she would say that she had fabricated her account. She has already been challenged about her evidence. There was knowledge already on the part of the Appellant's representatives about a civil claim, but they did not raise this into an allegation that the whole story was invented in order to obtain money through a false claim. It follows that the opportunities for further enquiries contemplated by Mr Justice Swift have not borne fruit.

73. The above criticisms of the anonymous Letter lead to the conclusion that it is unreliable and stretches credulity. For the reasons above, it cannot be tested without an identified author and without its author being cross-examined, and there is no reason to believe that any further enquiries by reference to the Letter would change the position. The Letter lacks weight because the evidence of Patient A has been tested as set out above, and the decision of the Committee is coherent and compelling. This is not based on the submission of the GPhC that the Letter went simply to the credit of Patient A and that the questioner would be bound by the answer: it is not about a collateral matter and so the submission is wrongly made: see Phipson on Evidence 19th Ed. at para. 12-46 under the section about 'no contradiction on collateral matters, the principle'. It is based on the inherent unreliability of the Letter, the inability to test it without an identified author and all the matters set out above.

74. In these circumstances, there is no real prospect of the Committee (whether as originally constituted or a freshly constituted) on a rehearing reaching a different conclusion as a result of the Letter or anything revealed directly or indirectly as a result of the Letter. Accordingly, there is no basis to remit the case for a rehearing.

75. The GPhC says that it is necessary to put into the balance the fact that on a rehearing, it would be suggested that the previous disciplinary matter about fabricating evidence to the gym may be relevant: it was not clear whether it was submitted as evidence of dishonesty or propensity to fabricate a document. I have come to the conclusions set out in paragraphs 73 - 74 above without putting the previous disciplinary matter into the balance and without considering its possible impact at a rehearing.

76. Further and separately, there is a need for caution about having a rehearing independently of the Letter essentially to see whether a different conclusion would be reached in circumstances if nothing happened which was wrong and if there was no irregularity before the Committee. In that event, this would be a second hearing not because the Decision was wrong or of a procedural irregularity, nor because the Letter required a rehearing on the basis of a real prospect of the Letter or anything revealed directly or indirectly as a result of the Letter altering the conclusion of the Committee. It would then be a remittal for a rehearing without a justification which would infringe the points about finality and would be inimical to justice for the reasons set out in paragraph 63 above.

77. For all these reasons, the Letter does not give rise to a finding that the Decision was wrong or irregular, nor that there should be ordered to be a remittal for a rehearing. It follows that Ground 7 of the appeal is dismissed. However, the conclusion as to Ground 7 is not dispositive, because it is now necessary to consider the wide-ranging challenge to the Committee's Decision under Grounds 1 - 6.

VI Grounds 1 - 6

(a) Preliminaries

78. There is a deference of an appellate court to a specialist tribunal. Although as noted in paragraph 36 above, the appeal is by way of rehearing, it is a re-hearing without hearing the evidence again and the proper approach has been stated as follows. In *Meadow v. GMC [2007] QB 462* at paragraph 197, the Court of Appeal (Civil Division) (in that case, referring to a medical tribunal) stated that the appellate court "*must have in mind and give such weight as is appropriate in the circumstances to the following factors:*

    (i) The body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserve respect;
    (ii) The tribunal had the benefit, which the court normally does not, of hearing and seeing the witnesses on both sides;
    (iii) The questions of primary and secondary fact and the overall value judgment to be made by the tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers."

79. Further guidance as to the extent of deference the appellate court should pay to the Committee's decision in cases where the credibility was in issue was given by the Court of Appeal (Civil Division) in *Southall v General Medical Council [2010] EWCA Civ 407,* Leveson LJ said (at paragraph 47, emphasis added):

    "First, as a matter of general law, it is very well established that findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are ***virtually unassailable*** *(see Benmax v Austin Motor Co Ltd [1955] AC 370); more recently, the test has been put that an appellant must establish that the fact-finder was plainly wrong (per Stuart-Smith LJ in National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1995] 1 Lloyd's Rep 455 at 458). Further, the court should only reverse a finding on the facts if it "can be shown that the findings … were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread" (per Lord Hailsham of St Marylebone LC in Libman v General Medical Council [1972] AC 217 at 221F more recently confirmed in R(Campbell) v General Medical Council [2005] 1 WLR 3488 at [23] per Judge LJ). Finally, in Gupta v General Medical Council [2002] 1 WLR 1691 , Lord Rodger put the matter in this way (at [10] page 1697D):*

    > *"In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability*

are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position…"

80. Although each case necessarily turns on its own facts, the existence of inconsistencies in the evidence is unlikely to be determinative nor fatal, *see Mubarak v.GMC [2008] EWHC 2830 (Admin) "The task [for the Panel] is to consider whether the core allegations are true. It is commonplace for there to be inconsistency."* Similarly, the fact of a tribunal of fact rejecting one allegation but finding other allegations proved is *"not unusual"* (*see,* for example, para 54 of *Yaacoub v. GMC* [2012] EWHC 2779)

(b) Ground 1: The Committee should not have accepted the evidence of Patient A and/or should have proceeded with caution before relying on her evidence

81. At paragraphs 23 – 24 of the Appellant's skeleton argument, section 32 of the Criminal Justice and Public Order Act 1994 is cited along with various criminal authorities regarding the need, in particular factual circumstances, for caution to be applied to the evidence of complainants. It is then submitted on behalf of the Appellant that *"the same approach has broadly been adopted by the courts in professional conduct proceedings with the need for special caution where in some cases a healthcare professional seeing a patient alone becomes the subject of an allegation of sexual misconduct"* (paragraph 24).

82. In response, it is submitted by the GPhC that there is no special requirement as a matter of law for caution to be applied to a complainant's evidence merely because the allegation is one of sexual misconduct cases. This is so because:

(1) each case must turn upon its own facts;

(2) *Cyc v. GMC* [2008] EWHC 1025 (Admin) notes that healthcare professionals can become the subject of false or exaggerated allegations in circumstances which are difficult to meet;

(3) *Yaacoub v. GMC* [2012] EWHC 2779 (Admin) and *Casey v GMC* [2011] NIQB 95 turned upon the adequacy of the Committee's reasoning rather than erecting a general proposition of law in relation to the weight to be attached to a complainant's evidence in sexual misconduct cases.

83. In the instant case, the written statement of Patient A was not made until over a month later. There was no immediate complaint at the time that she was at the chemist. There was no return to the pharmacy until the following day and no account of events until 2 days later. She was questioned about this and gave answers: she explained that she considered that the Appellant thought that something was wrong with her and it was a legitimate examination. Shortly thereafter, having discussed matters with her boyfriend, who in turn discussed the matter with a pharmacist, she thought that she had been naïve and she reported it the next day. All of this was carefully considered and evaluated.

84. No evidence was called by the boyfriend of Patient A or the other pharmacist with whom there had been conversations during this period. There was agreement that the touching was momentary and Patient A agreed that the Appellant seemed concerned about her condition. She did not report the matter to the police. It was also stated that there were contradictions about how far down the Appellant's hands went (to the pants line or to the top of the thigh).

85. None of this is a basis to interfere with the finding of the Committee. The decision was one which the Committee was entitled to come to on the evidence having the opportunity to consider the evidence carefully. There was full and thorough cross examination of Patient A and questions from the Committee and submissions by both parties. The Committee was best placed to determine whether or not to accept the evidence of Patient A. The existence of inconsistencies is commonplace. The Committee was cognisant of them since they were put in submissions and featured in their determination. The Committee considered carefully the timing of the making of the complaint, and rejected the submission that this was indicative of uncertainty as to what had transpired: see paragraph 136 of the Decision. Further, allegation 3b) was found not to be proved, showing that the Committee considered the matter conscientiously and with rigour to both what the witnesses said and how that evidence related to each of the allegations. In that regard, at paragraph 140 of the Decision, the Committee referred to the fact that Patient A had conceded that she did not recall the exact words used by the Appellant, and that he might have asked her to remove her jumper and not her dress. The Committee did not misdirect itself. The reasoning of the Committee was detailed in consideration of the evidence as a whole. The judgment in respect of the other grounds is also relevant to Ground 1. The reasoning below is relevant to the criticism in Ground 1, especially Ground 3 (particularly as regards the detailed criticisms made about Patient A's evidence considered especially at paragraph 92 below) and Ground 6 (the burden of proof and the approach of the Committee to being satisfied that the case was proved considered especially at paragraphs 118-119 below). In view of the above and the reasoning below, Ground 1 is rejected. These criticisms do not show anything wrong about the Decision nor that there was any irregularity of the Committee nor anything unjust thereby.

(c) Ground 2: The inadequacies of Superdrug's investigation.

86. It was submitted that the investigation carried out by Superdrug was perfunctory and unfair. There were several criticisms, some overlapping with matters identified in respect of Ground 1. It is not necessary to identify each of the complaints and answers which were fully ventilated in the skeleton arguments. The complaint misses out that it was not Superdrug's investigation which mattered, but the evidence derived from the investigation after referral to the GPhC. In any event, there was no allegation that the Superdrug stage of the enquiries prejudiced the ability of the GPhC to investigate the matter.

87. The detailed criticisms were set out in the Appellant's skeleton argument at paragraphs 40-41. In my judgment, they were completely refuted in the GPhC's skeleton argument at paragraphs 34-42.

88. The Appellant criticises (1) the absence of a witness statement on the part of Patient A before the Appellant was interviewed on 12 October 2017, (2) the fact that Patient A was thanked for her "honesty" after speaking on the telephone implying pre-judgment

despite the fact that no witness statement had been obtained at that stage, (3) the absence of advance notice or warning prior to the interview of the Appellant, (4) the record of interview not being verbatim, leading to the Appellant pointing out discrepancies in the interview by a letter of 15 November 2017, and (5) no steps having been taken at the time to check Patient A's records at the pharmacy.

89. The GPhC has answered these matters by saying that (1) the findings of Superdrug were irrelevant for the purposes of the Committee's decision in that the investigation following the referral to the GPhC was separate and independent, (2) there is no complaint that the investigation of Superdrug prejudiced the ability of GPhC to investigate the allegations independently so as to constitute an abuse of process, (3) there was no attempt to argue that any of the evidence obtained was unfair such that it ought to be treated as inadmissible by the Committee, and (4) there was cross-examination before the Committee of Ms Morton-Channon, the Clinical Governance Manager at Superdrug as well as Patient A.

90. In my judgment, the response of the GPhC is a complete answer to the criticisms. Some of the criticisms are to equate a local-level investigation with a police enquiry. Only the latter is governed by the Police and Criminal Evidence Act 1984. A local-level investigation is not, and there is no parallel. As regards the criticism about not checking the records at the pharmacy and specifically a record of the examination of the armpits of Patient A, there was an enquiry into the existence of these documents at the behest of the Committee on 26-27 November 2018, and no documents supporting the Appellant's recollection were located. A number of screenshots were located from a computer record. There was one missing tab of information concerning 'history' from the computer records and one incomplete entry about medication, but the Committee concluded that that was immaterial, and it had the relevant information. That was justified because the Committee was entitled to conclude that history or medication would not assist to any substantial degree about the events of the day in question.

91. In my judgment, there was nothing about the way in which this matter was handled which can amount to a ground of challenge of the process undertaken or which imputes the fairness of the hearing or the reliability of the findings. Here too the matters referred to in answer to the other Grounds show that Ground 2 is not well made.

(d) Ground 3: The reliability of the witnesses

92. There are detailed criticisms of almost each and every basis for accepting the evidence of Patient A and for rejecting the evidence of the Appellant. In my judgment, this is an attempt to have the appellate court substitute a view of the evidence for that of the Committee. The Committee by its reasoning demonstrated that it did not simply approach the matter based on the demeanour of the witnesses. It showed that it had given careful attention to the accounts of the parties. It was entitled to consider consistency in the evidence. It was also entitled to consider inconsistencies and appraise in the circumstances that they did not affect the overall conclusion. It was entitled to reject the allegation about asking for the skirt to be lifted whilst accepting other allegations about touching (allegation 3b). The Committee considered the reliability of the witnesses in detail, and gave full reasons

for its findings. This is exemplified as regards Patient A from the very detailed examination of the evidence and findings in respect of Patient A at paragraphs 135-144 of the Decision. Likewise, the same applies as regards the evidence and findings in respect of the Appellant at paragraphs 145-164. Much of that has been referred to elsewhere in this judgment. It included the identification of what it found to be significant findings relating to the absence of a record of Patient A's symptoms on an electronic PMR (paragraphs 148-152), the absence of credibility of his evidence as regards why he had advised Patient A as regards breast cancer risks (paragraphs 153-155) and his evidence which was rejected regarding his examination of Patient A's armpits (paragraphs 156-164). That was not the end of it. The above findings were applied in the consideration of each of Allegations 3a (paragraphs 165-168), 3b (paragraphs 169-184), 3c (paragraphs 185-190) and Allegation 4 (paragraphs 191-197), and within these sections, there was yet further analysis of the respective evidence of Patient A and the Appellant and consideration of their respective reliability. This is very different from decisions relied upon by the Appellant, for example *Yaacoub v GMC* above and *Casey v GMC* above (paragraph 82(3)), in which cases the respective tribunals were found, on the facts of those cases, to have been cursory in their reasoning. By contrast, in this case, the Committee has undertaken a very detailed and carefully reasoned analysis of the evidence, reaching conclusions which were open to the Committee and making use of the advantage of being able to judge the credibility and reliability of the evidence given by the witnesses. All of this in this case is part of the exercise of an experienced tribunal hearing the evidence, forming a view and setting out their reasoning for the views.

93. There is ignored in these challenges and especially in respect of credibility the narrow circumstances in which such findings can be challenged. The Committee saw and heard the witnesses in a case where credibility and reliability were at the heart of the fact finding in the case, and provided detailed reasons for their findings. The matters related simply do not amount to a basis for an appellate court, not having the advantages afforded to the Committee, to form a different view of the evidence. In my judgment, there is nothing to say that the Committee abused that advantage or indeed did not make use of it.

94. The reasoning of the Committee was thorough and well-reasoned. If and to the extent that there is any residual scope for criticism, they are not criticisms which go to the heart of the reasoning and which impugn the Decision. Further, it is necessary to take into account the oft cited speech of Lord Hoffmann in *Biogen v Medeva* [1997] RPC 1 reminding appellate courts of the *'penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance'*. Where the tribunal had the considerable advantage of seeing the witnesses and assessing their credibility against such documentary material as there is, the appellate court should take particular care before holding that the conclusions of fact were wrong. In my judgment, the Appellant has not shown anything wrong or any injustice caused by any irregularity, procedural or otherwise.

95. There is nothing to show that the Committee failed to consider the probabilities of the case. Attention is drawn to the implausibility by the Appellant to the case of Patient A, but this has all been considered, and in the event, the Committee considered that the implausibility lay with the Appellant's case. Attention was drawn to the question as to why a pharmacist should have any physical examination whether on the basis of

his evidence or that of Patient A. There was no apparent need for a pharmacist to inspect the armpits of Patient A which was part of the consideration that an examination of the armpits did not take place at all: see paragraph 193 of the Decision quoted above.

96. All of this supports the central point that this ground is an unjustified attempt to substitute the judgment of the Court for that of the Committee or to invite a retrial of the matter in circumstances where the criticisms about how the Committee made its findings are unjustified. In the circumstances, Ground 3 must fail.

(e) Ground 4: The risk of breast cancer

97. This ground relies on the credibility of the Appellant's account of one aspect of his evidence (that he had personal experience in the NHS context of breast cancer patients) which, in turn, the Committee rejected. It is also premised on there being a sufficiently cogent body of objective evidence which "*identifies amongst other possible side effects that EHC may include infertility and an increased risk of breast cancer"*. The objective evidence of increased risk of breast cancer relied upon by the Appellant before the Committee was limited. The Committee was entitled on the basis of this to conclude, which it did, that the Appellant's explanation was implausible. It was to be seen in the context of the evidence as a whole.

98. It was common ground that the Appellant raised the subject of breast cancer being mentioned as a risk of the EHC: see the account of Patient A's evidence at paragraph 19 of the Decision and of the Appellant at paragraph 77 of the Decision. The Committee drew attention at paragraph 153 of the Decision to risk of breast cancer *"not [being] required by the Patient Group Direction governing the supply of EHC; did not appear on the pro-forma; was not contra-indicated nor mentioned as a risk on the drug patient information leaflet for Levonelle; when Patient A had used EHC only twice previously in three years; was not using the contraceptive pill regularly; and when there were numerous other risks - such as stroke risk - that are recorded on the patient information leaflet about which the Registrant made no mention."* It also stated at paragraph 155 of the Decision that *"the drug information which the Registrant adduced failed to mention any quantified risk of breast cancer and the Registrant had not discussed with Patient A the many other more common, significant and quantified risks and side effects detailed in the drug information provided in evidence."*

99. This then led to the findings at paragraph 167 of the Decision that

(1) "there was no reasonable or legitimate clinical purpose which could have been served by the Registrant embarking on a discussion of breast cancer risks with Patient A in the context of a consultation for the provision of EHC. There is no question on this topic necessary in order to complete the required EHC pro-forma and according to the drug information provided in evidence, breast cancer is not contra-indicated for the prescribing of EHC."

(2) "In the absence of any other credible explanation the Committee considered that, on the balance of probabilities, the Registrant had embarked upon a discussion of breast

cancer risk in order to provide a reason to suggest to Patient A that he examine her breasts for lumps."

100. This was expressed in this way at paragraph 194 as follows:

"As described above the Committee did not accept the Registrant's explanation for embarking upon a discussion of breast cancer risks. Without producing any evidence, the Registrant asserted that he had breast cancer risk in mind because of evidence that there was such a link which he had become aware of from his previous experience in a hospital setting. What is more, the Registrant had not embarked on any discussion of any of the documented more common, significant and quantified risks associated with EHC."

101. This then led to the findings at paragraph 310 as follows:

(1) "That the misconduct was deliberate and conscious in as much as that the Registrant had fabricated a rationale – a risk of breast cancer - for conducting an unnecessary clinical examination;
(2) *That this rationale was calculated to be alarming to Patient A in order for her to accede to being examined, and that it had in fact alarmed her."*

102. The Appellant submits that the Committee has failed to take into account the evidence contained in three published papers which were before them, namely

(1) Levonorgestrel Side Effects Published by Drugs.com: 10/309,313
(2) Ovranette (which contains Levonorgestrel) manufactured by Pfizer Limited: 10/319, 323, 327-329, 333
(3) Norgeston (which also contains Levonorgestrel) manufactured by Bayer, the manufacturers of Levonelle: 10/343, 347, 353.

103. In the literature in respect of Norgeston, which contains only Levonorgestrel which itself is the exact ingredient of the EHC, there appears the following under the heading "tumours, breast cancer" at page 347:

"• <u>Breast Cancer</u>
…
Breast cancer is rare among women under 40 years of age whether or not they take OCs. Whilst the background risk increases with age, the excess number of breast cancer diagnoses in current and recent progestogen-only pill (POP) users is small in relation to the overall risk of breast cancer, possibly of similar magnitude to that associated with combined OCs. However, for POPs, the evidence is based on much smaller populations of users and so is less conclusive than that for combined OCs. Available studies do not provide evidence for causation.
….
It is important to inform patients that users of all contraceptive pills appear to have a small increase in the risk of being diagnosed with breast cancer, compared with non-users of oral contraceptives, but that this has to be weighed against the known benefits."

104. The Appellant sought to rely on evidence of other literature (put into the authorities bundle, rather than the subject of an application to admit new evidence). This literature was not before the Committee. There is no explanation as to why it could not have been before the Committee. In any event, there is no evidence that this

literature was known about by the Appellant at the time of the examination of Patient A. The relevant inquiry was about the mind of the Appellant at the time when he gave the advice, and not about the state of medical science and literature generally.

105. I have reached the following conclusions, namely

(1) The Committee was entitled to reach the conclusions which it did having heard and considered all the evidence before it.
(2) The evidence about risk of breast cancer in the published literature placed before the Tribunal was considered (paragraph 155) and it was unquantified. The Committee was also entitled to take into account the fact that the risk was not in the Patient Group Direction governing the supply of EHC, nor did it appear on the pro-forma, nor was it mentioned in the drug patient information leaflet for Levonelle.
(3) The Committee heard detailed cross-examination and was unimpressed by the answers of the Appellant as to why he advised about the risk of breast cancer. There was some concern of the Appellant about her use of EHC as the only contraceptive measure leading to what the Appellant thought was a change in her statement that she had only used EHC once before this occasion, but none of this impressed the Committee as regards the advice about the risk of breast cancer.
(4) The Committee was entitled to take into account the contradictory nature of not advising about strokes because of the young age of Patient A (22 at the time) yet advising about breast cancer (despite her being young).
(5) The Committee was entitled to be unimpressed by the Appellant's experience in a hospital setting without the production of evidence to support it, regarding it without more as mere assertion.
(6) Ground 4 is therefore rejected.

(f) Ground 5: The Council should have informed the Committee that Patient A had instructed solicitors

106. The Appellant complains that the Case Presenter should have informed the Committee that Patient A had consulted lawyers. In fact, the Appellant knew that Patient A had instructed lawyers. On 4 July 2018 and again on 5 July 2018, a letter was disclosed to the solicitors for the Appellant stating that lawyers had been instructed to be bring a civil claim. It was therefore up to the Appellant as to the extent to which he deployed that in evidence. The fact of the instruction of lawyers by itself is neutral in that it is legitimate for a person the subject of an assault or an unwanted touching to make a civil claim. Although it was put to Patient A that she had instructed a lawyer, it was not put that she had brought proceedings or that she had done so inventing the event in order to obtain compensation. Given the knowledge of the civil proceedings, this Ground 5 must fail.

(g) Ground 6: The Legal Adviser

107. It is suggested that the Legal Adviser to the Committee misled as regards the burden and standard of proof. A leading authority as regards the standard of proof in

cases of this kind is *Re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 which provides especially at 586D-H:

> *i.* a tribunal is satisfied an event occurred if it considers that on the evidence it was more likely than not to have occurred.
>
> ii. one factor of this exercise may be that the more serious the allegation, the less likely it is to have occurred and hence the stronger the evidence should be before the tribunal finds it proven on the balance of probabilities. This does not mean that where a serious allegation is in issue the standard of proof required is higher.

108. On a close reading, the legal assessor properly advised at various points of the proper standard to be applied:

(1) "*The committee must consider whether the facts have been established by the Council using the civil standard of proof, and that is on the balance of probabilities: i.e. is it more likely than not that each of those outstanding allegations took place."* Day 4-19 at G.

(2) *"It was incorrect to apply a heightened standard consistent with the gravity of the allegations. Perhaps that reflects Mr Hadley's observations to you that* ***that does not alter the standard of proof but heightens the probity of the evidence that you are looking for"***. Day 4-20 at para b. Reference to the word 'probity' is clear in the circumstances (emphasis added).

(3) *"It surely does"* in response to the Chairman's question of whether the "*standard remains the same as it always has".* Day 4-20 at C.

(4) *"That is what the case tells you"* in response to the Chairman stating, ***"it would be appropriate to consider the strength of the evidence in relation to the seriousness of the allegation"***. Day 4-20 at D (emphasis added).

109. The specific complaint seems to be that the legal assessor did not state that the more serious the allegation, the less likely it was to have occurred. This is not a requirement of <u>*Re H*</u>. Furthermore, the words twice used (and shown with the emphasis added) by the legal assessor as outlined above have the same meaning. At paragraphs 92-93 and paragraphs 112-113 of the Decision, the Committee correctly characterised the approach required under *Re H* when rehearsing the defence advocate's submissions and the legal advice.

110. This can be seen in the following passage from the transcript, where the Chairman of the Committee interpreted the advice alongside the way in which *Re H* (and the subsequent case of *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35) had been outlined to the Committee by Mr Hadley, the Solicitor for the Appellant who appeared on his behalf. The observations of the Chairman show that there was no misconception of the law, and that the Chairman had well in mind the way in which Mr Hadley had dealt with the onus and standard of proof. In her advice to the Committee the legal adviser said:

"The Legal Adviser: …. May I add this to Mr Hadley's observations to you, that it is now settled law that the standard of proof of Children Act care proceedings is the balance of probabilities, and that is as set out in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 and confirmed in a further House of Lords case of Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35….It was

incorrect to apply a heightened standard consistent with the gravity of the allegations. Perhaps that reflects Mr Hadley's observations to you that that does not alter the standard of proof but highlights the probity of the evidence that you are looking for.
The Chairman: Just to confirm that I have understood, so the standard of proof remains as it always was.
The Legal Adviser: It surely does.
The Chairman: ***However, it would be appropriate to consider the strength of the evidence in relation to the seriousness of the allegation because that is what we heard Mr Hadley say.*** *[emphasis added]*
The Legal Adviser: That is what Mr Hadley says and that is what the case tells you." Day 4/19H-20D"

111. This was a reference back to the submissions of Mr Hadley for the Appellant who had stated the legal position at Day 4 page 9B-C including unusual cases where Re H *"told us that the more serious the allegation, the less likely it is that the events occurred, and hence the stronger the evidence should be before the tribunal concludes that the allegation is established on the balance of probabilities. That case does not shift the burden of proof, that is something that has to be accepted, but what it does say to you is that in serious matters extra care should be taken when coming to your conclusions. You have to be of the mind that there is stronger evidence to conclude that it is proved."*

112. It was submitted by the Appellant that at no point in their determination of the facts (paragraphs 132-197 of the Decision) did the Committee say that they were applying the test laid down by Lord Nicholls in *Re H* [1996] AC 563. Instead they approached the case on the basis of the reliability of the evidence of the two main witnesses namely, Patient A and the Appellant, and having found Patient A to be the more credible witness, the Committee jumped to the conclusion that the Appellant committed the act without testing the evidence against the yardstick of the overall probabilities. It is apparent from the above quotations that the Committee was not only reminded of the appropriate test, but they understood it and did test the evidence as a whole. It is not required that they should set that out in the judgment.

113. Further, it is apparent from the judgment that the Committee still had this well in mind in that it summarised the submission of Mr Hadley at paragraphs 92-93 of its decision:

> *"92. Mr Hadley for the Registrant reminded the Committee that the burden lay upon the Council to prove each particular; it was not for the Registrant to prove his case or disprove the Council's case. That the standard of proof was on the balance of probabilities but that did not mean that such decisions should be made lightly.*
>
> *93. Mr Hadley cited case law to the effect that the more serious the allegation the less likely they had in fact occurred and therefore required stronger evidence. He cited other case law regarding the danger of relying upon demeanour as a guide to the credibility of witnesses; it is relevant, but the Committee must look at all the surrounding evidence before considering demeanour."*

114. The Appellant seeks to criticise the advice of the Legal Adviser to the Committee which is set out at paragraph 113 of the Decision when it was stated:

"May I add this. It is now settled law that the standard of proof in Children Act care proceedings is the balance of probabilities, as set out in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 and confirmed in Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35. It is clear from the observations of Lord Hoffman and Lady Hale in Re B that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. It was incorrect to apply a heightened standard consistent with the gravity of the allegations."

115. As regards *Re B*, at paragraph 70, Lady Hale said the following:

"…the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

116. It follows there is no reason to criticise either the Legal Adviser or the Committee for its finding at paragraph 133 of the Decision. However, it is also to be noted that although not articulated specifically in the Decision, the Committee clearly had in mind the fact that in order to reach the standard of balance of probabilities, the Committee had in mind that more might be required to prove something on the balance of probabilities without any heightened standard. This much is evident from the intervention of the Committee during the advice of the Legal Advisor. In fact, this is entirely in accordance with the case of *Re B (Children).* It is not a heightened standard. Thus, it was correct at paragraph 133 of the Decision for the Committee to say the following, namely that *"In approaching its decision-making the Committee bore in mind throughout that the burden falls upon the Council to satisfy the Committee in relation to each outstanding allegation that the burden has been discharged on the balance of probabilities…"*

117. In approaching its decision making, the Committee bore in mind throughout that the burden falls upon the GPhC to satisfy the Committee in relation to each outstanding allegation that the burden has been discharged on the balance of probabilities. The Committee considered directly therefore the question of the witnesses' reliability.

118. There is nothing in the judgment to indicate that the Committee was misapplying the law. This was not a case of simply a preference of one witness over another. It went further than this. In the case of Patient A, she was found to be *"a reliable witness as regards the material matters"* at paragraph 144 of the Decision following very detailed analysis of her reliability at paragraphs 134-143 of the Decision and consideration of points made to contrary effect of Mr Hadley on behalf of the Appellant. The culmination of detailed reasoning as to whether Patient A had asked the Appellant to examine her armpits was for various reasons that it could not rely upon the account of the Appellant (paragraph 164) and to find that there was no reason why Patient A would have withheld this detail when making her complaint (paragraph 161). The finding against the Appellant in respect of the allegation of touching breasts was not simply to prefer one account to the other, but the Committee

found Patient A's account to have been *"clear, confident and consistent"* and that she *"provided a vivid and detailed account"* (paragraph 166). She was found to have been a *"reliable, consistent and credible witness",* and the Appellant to be *"unreliable, inconsistent and lacking credibility"* (paragraph 168).

119. It is not necessary to go through each part of these many paragraphs. The Court is satisfied that the Committee had well in mind the seriousness of the allegations and made the clearest of findings generally accepting Patient's A evidence and rejecting the Appellant's evidence. I am satisfied, looking at paragraphs 132 – 197 as a whole that an entirely appropriate and detailed analysis of the respective merits of the evidence of Patient A and the Appellant was conducted, in a manner which was appropriate for the Committee. In my judgment, there was no error of law as regards whether the case was sufficiently proven.

120. It therefore follows that each of Grounds 1 – 6 are rejected. It therefore remains to consider only the appeal against sanction.

VII Ground 8: the sanction of removal in any event was disproportionate and excessive

121. It was submitted on behalf of the Appellant that this was a one-off instance of sexual misconduct in the course of a practising career of 24 years, there was no evidence that the actions of the Appellant were pre-meditated, this was serious, the behaviour was of short duration, there was no evidence to show that Patient A was suffering from mental health issues and she was not a 'young person' and the Appellant had a series of testimonials. It was submitted that the public interest could have been protected by suspension.

122. As regards the relevant law, the Appellant drew attention to the case of *Khan v General Pharmaceutical Council* [2016] UKSC 64 where Lord Wilson said at paragraph 36:

"An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to the reputation of the profession and it is best qualified to judge the measures required to address it: Marinovich v General Medical Council [2002] UKPC 36, para 28. Mr Khan is, however, entitled to point out that
(a) the exercise of appellate powers to quash a committee's direction or to substitute a different direction is somewhat less inhibited than previously: Ghosh v General Medical Council [2001] UKPC 29, [2001] 1 WLR 1915, para 34;
(b) on an appeal against the sanction of removal, the question is whether it "was appropriate and necessary in the public interest or was excessive and disproportionate": the Ghosh case, again para 34…"

123. The GPhC relied on the case of *Fatnani and Raschid v GMC* [2007] 1 WLR 1460 at paragraph 26, where Laws LJ, in disagreeing with the decision of the judge below to replace a decision of removal from the register to suspension, Laws LJ said: *"…I have to say that they (the judgments below) do not in my view remotely offer sufficient recognition of the two principles which are especially important in this jurisdiction: the preservation of public confidence in the profession and the need in consequence to*

give special place to the judgment of the specialist tribunal. Applying these principles I am driven to conclude that there was not in either of these cases any proper basis established for overturning the sanctions set by the Fitness to Practise Panel."

124. The need for deference to the Committee is substantial especially in respect of sanction, particularly where the conduct in question is in respect of actions carried out in the course of the Registrant acting in the course of professional duties. The submission that this was a one-off instance of sexual misconduct with a short duration and no premeditation must be considered, but in my judgment, they do not lead to a conclusion that the sanction of removal was excessive or disproportionate. The Committee found the sexual misconduct took place in a clinical setting, in a private consultation room, and that the conduct was deliberate and conscious by conducting an unnecessary clinical examination. It was held to be an abuse of trust by a pharmacy professional: see paragraph 319 of the Decision. The Committee was rightly entitled to consider that the preservation of public confidence in the profession required this outcome. It is in this context that the Court gives special place to the judgment of the Committee. In my judgment, the foregoing suffices for the Court to conclude that the penalty was not excessive or disproportionate.

125. Whilst the foregoing would suffice, there are two further features. First, the Appellant does not have the mitigation of having admitted the allegations. Secondly, this was not the first occasion that the Appellant had been before the regulator. Albeit for a different character of offence, he had already served a 12-month suspension. In all the circumstances, the appeal against penalty is dismissed.

VIII Conclusions

126. It follows from the above analysis that the Court rejects each of Grounds 1 – 6. This has been a widespread attack on the findings of the Committee which seeks to go behind most of the findings of fact of the Committee. There is no reason for the Court in this case to depart from its reluctance to interfere with the findings of fact of a specialist tribunal. The analysis of each ground has led to the conclusion that the Committee was entitled to reach the conclusion which it did, that it was not wrong and that there was not unjust because of a serious procedural or other irregularity by the Committee.

127. As regards Ground 7, the Court is unable to find that the Committee would in all probability that it would have rejected the evidence of Patient A if it had known of the matters contained in the Letter. Further, for the reasons set out in this Judgment, there is no real prospect if this matter were remitted to the Committee (whether the one which heard the matter or a new one) that a different conclusion would be caused by reason of the Letter or anything revealed directly or indirectly as a result of the Letter. Further, in those circumstances, it would be contrary to principle about finality and overriding justice for there to be a remittal for a rehearing by reason of the Letter. It therefore follows that Ground 7 must be rejected.

128. The Court has also considered the sanction of removal from the record. The Committee reached a decision which was open to them, and it was not disproportionate or excessive. Accordingly Ground 8 must be rejected.

129. It follows that the appeal is dismissed.

130. I should be grateful if Counsel would consider an appropriate form of order to give effect to the above decision. It remains for the Court to thank both Counsel for the very great assistance which they have both given throughout to the Court and for the expert and thorough way in which they made their respective written and oral submissions.