Neutral Citation Number: [2021] EWHC 1674 (QB)

Case No: QB-2020-004534

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

- -

Between :

Miss Sasha Burn	**Claimant**
- and -	
Alder Hey Children's NHS Foundation Trust	**Defendant**

- -
- -

Ms Betsan Criddle (instructed by **Medical Protection Society**) for the **Claimant**
Mr Simon Gorton QC (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 27 - 29 April 2021

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Approved Judgment

The Hon. Mrs Justice Thornton :

Introduction

1. The Claimant is a consultant paediatric neurosurgeon employed by the Defendant, the Alder Hey Children's NHS Foundation Trust, since 2009. The claim arises out of the death of a patient, 'Patient A', in December 2017. The Claimant was the consultant, in charge and on-call, when Patient A required operative procedures and her condition deteriorated. The Claimant has been restricted from clinical duties whilst an internal investigation, conducted in accordance with the NHS national framework for handling concerns about medical staff (Maintaining High Professional Standards, 'MHPS') considers allegations about her behaviour and clinical decision-making in relation to Patient A.
2. This claim is not about the merits of the allegations against the Claimant in relation to her clinical care of Patient A. It is about the Defendant's conduct of the disciplinary proceedings against the Claimant.
3. During the course of the internal investigation, the Claimant sought disclosure of a number of documents from the Case Investigator appointed by the Defendant, prior to attending an interview to give her account of events. Some of the material sought was provided. Information which was not provided included correspondence with Patient A's parents and statements from staff produced for an earlier investigation into Patient A's care. Matters reached a stalemate with the Claimant declining to attend an interview without sight of the documents and the Defendant indicating its intention to conclude the investigation without further input from the Claimant if she remained unwilling to attend an interview. The Claimant subsequently applied to the Court for an injunction to require the Defendant not to conclude the investigation prior to disclosing the documents and a declaration in respect of her contractual rights.
4. The parties agree the following issues are in dispute:
    a. Does the Claimant have a contractual right, pursuant to express terms in the MHPS/Trust Policy and/or terms implied by law, in particular, the implied duty of mutual trust and confidence:
        (i) to be consulted by the Case Investigator about information to be collected as part of the investigation?
        (ii) to be provided with the documents sought and before she is interviewed about her care of Patient A as part of the MHPS investigation?
    b. Has the Trust breached the terms of the Claimant's contract by (i) not consulting her; (ii) refusing to provide her with the documents on the basis that it is said that the documents are not relevant and/or because of a lack of consent to disclose them; (iii) informing her that the investigation will be concluded without her being interviewed if she does not agree to attend without having received the documents?
    c. Is the decision of the Case Investigator as to the relevance of the documents sought a matter of discretion and, if so, has that discretion been exercised lawfully?
    d. In terms of relief or remedy resulting from these issues:

(i) If the Claimant enjoys the contractual right to the documents, what is the effect (if any) of the Defendant not having consent to disclose the documents?

(ii) Should the Court exercise its discretion to grant a permanent injunction preventing the Defendant from concluding its investigation unless it provides the documents?

The contractual framework

Express terms

5. The Claimant's written contract of employment is a standard form consultant contract. Clause 3 is headed 'General Mutual Obligations'. It records a mutual agreement *"to co-operate with each other; to maintain goodwill; and to carry out our respective obligations in devising, reviewing, revising and following the organisation's polices, objectives, rules, working practices and protocols".*
6. Clause 17 relates to disciplinary matters. It provides that, wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, "*should we consider your conduct or behaviour may be in breach of the Trust's Policies or that your professional competence has been called into question, we will resolve the matter through our disciplinary or capability procedures, subject to the appeal arrangements set out in those procedures*".
7. It was common ground that the Defendant's disciplinary procedures included the Defendant's policy for handling concerns about the conduct and performance of medical staff, titled "E27- Handling Concerns about Conduct, Performance & Health of Medical & Dental Staff Policy". It was also common ground that the Defendant's policy implements, for the most part, the national framework in the MHPS.
8. Under the MHPS, an employing trust has responsibility for disciplining doctors whom it employs. The same disciplinary procedures apply to all doctors employed in the NHS. The framework was drafted by the Department for Health and British Medical Association in close collaboration with NHS Employers and the National Clinical Assessment Authority. The MHPS is of crucial significance to the contractual arrangements between a doctor and their employing Trust within the NHS (Kerslake v North West London Hospital NHS Trust [2012] EWHC 1999 QB).
9. The relevant parts of the Trust's disciplinary policy are as follows. The particular aspects under scrutiny in the claim are underlined:

> *"Appendix A Procedure For Handling Concerns about Conduct, Performance …of Medical…Staff*
>
> *Section 1 Action when a concern arises*
>
> *1 Introduction*
>
> *1.1 The management of performance is a continuous process which is intended to identify problems. Numerous ways now exist in which concerns about a practitioner's performance can be identified; through which remedial*

and supportive action can be quickly taken before problems become serious or patients harmed; and which need not necessarily require formal investigation or the resort to disciplinary procedures.

1.2. Concerns about a practitioner's conduct or capability can come to light in a wide variety of ways, for example:

• Concerns expressed by other NHS professionals, health care managers, students and non-clinical staff,-

…

• Complaints about care by patients or relatives of patients;

1.3. Unfounded and malicious allegations can cause lasting damage to a practitioner's reputation and career prospects. Therefore all allegations, including those made by relatives of patients, or concerns raised by colleagues, must be properly investigated to verify the facts so that the allegations can be shown to be true or false.

…

"The Investigation

1.13. Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Medical Director must, after discussion between the Chief Executive and Director of Human Resources and OD, appoint an appropriately experienced or trained person as Case Investigator….

1.14. The Case Investigator:

• Is responsible for leading the investigation into any allegations or concerns about a practitioner, establishing the facts and reporting the findings;

…..

•Must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible. Patient confidentiality needs to be maintained but any disciplinary panel will need to know the details of the allegations. It is the responsibility of the Case Investigator to judge what information needs to be gathered and how - within the boundaries of the law - that information should be gathered. The investigator will approach the practitioner concerned to seek views on information that should be collected;

- *Must ensure that there are sufficient written statements collected to establish a case prior to*

a decision to convene any disciplinary panel, and on aspects of the case not covered by a written statement, ensure that oral evidence is given sufficient weight in the investigation report;

- *Must ensure that a written record is kept of the investigation, the conclusions reached and the course of action agreed by the Director of Human Resources and OD with the Medical Director,-*

1.15. The Case Investigator does not make the decision on what action should be taken nor whether the employee should be excluded from work and may not be a member of any disciplinary or appeal panel relating to the case.

1.16. The practitioner concerned must be informed in writing by the Case Manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the Case Investigator and made aware of the specific allegations or concerns that have been raised. The practitioner must be given the opportunity to see any correspondence relating to the case together with a list of the people that the Case Investigator will interview. The practitioner must also be afforded the opportunity to put their view of events to the Case Investigator and given the opportunity to be accompanied.

1.17. At any stage of this process - or subsequent disciplinary action - the practitioner may be accompanied in any interview or hearing by a companion.

1.18. The Case Investigator has discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended simply to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

…

1.20. Wherever possible, the Case Investigator should complete the investigation within 4 weeks of appointment and submit their report to the Case Manager within a further 5 days. The report of the investigation should give the Case Manager sufficient information to make a decision whether:

- *There are concerns about the practitioner's performance that should be further explored by NCAS*
- *Restrictions on practice or exclusion from work should be considered*
- *There is a case of misconduct that should be put to a conduct panel; (see Section 3)*
- *There are intractable problems and the matter should be put before a capability panel; (see Section*
- *There are serious concerns that should be referred to the GMC or GDC;*
- *No further action is needed."*

10. The extracts above replicate the MHPS save for the underlined part of paragraph 1.14 which does not appear in the MHPS. It was common ground that paragraph 1.16 has contractual force as between the Claimant and the Defendant. There was however a dispute between the parties as to whether the underlined part of paragraph 1.14 could be said to be incorporated into the Claimant's contract.

Relevant principles of contractual interpretation

11. The following principles of contractual interpretation were common ground:
    a. When interpreting a written contract, the Court is concerned to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions (Arnold v Britton [2015] AC 1619).
    b. Save perhaps in a very unusual case, the contractual meaning is most obviously to be gleaned from the language of the provision. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision. Furthermore, the clearer the natural meaning the more difficult it is to justify departing from it. Arnold v Britton [2015] AC 1619, per Lord Neuberger PSC [15].
    c. In the MHPS context: where the contractual term is that set out in the Trust's own disciplinary policy and the employed person is a doctor, the provisions of that disciplinary policy must be consistent with MHPS. In the particular context of a collectively negotiated agreement as with the MHPS, it must be recognised that there were a number of issues to be dealt with besides the issue before the Court. There was probably horse trading and eventually the parties arrived at a form of words which both

sides were prepared to accept on a particular issue (Kulkarni v Milton Keynes Hospital NHS Trust [2010] ICR 101, per Smith LJ [57]).

d. The Court should work on the basis that the parties to MHPS considered that it struck a fair balance between the important, potentially competing interests. These are: a public interest in the effective and efficient management of the conduct, capability and performance of medical professionals; and the interests of the practitioner for whom there is potentially a great deal at stake for the practitioner and for whom the procedure may provide them with an opportunity for vindication or, at least, that the faithful application of the procedure would ensure fairness (Smo v Hywel Dda University Health Board [2020] EWHC 727 (QB)).

e. The Courts adopt a purposive approach to interpretation so as to enable sensible procedural decisions to be taken. Interpretation should recognise that disciplinary procedures provide employees with an opportunity to justify themselves in relation to allegations of misconduct or incompetence or other criticisms of them. They also provide safeguards against loss of congenial employment and potential career damage consequent upon dismissal for such reasons (Smo v Hywel Dda University Health Board [2020] EWHC 727 (QB)).

Implied duty of mutual trust and confidence

12. The following principles emerge from the caselaw and were not in dispute:

a. The duty of trust and confidence is an implied term of contracts of employment that the employer will not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606). It is a response to the significant imbalance of power between the contracting parties as there often will be in an employment context (Braganza BP Shipping Ltd [2015] UKSC 17 Baroness Hale at 457 C-D).

b. The test is a severe one. It applies only where there is "no reasonable and proper cause" for the employers' conduct, and then only if the conduct is calculated or likely to destroy or *seriously* damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation (Malik v BCCI [1998] A.C. 20 (Lord Steyn at 45D-E 53 B- C and 628) and Gogay v Hertfordshire County Council [2000] IRLR 703 Lady Hale at [55]).

c. A distinction has been drawn between cases where:
    i. the employer is exercising an express or implied discretionary power, and
    ii. cases where the concern is simply with the conduct of the employer (Linden J in Smo v Hywel Dda University Health Board [2020] EWHC 727 (QB) referring to IBM UK Holdings Ltd v Dalgleish [2018] IRLR 4).

d. In the former category of case, (the exercise of contractual discretion in accordance with the duty of mutual trust and confidence), the extent of the Court's oversight is influenced by recognition that where a contractual term gives one party to the contract the power to exercise a

discretion, or to form an opinion as to relevant facts, the Court cannot rewrite the bargain nor substitute itself as the decision-maker, but it will seek to ensure that such contractual powers are not abused. The test to be applied by the Court is the rationality of the employer's exercise of discretion. It is of the essence of "*Wednesbury* reasonableness" review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker. In applying the test of rationality, both limbs of the *Wednesbury* formulation (Associated Provincial Picture Houses Ltd v Wednesbury Corpn *[1948] 1 KB 223*) should be included: a) have the relevant matters (and no irrelevant matters) been taken into account, and b), is the result such that no reasonable decision-maker could have reached it? (Braganza v BP Shipping Ltd [2015] ICR 449 UKSC).

e. The second category of case (the conduct of the employer, in the absence of an express/implied discretion) includes conduct which is aimed at a given employee or a group of employees, of the kind that can lead to a claim of constructive dismissal, such as harassment or other objectionable behaviour. *Malik v BCCI* is an extreme example of the second category of case. There the employer's conduct (running a fraudulent business) was not aimed at any particular employee although, once discovered, it affected many employees by way of a stigma of association (Smo v Hywel Dda University Health Board [2020] EWHC 727 (QB)). For this second category of case 'the *Wednesbury* test is hardly likely to be directly relevant'. The test remains that of whether the employers' conduct was calculated to destroy or *seriously* damage the relationship of trust and confidence and there was no reasonable or proper cause for it (Malik v BCCI)

f. The test for whether there has been a breach is objective, albeit the court will take into account the employer's subjective reasons for the actions complained of (Smo v Hywel Dda University Health Board [2020] EWHC 727).

Chronological Narrative of events

Admission and treatment of Patient A

13. Patient A was admitted to Alder Hey Hospital on the 27 November 2017.
14. The Claimant was the consultant in charge of the care of Patient A from 1 December 2017 until 4 December 2017 and was the on-call consultant during this period. Under the Claimant was Ms Marnet a specialist middle grade neurosurgical Fellow. Patient A required a number of operative procedures. Ms Marnet performed two procedures, known as an external ventricular drain (EVD) procedure, both of which were to assist the drainage of fluid from Patient A's brain:
    a. on 3 December at 18:00 and when Patient A's condition deteriorated;
    b. at 03:15 on 4 December 2017.
15. The Claimant was not present at the hospital for either procedure but was on-call and was in communication with Ms Marnet and other members of staff by telephone and text.
16. Patient A died several days after the events of 3-4 December 2017.

17. A number of enquiries and investigations were undertaken into the care and treatment of Patient A by the Defendant, as detailed below.

The initial investigation -December 2017 – January 2018

18. On 6 December 2017, the Trust's Director of Surgical Care (Mr Duncan) sought input from three neurosurgeons about the care of Patient A and the level of harm caused by events over the weekend of 3-4 December 2017.
19. On 8 December 2017, the same Director identified a need for a 'Root Cause Analysis' of events over the weekend (an investigation to identify the root causes of an incident).
20. On 12 December 2017, the Claimant was informed that she was not to perform on call duties whilst an investigation was made into the care of Patient A.
21. On 13 December 2017, Ms Marnet produced a statement of the treatment she had provided to Patient A to her training supervisor.
22. On 15 January 2018, the Claimant received (through her legal advisors at the Medical Protection Society ("MPS")) a letter from the Trust's Medical Director (Dr Ryan) informing her of concerns arising out of the care of Patient A. The letter reported the conclusion of preliminary review based upon a chronology of events; the advice of the Trust's most senior neurosurgeon, nursing notes and detailed observations of Patient A. The Claimant was invited to a review meeting.

Review meeting with the Claimant - February 2018

23. The review meeting was held on 19 February 2018 between the Claimant and the Trust's Medical Director, amongst others. In advance of that meeting, the Claimant produced a statement, dated 26 January 2018 detailing the care of Patient A during the period in question ('the Claimant's statement'). The statement was based on clinical records and the Claimant's own recollection of events. After the meeting, the Claimant also produced slides setting out the clinical presentation of Patient A in chronological order and notes on the decisions taken with regards to her care.

The Medical Protection Society review – March 2018

24. The Medical Protection Society commissioned an investigation, conducted by a consultant adult and paediatric neurosurgeon, who was provided with some of the medical records, salient notes and a limited number of copies of CT head scans. The report was provided on 27 March 2018.

The Royal College of Surgeons Clinical Records Review – May 2018

25. The first formal investigation by the Trust was commissioned in March 2018 by the Trust's Medical Director. It comprised a review of clinical records by the Royal College of Surgeons (RCS) to support the ongoing Root Cause Analysis investigation. The RCS was provided with various documents including copies of a timeline, the Claimant's statement and Patient A's clinical records.

The Root Cause Analysis review – July 2018

26. The Root Cause Analysis report investigation generated 14 statements by staff including the Claimant's statement, referred to above and statements by Ms Marnet and nursing staff (Ms Toni and Ms Rymill). The statements of Ms Marnet, Ms Toni and Ms Rymill (referred to hereafter as the "RCA Statements") are amongst the documents sought by the Claimant in these proceedings. A copy of the RCA report, but not the underlying statements, was shared with staff, including the Claimant, on 17 July 2018.

Meetings and correspondence with Patient A's parents – September 2018 – April 2019

27. On 5 September 2018, the Trust's Medical Director, its senior neurosurgeon and the Claimant met with Patient A's parents who raised a number of concerns and queries about the care and treatment of Patient A. The Trust's Medical Director wrote to the parents responding to the queries by letters of 13 September 2018 and 19 September 2018. The Claimant contributed to the correspondence by way of track changes amending an initial draft. She was copied into the final version of the correspondence. A further meeting took place between Patient A's parents and representatives from Patient A's local hospital on 1 October 2018 to discuss the letters from the Trust. The Claimant was not in attendance but was provided with a copy of the minutes of the meeting.
28. On 6 March 2019, the new Medical Director of the Trust (Professor Murdock) wrote to the parents of Patient A. The Claimant has not had sight of this correspondence. On 8 March 2019, the Director of Surgical Care also wrote to the parents of Patient A. The Claimant has not had sight of this correspondence.
29. The Medical Director (Professor Murdock) attended a further meeting with the parents of Patient A on 5 April.

The Campbell report – November 2019

30. In July 2019, the new Medical Director decided to commission a further external review and report into the care of Patient A. In October 2019, an Australian neurosurgeon was instructed to produce a further report which he did on 15 November 2019. This was shared with the Claimant in January 2020.

The MHPS investigation – January 2020

31. At a meeting on 24 January 2020, the Claimant was informed that, with immediate effect, her duties would be restricted pending an internal investigation to be concluded in accordance with the Trust's policy for handling Concerns about Conduct, Performance & Health of Medical Staff. The relevant Terms of Reference for the investigation were identified as *"to explore whether the decisions taken by [the Claimant] in relation to patient [A] on 3rd and 4th December 2017 were appropriate and reasonable"*. The Medical Director was appointed Case Manager, although she was subsequently replaced by the Trust's interim Medical Director (Mr Turnock) in April 2020 in light of the pressures created by Covid-19. Ms Sarah Wood, a consultant paediatric surgeon was appointed Case Investigator. Capsticks Solicitors (Ms Shaw) were asked to assist with the investigation.
32. On 1 June 2020, Ms Wood wrote to the Claimant seeking a meeting with her "*to discuss events surrounding the terms of reference…to gather further*

information and facts to produce a report to enable the Trust to determine the most appropriate course of action'.

33. By email of 4 June 2020, the Claimant's legal adviser from the Medical Protection Society (MPS) (Ms Jones) informed Ms Wood that the Claimant was not in a position to attend the meeting. One of the reasons was that she (Ms Jones) did "*not consider that Ms Burn has received copies of all the necessary documentation to enable her to provide a meaningful response to all of the concerns raised*". Ms Jones' email further stated that "*as you are aware Ms Burn is entitled to see all relevant correspondence in respect of this case and we would be grateful to receive this as soon as possible*."
34. Ms Jones continued to request the information.
35. By email dated 13 July, Ms Jones requested a list of documents seen by Ms Wood. In Ms Wood's absence on leave, Capsticks Solicitors advised by email dated 15 July 2020 that the intention was not to rely on the external reports (e.g. the Campbell and RCS reviews) but to focus on questions in line with the terms of reference:

> "*We do not believe that we have seen any documentation that Ms Burn has not, in addition to the reports mentioned above and medical records of the patients concerned with the terms of reference then the only additional information we have gathered is from witnesses which would not be appropriate for sharing at this stage*."

36. On 17 July 2020, the MPS provided Ms Wood with the Claimant's statement and the slides previously provided after the review meeting in February 2018.

Investigatory interview with the Claimant and document requests – July 2020

37. The Claimant attended an investigatory interview with Ms Wood on 20 July 2020 in which she gave an account of events relating to other matters under investigation. She was not however asked questions about her care of Patient A.
38. On 21 July, Ms Wood sent the Claimant and Ms Jones a list of documents which she had access to as Case Investigator and a list of "preliminary" questions to be put to the Claimant at an interview about the care of Patient A. Twenty two documents were listed, including *"Statements for RCA", "letter to parents by [Trust's Director] 6/3/19"* and *"letter to [A's] parents with operation notes from overnight and am 4th December".*
39. Over the following two days, the MPS exchanged emails with Ms Wood, identifying the documents contained in Ms Wood's list of 21 July 2020 which the Claimant had not seen and wished to see.
40. In an internal email dated 23 July, 2020 from the then interim Deputy Medical Director (Mr Turnock) to Ms Wood and Capsticks Solicitors (Ms Shaw) said that "*my feeling is that we should let her have them but what do others feel"*.
41. In August, Ms Wood sought advice from Ms Saunders, the Defendant's Director of Corporate Affairs and responsible for the Trust's information governance policy, about disclosing the documents. Ms Saunders sought legal advice on disclosure due to the sensitivities in relation to a potential clinical negligence claim and data protection issues. A decision was made to seek consent to disclosure from those involved.

42. On 24 August, after a number of chasers from the MPS, Ms Wood sent an email attaching a number of documents "*which the trust have given me permission to share from the list we discussed. These are the documents which relate to the investigatio*n". They did not include the documents listed at paragraph 38 above.
43. There followed another email exchange between the MPS and Ms Wood in which the MPS asserted that the Claimant was "*entitled to see all correspondence relevant to the investigation*". In response, Ms Wood reported that she had spoken to "*the trust governance lead*" (Ms Saunders) and that the documents sought were "*not pertinent to the case however if we gain consent from the family and the coroner to share them we will do so.*"
44. Around this time, Ms Rachel Greer was appointed as Case Manager to replace Mr Turnock.

Attempts by the Trust to seek consent for release of the material -September – November 2020

45. During September 2020, further correspondence was exchanged between the MPS and Ms Wood. The MPS continued to press for the provision of the outstanding documents not previously provided. By email of 7 September 2020, Ms Wood resisted these requests on the basis of "*specific consent*" needing to be sought from third parties.
46. The Defendant sought to obtain consent from Patient A's parents to disclosure of the correspondence. By letter of 7 September 2020, Ms Saunders wrote to the parents as follows:

> "*As part of our internal processes following the sad death of [Patient A] we are in correspondence with a Medical Defence Organisation who are representing a member of our clinical team. You will appreciate that I cannot go into further details about this matter, as it is confidential. They have asked us to provide them with disclosure of the attached documentation, arising from the internal investigation. As a courtesy I have indicated I will seek your consent in the first instance. Please can I ask you to confirm whether you are agreeable to the disclosure?*"

47. On or around 9 September 2020, the mother of Patient A responded, indicating that she was not consenting as she did not understand what she was being asked to consent to. The email further stated that she would "*get back to you once I've spoken to someone*". No further communications were received from Patient A's mother regarding consent and Ms Saunders did not press the point further.
48. On 10 September 2020, Ms Wood emailed the MPS about the outstanding documents. Ms Wood disputed that the correspondence sought related to the investigation and said that *"in any event they certainly relate to matters of the "utmost sensitivity and I consider it was entirely proper that I should have sought consent from [redacted] before disclosure to a third party, outside the control of the Trust".*
49. Throughout the remainder of September and October 2020, the MPS and Ms Wood exchanged emails, with the MPS maintaining that the Claimant would not attend a further interview in absence of the documents sought and contesting

the Defendant's position that consent to disclosure was required from the relevant third parties.

50. On 22 September 2020, in the context of repeating the Defendant's position that it was appropriate to seek consent for the documents sought by the claimant, Ms Wood informed the MPS that she would proceed to conclude her investigation report without further input from the Claimant if the Claimant chose not to co-operate in attending a further interview.
51. In October 2020, the Trust made contact with Ms Rymill, Ms Toni and Ms Marnet seeking consent to disclosure of their RCA Statements. Ms Toni responded to ask who had requested to see the statement but otherwise no responses were received at this time.
52. In the meantime, the MPS continued to push for disclosure, including by email of 5 October 2020 to the Case Manager, Ms Greer, asking that she direct Ms Wood to provide information including details of what the correspondence with the parents of Patient A consisted of.
53. In November 2020, the Trust, through Ms Wood, provided the Claimant with eleven statements from the RCA investigation, but not the statements of Ms Rymill, Ms Toni and Ms Marnet as consent had not been received.
54. The deadlock continued throughout November 2020. The Claimant reiterated that she would not attend a further interview without provision of the documents. In turn, the Defendant maintained that the investigation would be concluded without further input from the Claimant if she did not attend an interview.

Proceedings commenced – December 2020

55. On 18 December 2020, the Claimant commenced the present claim. The Defendant agreed that it would not conclude its investigation until resolution of the present proceedings.
56. Ms Marnet has since consented to the release of her RCA statement and the Defendant has indicated that once the MHPS process resumes, it will provide her statement to the Claimant.
57. Directions were given by Mrs Justice Eady for an expedited trial on 15 February 2021.

The Hearing

58. The hearing took place, remotely, over 2.5 days of which 1.5 days was spent on cross examination of witnesses and the remainder on opening and closing submissions. Evidence was given by four witnesses: the Claimant and three witnesses for the Defendant as follows:
    a. Ms Sarah Wood, a consultant paediatric surgeon employed by the Defendant and the appointed Case Investigator;
    b. Ms Rachel Greer, Associate Chief of Operations for the Community and Mental Health Division for the Defendant and the Case Manager in the investigation since August 2020; and
    c. Ms Erica Saunders, Director of Corporate Affairs at the Defendant and its Senior Information Risk Owner.
59. The Court was provided with a voluminous bundle of documentary material explaining the narrative of events summarised above (with two supplementary

bundles provided in the course of the hearing) and a separate bundle of authorities (again supplemented during the hearing).

The Witness Evidence

60. Much of the cross examination of the witnesses comprised taking them through the documentary materials explaining the chronological events set out above. The following additional points of note emerged from the evidence of the witnesses.

The Claimant's evidence

61. *Access to documents*: The Claimant accepted that she had access to much of the documentary material before the Court. She had been copied into most emails between the MPS and the Trust from June 2020. Her RCA statement from January 2018 was a full account of the care and treatment of Patient A. She had already had access to the relevant medical records to compile her statement. However, she requires access still because she is now based at home without access to them and requires them to refresh her memory to answer questions in any interview. She made a subject access request to the Defendant and to the Practitioner Performance Advice service (PPA) in order to gain as much information as possible about what was going on, albeit that the proportion of material relating to Patient A obtained through those requests was very small. She had received a copy of Ms Marnet's statement written in December 2017, but not her RCA statement.
62. She wished to see every document generated in the MHPS investigation. She did not see how she could be expected to respond fairly and properly to allegations at an interview without seeing all the documents that the Case Investigator has been given and without being able to comment on those documents.
63. *The Campbell Report:* She did not agree to the production of the Campbell report in November 2019 and had always been concerned as to the opacity around the decision to commission it. She inclined to the view that the reasons for its commissioning were neither sound nor valid.
64. *Case Investigator and Manager*: Both Ms Wood and Ms Greer are respectable professionals doing their best and that she had no reason to doubt their professional integrity. She was not suggesting any bad faith on their part. In particular, she had no reason to doubt Ms Wood's professionalism and sincerity in relation to her view that the correspondence with Patient A's parents was not relevant to the investigation although she herself considered the documents would be relevant. She did not know Ms Saunders so was unable to comment on her professionalism and integrity, save to comment that the letter sent to Patient's A's parents could have been clearer.

Ms Wood's evidence

65. *Role as Case Investigator:* This was Ms Wood's first investigation under the MHPS Policy. A practitioner subject to an investigation under the Policy is entitled to expect a full and fair investigation. Her role was to present the facts. Her own responsibility did not extend to that decision-making. Being subject to an MHPS investigation was a serious business. Whilst her Case Investigator training course material referred to the provision of a 'disclosure file' a

practitioner subject to an investigation under the Policy was not entitled to see documents at this stage of the process.

66. *Interview on 20 July 2020:* At the interview the Claimant said that she wanted to see further documents before being asked questions about Patient A so this part of the investigation did not proceed on that date. She, Ms Wood, had wanted to get the best information from the Claimant in the interview and wanted her to feel that the process was as fair as possible. The interview itself was an exchange of information. In response to the suggestion that it would be nonsensical for the Claimant to be provided with documents after the interview, Ms Wood stated that the interview was part of her fact-finding mission and that the interview might help identify further relevant documents to consider.
67. *The list of documents provided on 21 July 2020:* This was the first time the Claimant had been notified of the documents in her, Ms Wood's, possession. She had provided the list of documents in the spirit of being transparent, but it was not her intention that the Claimant be provided with the documents contained in the list.
68. *The RCA statements:* The RCA statements helped her draw up the list of questions for the interview with the Claimant. The relevance of the statements themselves would be determined at a later stage. She decided to re-interview some of those involved in the RCA process in order to obtain additional thoughts and opinions as the RCA statements had been compiled for a broader purpose. She had interviewed other members of staff (including nursing staff) not interviewed for the RCA process and this had produced more relevant information in relation to the terms of reference of her investigation of the Claimant's conduct. Ideally the Trust would have released the RCA Statements if they had obtained consent. This did not necessarily mean she had formed a view that the documents were relevant but that the Trust was trying to advance the investigation. In her view only the statements of Ms Marnet and Ms Toni are relevant. The statement of Ms Rymill is not relevant.
69. *Correspondence with Patient A's parents:* There had been discussions with Ms Saunders and with legal advisors about disclosure of the correspondence with Patient A's parents. There was no concern that the Claimant was going to do anything nefarious with the correspondence if she received it. She, Ms Wood, had made her own decision that the letters were not relevant. She had also discussed the matter with and taken advice from Ms Greer. Ms Saunders had informed her that the parents had refused to consent. She had not herself seen the response of the parents to the request for consent to disclose.
70. *Her preliminary questions:* Her provision of preliminary questions to the Claimant was an attempt to be fair and open, without limiting herself to asking only those questions. The questions were based mainly on interviews with the Claimant's colleagues.
71. *Confidentiality/data protection:* She had taken advice from several people including Ms Greer and Ms Saunders. There were also legal discussion about disclosure of the documents. A decision was made to seek consent to disclose from the authors of the documents.
72. *Overall:* She thought she had provided the Claimant with everything she should have as stipulated by her Case Investigator training. She had reviewed numerous documents during the investigation, many of which she did not consider relevant.

Evidence of Ms Greer

73. *Training materials:* Her understanding of her training materials was that documents were not disclosed to the practitioner before her decision as Case Manager on how matters should proceed. However, as a matter of good practice, a draft of the report should be shared with the practitioner in question. The interview was not therefore a doctor's only chance to comment on the case against him/her.
74. *Consent from Patient A's parents and the authors of the RCA statements*: She had a number of conversations with the Trust's HR team regarding the release of the material but was not personally involved in the process of seeking consent. She had started in the role in late August 2020 when it had already been decided that disclosure of the outstanding documents would be dependent on consent. As at October 2020 she had not seen the correspondence with Patient A's parents but was aware of Ms Wood's view that the information would not be relied on in the final report and was not relevant. She had since seen the material herself and agreed with her. She had not herself seen the response of Patient A's mother to the disclosure request.
75. *Decision to move forward with the Investigation:* By 20 November 2020 some considerable time had passed and that she felt that the Trust had shared everything with the Claimant that it could share, and there now needed to be a conclusion to the process. This required the Claimant to choose between being interviewed without the documents or not being interviewed and the Investigation being concluded without her input.

Evidence of Ms Saunders

76. *Her role:* She had been made aware of the death of Patient A in December 2017, in part, because she was the budget holder for all legal matters and her attention was brought to the potential for a clinical negligence claim by the family of Patient A.
77. *Disclosure:* She sought advice on the question of disclosure from the Trust's clinical negligence solicitors who advised that the documents should not be released without consent. She accepted that the Claimant was already in possession of previous correspondence with the family of Patient A, which was likely to contain some of the same personal data as contained in the correspondence with Patient A's parents. In her view the Trust had acted in the best interests of all parties in a sensitive investigation and had tried to move the process along.
78. *Relevance of the material sought:* It was for the Case Investigator and Case Manager to assess the relevance of documents sought. She was not directly involved in the MHPS investigation nor should she be. She had, however, been told that the documents sought by the Claimant were not relevant.
79. *Consent from Patient A's parents:* A draft letter to Patient A's parents seeking consent to disclose the correspondence had been prepared by legal representatives of the Trust. She had checked the draft and was content with its contents. The letter did not name the Claimant and only gave a broad indication of the reasons for seeking consent. This was to balance the interests of a number of parties including the family and the Claimant, who was entitled to confidentiality. The reference to seeking disclosure "as a courtesy" was a reference to courtesy to the Claimant, although it was possible it might be understood as a courtesy to the parents. She had not pursued matters further

following the refusal of consent on the basis that it would be insensitive to do so. She had considered going back again to Patient A's mother but decided against doing so having consulted with the Trust's legal advisor. When asked what sensitive personal data the correspondence with the parents might contain, Ms Saunders acknowledged that this would "*predominantly*" relate to Patient A's data. She accepted that there could be no obligations in relation to Patient A's sensitive data, given that the data protection regime relates to living subjects. When asked what other sensitive personal data not relating to Patient A might be contained in the letters, Ms Saunders could not respond fully for risk of betraying the content of the letters.

80. *RCA statements – consent:* whilst the template used by staff to prepare witness statements for the RCA investigation informs staff that their statements might be disclosed, she was of the view that this did not extend to an internal investigation under the MHPS Policy.

Findings

81. Having considered the documentary material, witness statements and listened to the cross examination of the witnesses, I make the following findings:
    a. The terms of reference for the investigation were narrowly focused on the Claimant's decisions in relation to Patient A on 3-4 December 2017 when the Claimant was on call but not physically at the hospital. She did not therefore operate on Patient A on either day. The operations were performed by Ms Marnet.
    b. Considerable sensitivities were at play in the investigation. These included concerns about a medical negligence claim and tensions between and amongst staff/the Claimant in relation to the events under scrutiny. It is apparent from Ms Wood's list of preliminary questions that some staff were emotionally affected by events.
    c. As the Claimant accepted in evidence, she had received a considerable amount of material relating to the case and she had a considerable understanding about relevant matters. She produced a detailed statement about Patient A's clinical care, based on medical records and her own recollections. She was provided with the reports of the earlier investigations. She was also provided with a preliminary list of questions that the Case Investigator proposed to ask her at her interview. The Court was told (and the point was not contested) that it is unusual for a Trust to do so.
    d. The Claimant's position on disclosure is that she wishes to see all the documents that the Case Investigator has seen before the interview and to comment on the documents.
    e. The Claimant accepted in cross examination that she has no reason or evidence to doubt the professional integrity of Ms Wood (Case Investigator) or Ms Greer (Case Manager).
    f. The RCA investigation was broader than the current MHPS investigation. Ms Wood re-interviewed the makers of the RCA statements (and others) to focus more specifically on the terms of reference for the MHPS investigation i.e. the Claimant's actions over the relevant period. Those interviews formed the main basis for her list of preliminary questions to ask the Claimant at the interview.

g. Ms Wood was (and remains) of the view that the RCA statements of Ms Marnet and Ms Toni are relevant to the investigation but Ms Rymill's statement is not.
h. Ms Wood was (and remains) of the view that the correspondence with Patient A's parents in March 2019 is not relevant to the investigation.
i. There were various discussions within the Defendant, involving Ms Wood, Ms Saunders, the then Medical Director and subsequently Ms Greer, as well as legal advisors about the Claimant's information request. The outcome of the discussions was a decision to disclose the documents if the Defendant obtained consent to do so. This would be done even though Ms Wood did not consider the correspondence and one of the statements to be relevant. The decision to proceed in this way was an attempt to move the investigation on; to balance the interests of the various parties involved or affected by the investigation including the Claimant; and to manage the sensitivities arising.
j. Ms Saunders considered whether to press matters further with the parents of Patient A after the initial refusal to consent to disclosure but decided not to do so, having taken legal advice, on the grounds it would be insensitive to do so.
k. Between June – November 2020 matters became increasingly litigious with the involvement of lawyers on both sides.
l. The investigation was conducted during the Covid-19 pandemic. The initial Case Manager, the Trust's Director had to be replaced by the Trust's interim Medical Director because of the pressures created by Covid 19 and the need for the Trust's Director to focus on the pandemic. Ms Greer was appointed Case Manager when the Interim Medical Director left the Trust.

Submissions of the Parties

The Claimant

Express terms

82. *Clause 1.16:* The proper interpretation of paragraph 1.16 of the Trust's policy, construed within the context of the MHPS and the overarching obligation of fairness, is that the Claimant is entitled to documents that the Case Investigator has seen, in advance of the investigatory interview, and not merely documents the Case Investigator has decided are relevant. The rationale for this approach is that the Case Investigator may have been influenced (consciously or otherwise) by seeing material which is not directly relevant to the allegations. If, which is not the Claimant's primary case, the Court considers that 'related to' means 'relevant to' then whether a document is relevant is an objective question of law, not a discretionary decision for the Case Investigator. Documents are either relevant to the issue being investigated or they are not. No question of discretionary decision-making arises.
83. *Clause 1.14* The Claimant is entitled to be consulted about information to be gathered as part of the investigation. This is consistent with the obligation on the Case Investigator to carry out an even-handed investigation in which evidence tending to acquit the doctor is sought out just as much as the evidence tending to convict. There had been a wholesale failure by the Defendant to engage with the Claimant's enquiries as to what the documents consist of. In

the circumstances, even if the Defendant had sought her views on the information to be gathered (which it did not), the Claimant would inevitably be in difficulty in exercising her right. The Defendant's procedural criticism that this aspect of the case has not been properly pleaded has no merit. The Case summary identifies the issue and it was pleaded in the Particulars of Claim permitted by Eady J to be served out of time. In any event, the Defendant had not pleaded the argument now advanced that the provision had no contractual force.

84. *Implied term of trust and confidence*: There is no reasonable or proper cause to withhold documents seen by a Case Investigator in the course of an investigation which a practitioner has a legitimate interest in seeing and commenting upon. This is conduct which at the very least is likely to destroy or seriously damage the relationship of trust and confidence between the parties. Not disclosing materials from a supplementary investigation to the practitioner was held to be a breach in Al-Obaidi v Frimley Health NHS Foundation Trust [2019] IRLR 1065, [41] [108-111]. An assessment of breach of the implied term is not to be gauged by looking at the documents that the Claimant has seen. The correspondence suggests that the original intention was for the Claimant to see all the documents. It was agreed by Ms Wood that the Claimant should not have to answer questions about Patient A without sight of the documents. This can only be a recognition by Ms Wood that it would be unfair to require the Claimant to proceed without the documents. The Defendant has offered no explanation as to how it came to perform a complete about-turn on the question of disclosure by 24 August 2020. The RCA statements are accepted to be relevant, being statements about the care provided to Patient A. Just because Ms Wood considers that she may have obtained better or different evidence through the interview process does not make them irrelevant. The documents were relevant and they should have been disclosed without the process undertaken of seeking consent. The issue of consent is a red herring. The Defendant has processed a large volume of personal data in connection with the investigation without the consent of the individuals whose data it represents. The Trust's attempts to obtain consent were woeful. There was no attempt to explain to Patient A's mother why and for what purpose her consent to disclosure was sought and no follow up explanation provided to her when she said that she did not understand the request. There was no requirement to seek consent from the makers of the RCA statements to their disclosure. The witness statement template used by staff for the RCA statements made clear that their statements might be disclosed.

The Defendant

Express terms

85. *Paragraph 1.16:* gives rise to an obligation in relation to correspondence relating to the case. Correspondence means written communications (e.g. letters, emails or similar). It does not oblige the Defendant to give disclosure generally of documents or, in particular, documents that the Case Investigator may have seen during the course of the investigation. Correspondence relating to the case means such communications between the Defendant and other related and concerned bodies in relation to an MHPS investigation, including the PPA and GMC. There are numerous examples within the E27 policy of this type of correspondence. Any such correspondence would give the Claimant the

right to request to see the same, subject to any confidentiality concerns that may arise. Moreover, there is no obligation on the Defendant to provide this correspondence unless it is specifically identified and sought by the practitioner, and there is no obligation on the Defendant to provide this correspondence before the practitioner is called for, or required to attend, an investigatory interview. 'Relating to the case' is a test of relevance and it is prima facie a decision for the Case Investigator. This is in keeping with the wide discretion given to the Case Investigator under paragraph 15 of the MHPS. It is therefore a 'Braganza' style case. The RCA statements cannot be regarded as 'correspondence relating to the case'. They are statements. Letters to Patient A's parents long before the MHPS investigation commence cannot be 'correspondence relating to the case'. The Case Investigator has correctly exercised her wide discretion to regard them as irrelevant.

86. *Paragraph 1.14* The Claimant's case had not been properly pleaded. It was not open to her to pursue this aspect of the claim. It did not form part of the issues on the basis of which Eady J made directions for trial at a hearing on 15/2/21. It did not feature as an issue in the order made at the hearing which identified the scope of the trial as being whether the Claimant had a contractual right to be provided with documents. The Claimant cannot and did not point to any case in relation to Clause 1.14 until a vague reference in the letter of claim on 30/11/2020. Even if it is legitimately part of the Claimant's case it suffers from lack of specificity and there is nothing about it in the Claimant's witness statement. In any event, the obligation was not intended to have contractual status. It was an expression of aspiration (Hussein v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB) at 168. It did not appear in the MHPS, only in the Trust's own policy. Its requirements are uncertain including whether it applies pre or post interview or amounts to an ongoing obligation. The language used is 'will' not 'must' and is to be contrasted with other provisions of paragraph 1.16 which say "must". It does not have the tone and quality of an obligation. It calls on an employer to ask for that which any reasonable investigator would seek to do anyway and therefore cannot objectively have been intended to be enforceable.
87. *Implied term of trust and confidence:* There is a high hurdle for a Claimant to get over in order to establish a breach of the implied term of trust and confidence. It requires a Claimant to prove objectively that there has been conduct so serious as to "*destroy or seriously damage the relationship of confidence and trust"*. This can only be a case based on an attack on the exercise of the discretion of the Case investigator as analysed in IBM v Dalgleish [45-57] and thus the Claimant must establish that the decision(s) fail the rationality test namely (i) that irrelevant matters were brought into account or relevant matters ignored and (ii) the decision is so outrageously wrong as to offend common sense. In any event no such analysis is required if Defendant is acting with 'reasonable and proper cause'.
88. The premise of the Claimant's case is that she is incapable of fairly being invited to and participate in an interview. That is simply wrong in light of: a) the materials the Claimant possesses which richly informs and prepares her for interview; b) No such pre-interview briefing is required as a matter of procedure (MHPS or E27), law or practice; c) There is no case advanced that attacks the good faith of the judgment of Ms Wood and Ms Greer and absent this, the Claimant's case that the correspondence with Patient A's parents is relevant to

the Terms of Reference is based purely on suspicion and wholly unsupported by evidence. The issue of consent is irrelevant, but in any event the Defendant has acted sensitively and properly in this regard. The real bar to the Claimant being given these materials is the failure of the relevant people to give their consent. This is all irrelevant if the Claimant does not establish a legal right to receive such documentation, which she has not.

Discussion

Initial observations

89. Before turning to the contractual provisions under scrutiny and evaluating the parties' submissions I make the following observations, drawn from caselaw and the wording of the MHPS/Trust policy.
90. **First**: it is wrong to regard the internal disciplinary process of the Trust as if it is an adjudicative process concerned with the determination of legal rights, such as occurs in a court or tribunal. In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically, it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and if so, to determine how that should affect future relations between them (Al Mishlab v Milton Keynes Hospital NHS Foundation Trust [2015] EWHC 3096 (QB) approved in Gregg v North West Anglia NHS Foundation Trust [2019] ICR 1279). I do not accept the Claimant's submission that the analysis to this effect in Mishlab relates only to an application for an interim injunction. The analysis extends more broadly, as is apparent from its content. Moreover, the analysis was approved in Gregg, in which a permanent injunction was sought.
91. **Second:** Where, as here with the MHPS, the disciplinary procedures have been contractually agreed and provide a panoply of safeguards of a kind typically found in adjudicative bodies, that does not alter their basic function. The Defendant has a duty to act fairly and the procedures are designed to achieve that objective (Christou v Haringey LBC [2013] EWCA Civ 178 Elias LJ)
92. **Third**: The disciplinary proceedings in this case are in their infancy. The MHPS envisages that investigatory interviews may resolve matters and the matter will progress no further. The purpose of the investigation is to decide if there is a case to answer against the practitioner. Paragraph 17 of the MHPS sets out a number of options for the Case Manager which include that no further action is needed.
93. **Fourth**: The Case Investigator is responsible for leading the investigation into the concerns, establishing the facts and reporting the findings. It is the Case Investigator's responsibility to judge what information needs to be gathered and how (paragraph 1.14 Defendant's policy). The Case Investigator has a discretion on how the investigation is conducted providing the facts are obtained in an unbiased manner (1.18). The Case Investigator does not however make any decisions about next steps. That is for the case manager (1.15). The report must contain sufficient information to enable the case manager to make a decision about next steps (1.20). Accordingly, the Case Investigator's role is more limited than that of the investigating panel under the previous disciplinary procedure, set out in circular HC(90)9, which could be described as quasi-judicial in nature. The latter made findings of fact after hearing evidence which

would often have been tested by cross-examination. The panel produced a report, making findings of fact, and determining whether the practitioner was at fault. The panel was entitled to recommend disciplinary action. The authority then acted on the facts which the investigating panel had determined. By contrast, under the MHPS procedure, the case investigator enquires into the facts by interviewing people, and the practitioner is not able to test their accounts of events during the investigation. The outcome of the investigation is a report on whether there is a prima facie case of misconduct. Thereafter, if the case manager decides that it is appropriate, the facts are determined at a hearing before a conduct panel, where the practitioner may be represented, test the evidence of the management witnesses, and call his or her own witnesses (Chhabra v West London Mental Health NHS Trust [2014] ICR 194 [16] & [17])

94. **Fifth:** Paragraph 1.16 of the Trust's disciplinary policy sets out six obligations for the Trust which provide protection for the practitioner: First, the Case Manager must inform the practitioner concerned in writing that an investigation is to be undertaken. Second, the name of the Case Investigator must be given to the practitioner. Third, the practitioner must be made aware of the specific allegations or concerns raised. Fourth, "the practitioner must be given the opportunity to see any correspondence relating to the case". This is at the heart of this case. Fifth, the Claimant is entitled to see a list of the people that the Case Investigator will interview. Sixth, the practitioner concerned must be afforded the opportunity to put their view of events and also be given the opportunity to be accompanied when doing so. This, then, is the context in which the obligation on the Defendant in relation to correspondence must be considered.
95. **Sixth:** There is a public interest in allowing internal processes to run their course. The Courts should not engage in micromanagement of employment procedures. They should be slow to interfere if disputed issues can be sorted out and resolved within the framework of internal procedures Gregg v North West Anglia NHS Foundation Trust [2019] ICR 1279
96. **Seventh:** Where detailed procedures are silent on the matter then the fallback is that it is a managerial discretion for the employer to decide upon in relation to that gap (MacMillan v Airedale NHS Foundation Trust [2014] EWCA Civ 1031 para 51).

Clause 1.16 - Correspondence relating to the case

Contractual interpretation

97. The natural and ordinary meaning of 'correspondence' is an exchange of written communications, as for example by way of letter, email or similar. In my judgment it has a distinct and separate meaning from the broader term 'document'. The former may be a subset of the latter but the latter encompasses a broader range and type of material. The clearer the natural meaning the more difficult it is to justify departing from it (Arnold v Britton). The choice of language in this respect ('correspondence') is consistent with the numerous references within the MHPS/Trust policy to communications between a Trust and other related and concerned bodies in relation to an investigation under the MHPS. These are the organisation which are likely to be told about the investigation and to be receiving and sending correspondence. They include; the General Medical Council and the NCAS (now Practitioner Performance Advice

(PPA)) (See Trust policy; Appendix A paragraphs 1.8, 1.20, 1.21, 1.25, 2.12, 2.16, 4.27), the National Patient Safety Agency (Ap 1.10) the police (Ap A 2.12) Director of Public Health (Ap 2.30) and the Medical Director of NHSE (Ap 2.25, 2.30 and 2.37).

98. I do not, however, accept the Defendant's submission that 'correspondence' in this context is limited to those professional organisations which tend to be involved in an investigation and does not extend to correspondence with relatives. There is no express limitation in the policy to correspondence with professional bodies. Instead, the sentence in question refers to *"any correspondence".* The only expressed limitation is correspondence '*relating to the case'* not as to the source of it. Moreover, it was common ground between the parties that the MHPS should be interpreted purposively. The MHPS recognises that concerns about a practitioner's conduct can arise from complaints by relatives ('*concerns about a practitioner's conduct ..can come to light in a variety of ways, for example…complaints by ..relatives..[*1.1] and *"Unfounded and malicious allegations can cause lasting damage to a doctor's reputation and career prospects. Therefore all allegations, including those made by relatives of patients…. must be properly investigated to verify the facts so that the allegations can be shown to be true or false"* [1.2]. The Defendant explained that correspondence with relatives is more rare than with professional organisations, but that does not amount to a reason to deny the practitioner the opportunity to see it if it arises. Correspondence may be the way in which the relatives express specific concerns or allegations, which the practitioner is entitled to be made aware of in any event, pursuant to Clause 1.16. The Defendant expressed concern about confidentiality issues that might arise from disclosure of such correspondence. However, the Case Investigator is given discretion to ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible [12].
99. The requirement that the correspondence to be provided is that *"relating to the case"* can only, it seems to me, impose a test of relevance. There must be a nexus and causative connection between the correspondence and the investigation. The Claimant's interpretation that the phrase refers to any document seen by the Case Investigator could extend to anything that has come across the Case Investigator's (virtual) desk without any qualification of relevance or whether the documents remain in the Case Investigator's possession. The Claimant's interpretation sits oddly with the accompanying reference in the paragraph 1.16 to the provision of *"a list"* of people to be interviewed which provides a flavour of the level of detail envisaged to be in play at this juncture. The Claimant's interpretation could lead to an unworkable amount of information to be disclosed which could, in turn, raise confidentiality and data protection issues when the document in question may not even be relevant.
100. Further, the test of relevance: must, it seems to me, be prima facie a decision for the Case Investigator and not the Court. The MHPS/Trust policy provides a wide measure of discretion to the Case Investigator in the conduct of the investigation ([1.18] of the Trust Policy and [15] of the MHPS). The Claimant's case, that relevance is a matter of law for the Court, draws the Court into the sort of micro management of internal disciplinary processes which the Courts have deprecated [Gregg][109-111]. The Claimant's approach is inconsistent with Lady Hale's analysis in Braganza that "contractual terms in which one

party to the contract is given the power to exercise a discretion are extremely common… It is not for the Courts' ...to substitute themselves for the contractually agreed decision maker" ([2015] UKSC 17 [18]). Accordingly, the test to be applied by the Court is the rationality of Ms Wood's exercise of her discretion, in particular a) did she take account of relevant matters (and no irrelevant matters) and b) was the decision such that no reasonable decision maker could have reached it? The burden of proof rests on the Claimant to establish the decision lacked rationality. *"The Claimant must show a prima facie case that the decision is at least questionable"* (IBM v Daglish [2018] 4 at [13]).

101. The effect of the Claimant's case on contractual interpretation is to seek a wide ranging pre-interview right of disclosure of all documents seen by the Case Investigator, irrespective of relevance. I cannot accept this submission for the following reasons:

a. Disciplinary Matters are in their infancy. The investigatory interview may resolve matters and the case will progress no further. This stage is designed to be informal and non-litigious, as is apparent from the language of the requirement that the practitioner be given the opportunity to 'see' the correspondence.

b. The MHPS does not make any reference to a pre- interview disclosure exercise. As explained above, the level of information likely to be generated by this exercise is wholly inconsistent with the other information requirements at this stage of the disciplinary proceedings (the practitioner should be 'made aware' of the concerns raised and should have 'a list' of those to be interviewed).

c. There is no explicit right to disclosure further along in the disciplinary proceedings when employment may be in peril. The MHPS pre-hearing procedures for a capability hearing provide that *"the case manager must give the practitioner the opportunity to comment in writing on the factual content of any report produced by the case investigator"* (Section IV MHPS Procedures for dealing with issues of capability at [13]). There is no right to documents that the Case Manager might have seen. Prior to a capability hearing the practitioner is entitled to "*copies of any documentation and/or evidence that will be made available to the capability panel"*. There is therefore no right to see all documents, just documents on which the employer intends to rely. It would be surprising if there was a greater legal protection, by way of disclosure, for those to be interviewed when the matter may go no further than there is for panel hearings for practitioners facing the end of employment. If anything it ought to be the other way round.

d. It would also be surprising if this is a feature of the MHPS regime but not of the preceding, more adversarial, HC(90)9 regime (See Chhabra at [16] and [17]).

e. More broadly; I was shown the ACAS Code of Practice on Disciplinary and Grievance Procedures which provides no such entitlement nor gives any comparable guidance. Only in the criminal sphere is there any obligation for a pre-interview briefing or disclosure and this does not extend to an entitlement to documents (I was shown the Association of Chief Police Officers guidance June 2014 on Pre-Interview Briefings and Home Office guidance on Interviewing suspects guidance 10/2/20).

102. There is no mention in the MHPS of a timetable for the practitioner to have sight of the correspondence. The Claimant submitted that any material should be provided prior to interview. The Defendant submitted that if those writing the MHPS had meant for there to be any kind of temporal requirement even in the vaguest of terms here, they would have put it in. It is not necessary to determine this point for the purposes of this claim. However, in passing, I remind myself that where detailed procedures are silent on the matter then the fallback is that it is a managerial discretion for the employer to decide upon in relation to that gap (MacMillan v Airedale NHS Foundation [2014] EWCA Civ 1031 para 51). The Defendant's policy (and MHPS) grants a wide discretion to the case investigator in the conduct of the investigation. To read in a formal timetable invites questions, which are not answered in the MHPS, including how long before the interview must the correspondence be disclosed e.g. 7 days? 14 days? What happens if a document comes to light after an interview? Accordingly, I would be inclined to accept the Trust's submission that the timetable for the Claimant to see the correspondence should be, prima facie, a matter for the Case Investigator's discretion. It may be the case that the fair conduct required of a Trust, which underpins the MHPS procedures, requires the practitioner to have sight of the documents beforehand but much is likely to depend on the circumstances. In a case like the present a number of earlier investigations mean that the relevant contours of the investigation are well understood by all those involved. In other cases the position may be different. The Case Investigator's discretion must be exercised bearing in mind the obligation in clause 1.16 that the practitioner can give their view on events. This approach gives the necessary flexibility to the procedures (Chhabra v West London Mental Health NHS Trust "it would introduce *an unhelpful inflexibility into the procedures… I do not interpret the MHPS … as being so inflexible or restrictive"* (Lord Hodge at 205).

103. The Defendant also suggested that a Trust is only obliged to provide the opportunity to view the correspondence if the practitioner requests it. The Claimant did not make detailed submissions on this as it did not form part of her primary case and it is not necessary for the purposes of this case to resolve the point because the Claimant has requested the material.

Breach

104. It follows from the analysis above that the RCA statements did not fall to be disclosed. It was not suggested by the Claimant that they could constitute correspondence.

105. Whilst the correspondence with Patient A's parents is, in my view, within the scope of disclosure, the Case Investigator, Ms Wood, was clear in her evidence that she considers the correspondence does not relate to the case. Ms Wood's view on relevance is supported by Ms Greer. The burden of proof rests on the Claimant to show a prima facie case that the decision is at least questionable (IBM v Daglish [2018] 4 at [13]). Neither the Claimant nor the Court have seen the correspondence in question. There is however other evidence available to the Court on which to form an assessment of the decision.

106. Ms Wood was appointed case investigator in April 2020 and conducted 22 interviews as part of the investigation. She was well placed to assess relevance (better placed than the Court). The investigation is focussed on events during

the 3 and 4 December 2017 when the Claimant was not present at the hospital and did not operate on the patient in question. The correspondence in question was generated in March 2019, some sixteen months later. It is therefore not immediately apparent why the correspondence might be relevant. The Claimant accepted in cross examination that she has no reason to doubt the professional integrity of Ms Wood or Ms Greer. Her position is that she wishes to see every document generated in the MHPS investigation and does not see how she can be expected to respond fairly and properly to allegations at an interview without sight of these documents. However her position does not find support in the contractual arrangements. During cross examination it emerged that the Claimant has concerns about the decision taken to commission the Campbell investigation which reported in November 2019. Whether or not correspondence in March 2019 with Patient A's parents led to a decision to commission the Campbell investigation is not however of relevance to the terms of reference of the present investigation. In any event, suspicion is not sufficient to establish that Ms Wood's decision was questionable.

Clause 1.14 'The Case investigator will approach the practitioner concerned to seek views on information that should be collected' (Clause 1.14)

107. The parties were in dispute as to whether the Claimant should be permitted to advance this aspect of her claim and as to whether clause 1.14 has contractual status. I have not, however, found it necessary to decide these matters because I am satisfied that the Defendant is not in breach of the provision.

108. The present investigation follows four previous investigations and three reports into the care of Patient A. The Claimant has produced a detailed statement on matters, which was supplied to Ms Wood in July 2020. The tramlines of the issues were (and remain) well understood by all those involved. It is apparent from the chronological narrative of events that that there was extensive liaison and discussion between the Claimant, her legal representatives and Ms Wood and, to a lesser extent, Ms Greer. There was no suggestion made by the Claimant or her advisors that Ms Wood was not looking at the right material. Instead the Claimant's advisors were focussed on seeing all the evidence that Ms Wood had seen. In essence, the Claimant's case in this regard boils down to a proposition that a Trust will be in breach of this provision unless it can point to an express statement asking for the practitioner's views on the information to be collected. That would be an anathema to the flexibility of procedure permitted by the MHPS. ("it would introduce *an unhelpful inflexibility into the procedures… I do not interpret the MHPS … as being so inflexible or restrictive"* (Chhabra v West London Mental Health NHS Trust Lord Hodge at 205).

Implied duty of mutual trust and confidence?

109. Having received the Claimant's information request, Ms Wood sought advice from Ms Saunders, Director of Corporate Affairs and Senior Information Risk Owner. There were also communications between Ms Wood and the then Case Manager and subsequently Ms Greer. Advice was sought from the Defendant's legal advisors. The outcome was a decision to disclose the

documents if the Trust obtained consent to do so. This would be done even though Ms Wood did not (and does not) consider the correspondence and one of the RCA statements to be relevant. The HR Department attempted to seek consent from the authors of the RCA statement and Patient A's parents. Eleven statements from the RCA process were provided to the Claimant. The evidence of Ms Wood, Ms Greer and Ms Saunders was that the decision to proceed in this way was an attempt to move the investigation on; to balance the interests of the various parties involved or affected by the investigation, including the Claimant; and to manage the sensitivities arising.

110. The decision on disclosure followed a specific request from the Claimant during the course of the investigation as part of the negotiations over arrangements for the Claimant's interview. In my view, the decision was reached as part of Ms Wood's wide discretion as to the conduct of the investigation and the information to be gathered *('It is the responsibility of the Case Investigator to judge what information needs to be gathered and how- within the boundaries of the law – that information should be gathered [1.14]* and *"The Case Investigator has discretion on how the investigation is carried out….[1.18])*. Accordingly, this is a 'Braganza' style case and not a 'Malik' one. The extent of the Court's oversight is therefore limited, in my view, to a rationality assessment. But, in any event, I do not consider that the outcome would be different on either approach.

111. I have concluded above that the Claimant is not entitled to the documents sought pursuant to the express terms of the contract. This is on the basis that the RCA statements are not correspondence and the correspondence with the patient's parents is not considered by the Case Investigator to be relevant to the investigation. To permit the Claimant to see the documents, nonetheless, would be to allow her to use the implied term of trust and confidence to modify the express terms of the contract. This point was acknowledged in passing but not determined in Gregg (*"Mr Sutton QC submitted, with some force, that the decision [Stevens v University of Birmingham [2015] EWHC 2300 (QB)] was open to the criticism that it allowed the implied term to modify the express terms of the contract, and may have confused the implied term of trust and confidence with a general duty to act fairly"*).

112. The Claimant criticised the Defendant's decision to seek consent to disclosure and suggested it was based on a misplaced legal understanding of data protection law. However, this is not consistent with the evidence of the Defendant's witnesses. The decision to seek consent was based on an attempt to accommodate the Claimant; move the investigation on; balance the interests of the various parties involved and to manage the sensitivities arising from the investigation. The Claimant criticised the Defendant's attempts to seek consent from Patient A's parents as woeful but Ms Saunders explained that the letter to the parents was carefully drafted to balance the interests and sensitivities arising. She further explained that she considered going back to the parents after their initial refusal but decided it would be insensitive to do so, having taken legal advice.

113. The Claimant accepted she was given a considerable amount of material including (unusually) a list of preliminary questions for the interview. She has had access to sufficient material to compile her own detailed statement about the events in question. She collaborated on correspondence with Patient A's family. She had sight of and participated in several previous investigations into

the care of Patient A. In my judgment, the Defendant went to considerable efforts to accommodate the Claimant's request in the context of a sensitive investigation at an early stage in the disciplinary process.

114. I have not seen any evidence to persuade me that the Defendant's decision making took account of irrelevant matters or it failed to take account of relevant matters or it was otherwise unreasonable. Nor am I persuaded that the Defendant's conduct was calculated to destroy or seriously damage the relationship of trust and confidence. There was reason and proper cause for its actions.

Relief

115. In light of the conclusions reached above it is not necessary to consider relief.

Conclusion

116. The Claim fails. The Defendant's decision not to disclose the documents sought did not breach the express terms of the Claimant's contract. Nor was there a breach of the implied term of trust and confidence. The decision of the Case Investigator as to the relevance of the correspondence sought is primarily a matter for her discretion, subject to rationality review by the Courts. There was no breach of any requirement to consult with the Claimant about the information to be collected for the investigation and it has not therefore been necessary to consider the contractual status of the provision. The question of relief does not arise.