Neutral Citation Number: [2020] EWHC 1500 (QB)

Case No: QB-2019-002976

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
(Remote Hearing by Skype for Business)

Date: 11/06/2020

Before :

MRS JUSTICE EADY

- -

Between :

(1) DR OLUWATOYIN OGUNSANYA
(2) TAYLOR WOOD SOLICITORS

Claimants

- and –

GENERAL MEDICAL COUNCIL

Defendant

- -
- -

Mr Jason Coppel QC (instructed by **Taylor Wood, Solicitors)** for the **Claimants**
Ms Alexis Hearnden of counsel (instructed by **General Medical Council, Legal**) for the **Defendant**

Hearing dates: 3 June 2020

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Approved Judgment

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MRS JUSTICE EADY DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii.
The date and time for hand-down is deemed to be 10.30 am on Thursday 11th June 2020

Mrs Justice Eady:

Introduction

1. This is the hearing of the Claimants' CPR Part 8 claim for a declaration (and associated injunctive relief) that the Defendant has no power to investigate the First Claimant pursuant to the Medical Act 1983 ("the 1983 Act"), in circumstances in which the First Claimant, who is both a registered medical practitioner and a solicitor, was acting in his capacity as a solicitor. The Claimants also seek a declaration that the Defendant's conduct amounts to unlawful interference in the business and lawful practice of the Claimants' trade; they accept, however, that this aspect of the claim is not capable of immediate determination and seek the Court's direction (pursuant to CPR 8.1(3)) that it should continue as a Part 7 claim.

2. The Claimants say this application is necessitated by the Defendant's decision, communicated in correspondence of 8 and 14 August 2019 (subsequently amended and confirmed on 26 November 2019) to investigate matters said to concern the First Claimant's fitness to practise as a doctor. It is the Claimants' case that, as the conduct in question was carried out in the First Claimant's capacity as a solicitor, the Defendant is not entitled to investigate the alleged misconduct, not least as it is unfair to investigate matters which are covered by legal professional privilege ("LPP").

3. For its part, the Defendant submits that the Claimants are seeking to challenge a public law decision of a statutory body, exercising its statutory duty; as such the claim should have been brought as an application for judicial review under CPR Part 54 and it is a breach of the principle of exclusivity and an abuse of process for the Claimants to pursue this matter as a private law claim. In any event, the Defendant contends that a lawful decision was taken, that the remaining allegations properly fall within the scope of section 35C of the 1983 Act, and it is thus required to refer the matter for investigation; moreover, the claim is premature as any subsequent decision will be susceptible to challenge by way of judicial review (if there were proper grounds for such a claim).

4. Given restrictions necessitated by the current Coronavirus pandemic, and with the parties' agreement, this hearing took place by video (using Skype for Business); it remained, however, a public proceeding and the hearing, its mode and its timing, was published in the cause list, giving contact details for any person who wished to attend.

The Parties

5. The First Claimant is a solicitor advocate of the Senior Courts of England and Wales and is one of two partners at the firm of Taylor Wood Solicitors, the Second Claimant; he is also a medical doctor and works part-time as a general medical practitioner.

6. The primary business of the Second Claimant is the provision of legal services, including advice and advocacy to its clients; it specialises in medical partnerships, regulatory work, employment and general civil litigation. The First and Second Claimants, and all qualified solicitors who work at that firm (six in total), are regulated by the Solicitors' Regulation Authority ("the SRA").

7. The Defendant is the body that has the sole statutory power and responsibility for registering and regulating the medical profession, and medical professionals, in the United Kingdom; its statutory powers being those provided in the 1983 Act. By virtue of his medical qualifications and medical practice, the First Claimant is registered with the Defendant pursuant to the 1983 Act and thus also subject to its regulatory powers.

The Defendant's Investigatory Powers – the Legal Framework

8. By section 1 of the 1983 Act it is provided that the over-arching objective of the Defendant is the protection of the public, which involves the pursuit of the following objectives:

> "(a) to protect, promote and maintain the health, safety and well-being of the public,
>
> (b) to promote and maintain public confidence in the medical profession, and
>
> (c) to promote and maintain proper professional standards and conduct for members of that profession."

9. Where an allegation is made against a medical professional, registered with the Defendant, that his fitness to practise is impaired, section 35C of the 1983 Act is engaged. A person's fitness to practise may be "impaired" for these purposes by reason of his misconduct (section 35C(2)(a)).

10. As for what is capable of constituting "misconduct", it is common ground that:

    i) There is no difference in meaning between "*misconduct*" in s. 35C(2)(a) and "*serious professional misconduct*", which was the relevant term used in earlier versions of the legislation (*R (oao Remedy UK) v GMC* [2010] EWHC 1245 (Admin), at paragraph 15).

    ii) "*Serious professional misconduct*" requires that the misconduct must be linked to the profession of medicine and must be serious (*Roylance v GMC* [2000] 1 AC 311, PC, at p 331B-C).

    iii) "*Professional misconduct*" does not, however, merely concern clinical misconduct; it must maintain a link to the profession of medicine, albeit what that link is and how it may occur will depend on the circumstances of the case (*Roylance* p 331F-G). The case-law has made clear that misconduct for these purposes can be seen as falling within two principal forms, as explained by Elias LJ at paragraph 37, *R (oao Remedy UK Ltd) v GMC* [2010] EWHC 1245 (Admin):

> "(1) Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and

> often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession."

iv) As for the requirement that the misconduct be "*serious*", that is a qualification to be given proper weight, connoting "*conduct which would be regarded as deplorable by fellow practitioners*" (see per Collins J at paragraph 31, *Nandi v General Medical Council* [2004] EWHC 2317(Admin); cited with approval by Auld LJ at paragraph 200, *Meadow v GMC* [2007] 2 WLR 286 CA).

11. Where an allegation of impaired fitness to practise is made, section 35C(4) of the 1983 Act provides that the Defendant's Investigation Committee shall investigate the allegation and decide whether it should be considered by a Medical Practitioners Tribunal.

12. Fitness to practise proceedings are subject to the General Medical Council (Fitness to Practise) Rules Order of Council 2004 ("the Rules"), made under paragraph 1 of Schedule 4 of the 1983 Act. Section 35CC(1) of the 1983 Act allows that the Rules may include provision for the functions of the Investigation Committee to be exercised by the Registrar, or any other officer of the Defendant, and by Rule 4 of the Rules it is provided as follows:

> "(1) An allegation shall initially be considered by the Registrar.
>
> (2) … where the Registrar considers that the allegation falls within section 35C(2) of the Act, he shall refer the matter to a medical and a lay Case Examiner for consideration under rule 8.
>
> …
>
> (4) The Registrar may, before deciding whether to refer an allegation, carry out any investigations as in his opinion are appropriate to the consideration of- (a) whether or not the allegation falls within section 35C(2) of the Act; (b) the practitioner's fitness to practise; …."

13. The question for the Registrar at this initial stage is "*whether the allegation is capable of producing a finding of misconduct*", per Collins J at paragraph 45 *R (oao Rita Pal) v GMC* [2009] EWHC 1061 (Admin). In *Rita Pal*, the process was described by the GMC as "*triage*" and the Court accepted that the Registrar was not thereby determining whether there had been unfitness to practise and was not, at that stage, required to carry out investigations to see whether the facts of the complaint could be established or not, unless it would be perverse to conclude that the matter should proceed further without having made such further inquiries, see *Rita Pal* at paragraphs 33 and 34; as Collins J further explained, at paragraph 35:

> "Since the general approach, which is implicit, and perhaps even explicit, in the procedure is that the Registrar will look at the allegation made, rather than go into any question as to whether the facts are likely to be established or not, it is

> difficult to see that there can be any perversity, generally speaking, in failing to make any particular inquiries which go to that issue. Of course, it is desirable, sometimes essential, that inquiries should be made in order to see precisely what actually is being alleged, because frequently allegations made are not at all clear. It may well be that in a given case it is not entirely apparent whether or not there is any foundation for the suggestion that misconduct might be established and it is necessary to find out a little more precisely what the allegation amounts to. It would be wrong, in my judgement, for a Registrar simply to say, "This is a somewhat obscure allegation. Although I recognise that it might be possible to identify what actually was at the heart of it by making some inquiries, I am not obliged to do so, and I throw it out for that reason". That, … I think, on the whole, would be a wrong approach. Equally, if the allegation depended upon a particular matter, and it was relatively straightforward to find out from an independent source whether that was indeed the true position, because the allegation may state something which can easily be verified one way or the other, then again it may well be that it would be wrong for the Registrar to fail to make the necessary simple inquiry which would sort the matter out one way or another. Those are but examples. One has to look at the circumstances of each individual case to see whether the Registrar did or did not unlawfully fail to make particular inquiries."

14. Should the Registrar consider that the allegation falls within section 35C(2) of the 1983 Act, Rule 4(2) requires that the matter must be referred to Case Examiners for consideration under Rule 8. At that stage, Rule 7 sets out the notification and information that is required to be given to the practitioner, who then has the opportunity to respond, and provides that the Registrar might carry out any further investigations deemed appropriate.

15. Pursuant to Rule 8, an allegation referred by the Registrar under Rule 4(2) must be considered by the Defendant's Case Examiners, who may decide (see Rule 8(2)):

> "(a) that the allegation should not proceed further;
>
> (b) to issue a warning to the practitioner …;
>
> (c) to refer the allegation to the Committee [for an oral hearing] …; or
>
> (d) to refer the allegation … for determination by a Medical Practitioners Tribunal."

The Factual Background

16. I am told that the Claimants have been involved in a number of successful challenges to decisions taken by NHS England ("NHSE"), relating to its contracts with, and

regulation of, GP practices; as such, Mr Coppel QC suggests they have become a "*thorn in the side of NHSE for some considerable time*". More specifically, in 2018 and 2019, the Claimants were engaged to advise and act for two doctors – Dr Agoe and Dr Ali – in relation to an attempt by NHSE to terminate its contract with their GP partnership. High Court proceedings (CO/3023/2019) had led to an injunction, preventing the termination of the contract, and NHSE had subsequently conceded a judicial review relating to a decision of the NHS Litigation Authority upholding its purported termination of its contract with Drs Agoe and Ali. The Claimants say this background provides relevant context when considering the NHSE complaint that led to the decision in issue in the current proceedings.

17. As well as representing Drs Agoe and Ali in their dispute with NHSE, the Claimants were instructed to advise and represent the doctors in their challenge to a decision by the Care Quality Commission ("the CQC") suspending the registration of their GP practice. Specifically, the First Claimant represented Drs Agoe and Ali at the hearing of their appeal from the CQC's decision, before the First-tier Tribunal ("the FtT"). The hearing took place over three days in January 2019, with the FtT deliberating for a further day before providing its decision, dismissing the appeal, on 4 February 2019.

18. One issue before the FtT related to the caretaker cover provided for the GP practice and whether the doctors providing this cover had agreed to continue to do so whilst Drs Agoe and Ali challenged the CQC's findings. The issue of cover during the period of suspension was important because it was the CQC's case that Drs Agoe and Ali were aware that if they continued to work, they would be in breach of the suspension and committing an offence. Dr Agoe had said, however, that she believed she was able to continue to work because she was covered by the continuation of the caretaker arrangements; in particular, in her statement for the hearing, Dr Agoe attested that the First Claimant had told her that, on 1 November 2018, he had spoken to one of the former caretaker-doctors, Dr Jowett, who had agreed to continue to provide the necessary cover. Dr Jowett had, however, firmly denied that account.

19. Identifying this evidential dispute at the outset of the hearing, the FtT Judge observed that if the panel was required to resolve a credibility issue between an advocate and a witness this "*raised the potential for difficulty and embarrassment*"; the doctors were duly asked to state whether they wished the First Claimant to continue to act as their advocate or as a witness. Having taken instructions, the First Claimant stated that "*it had been decided that he would act as advocate*", acknowledging "*he fully understood the reasons he would not be permitted to rely on his version of the events in either cross examination or submissions. His position was that the issue, in so far as relevant, could be fairly determined on the other evidence available.*" (see FtT decision, paragraphs 13 and 14). On the evidence before it, however, the FtT rejected the suggestion that Dr Jowett had given the confirmation Dr Agoe relied on (see paragraph 55 of its decision) and further rejected Dr Agoe's various attempts to suggest she had been confused about the arrangements that had been put in place.

20. By letters of 10 July 2019, relating to Dr Agoe and Dr Ali respectively, NHSE wrote to the Defendant raising various matters of concern. The letters made clear that the decision to write to the Defendant had been taken by NHSE's Performers List Decision Panel, and set out a chronology of matters which it had been determined should be drawn to the Defendant's attention. Relevantly for present purposes, the

letter relating to Dr Agoe (included in the bundle before me) included the following information:

> "On 2nd November 2018 the CQC obtained evidence to confirm that the two partners [Drs Agoe and Ali] were personally providing care despite the suspension. The CQC concluded that this was a serious breach and had put patients at risk. …
>
> On 2nd November Dr Hasz Sonigra, Associate Medical Director, spoke to Dr Agoe and her partner … advising them of the various support options open to them and pointing out the risks posed by continuing to work under those conditions. Dr Sonigra advised Dr Agoe and her partner to urgently contact their defence organisations and advise them of the conditions under which they had been practising. ….
>
> Later the same day … Dr Sonigra was contacted by a Dr Ogunsanya who signs as a solicitor for Taylor Wood and is apparently himself a GP. Dr Ogunsanya said that he was Dr Agoe's legal representative and told Dr Sonigra that he had not right to speak directly to Dr Agoe or her partner. Dr Ogunsanya was rude in tone and had a raised voice during this conversation. He has also sent a number of forceful e mails to various NHS E staff and encouraged Dr Agoe and her partner to resist and legally challenge actions taken by the CQC and NHS E.
>
> …
>
> Dr Agoe stated that she and her partner had been practising under the previous caretaking arrangements between 1st and 6th November. Dr Ogunsanya stated that he had spoken to one of the former caretakers and they had agreed to continue to provide cover whilst Dr Agoe and her partner challenged the CQC findings.
>
> NHS E spoke to the caretakers and they denied they had made any such arrangement and said that they had been quite clear with Dr Agoe and her partner that the arrangement ceased on 31 October.
>
> …
>
> The First Tier Tribunal considered Dr Agoe and her partner's appeal against the CQC termination. NHS England received a copy of the report upholding the decision to terminate … There is concern that the validity of Dr Agoe's evidence has been called into question … and that she may, have perjured herself."

21. On 8 August 2019, the Defendant wrote to the First Claimant, referring to the letters received from NHSE relating to Drs Agoe and Ali and stating that:

> "On review of that information, we have decided that there are concerns about your fitness to practise that we also need to investigate."

Specifically, the Defendant explained that it would be investigating concerns that the First Claimant allegedly:

> "- stated that you had spoken to one of the former caretakers and they had agreed to continue to provide cover whilst Dr Ali and Dr A challenged the CQC findings, but the former caretakers denied this agreement had been made
>
> - encouraged Dr Ali and Dr Agoe to resist and legally challenge actions taken by the CQC and NHS England
>
> - challenged requests from NHS England for Dr Ali and Dr Agoe to provide clarification/proof of indemnity cover from 1 to 6 November 2018
>
> - relied on arguments by doctors who he wasn't instructed in the tribunal hearing and was unclear in the tribunal whether he was acting as advocate or witness
>
> - was rude and spoke with a raised tone, and sent a number of forceful emails to NHS England"

22. The reference to the First Claimant relying on arguments in relation to doctors for whom he was not instructed related to the FtT's record of his submissions, at paragraph 6 of its decision, as follows:

> "In his final submissions … Dr Ogunsanya stated that there was no evidence that the other doctors in the partnership were aware of the order made, or the fact of the appeal. This has not been mentioned before. Dr Ogunsanya sought also, in his final submissions, to rely on arguments regarding the Article 8 rights of one doctor in particular, by whom he was not instructed. In our view this was a surprising development that arose very late in the day … ."

As Mr Coppel QC has observed, this was not a matter identified within the complaint letters from NHSE, although it was referenced within the FtT's decision and a copy of that had been sent to the GMC along with the complaint letters.

23. In the guidance attached to the GMC's email of 8 August 2019, it was further explained that:

> "On the basis of the information currently available, we've identified some areas of Good medical practice that have been called into question. We need to find out more information to

> see if this is correct and, if so, whether your fitness to practise medicine is potentially impaired."

24. The reference to "Good medical practice" gave no further detail of the paragraph/s in that guidance considered relevant in this case. In oral submissions before me, Ms Hearnden clarified that the Defendant considered paragraph 65 to be relevant, providing:

> "You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession."

25. The First Claimant has been represented by his firm, the Second Claimant, in his response to the Defendant's investigation. Having received the Defendant's email, another solicitor in the Second Claimant, Mr Ojo, responded on the First Claimant's behalf on the same day, as follows:

> "I note in your email … the GMC's intention to open an investigation into Dr Ogunsanya. With respect, commencing any such investigation on the basis of the purported concerns set out in your email is totally misconceived.
>
> As you are already aware, Dr Ogunsanya is a solicitor advocate with our firm and any advice given to clients are covered by legal professional privilege. The same goes for any actions taken on behalf of the clients of the firm on his position as a Solicitor with this firm.
>
> It is therefore not open to the GMC to commence any such investigation where it does not have jurisdiction to investigate Legal professionals.
>
> In the circumstance, I must demand that the GMC withdrawn the letter sent to Dr Ogunsanya and confirm that no investigation as originally intended will proceed. I should ask for this confirmation by no later than 4pm tomorrow failing which Taylor Wood solicitors will issue proceedings against the GMC seeking declaration of the Court that the GMC has not jurisdiction to commence an investigation into the conduct of a legal professional in the course of acting for a client. If we are forced to issue this proceedings, Taylor Wood Solicitors and Dr Ogunsanya will seek their costs of and occasioned by the application on an indemnity basis. …"

26. The Defendant responded to Mr Ojo, also on 8 August 2019, in the following terms:

> "As the statutory regulator for the medical profession in the UK, we need to ensure that doctors registered with us are fit to practise. Dr Ogunsanya is a registered doctor and there are aspects of the information we have received from NHS England which raises concerns about his fitness to practise that we may need to investigate.

> We accept that we do not have jurisdiction to investigate Dr Ogunsanya's conduct in his capacity as a legal professional. The case information, together with the concerns you have raised, are currently being reviewed by our legal team and I await their advice as to the scope of any investigation we decide to undertake.
>
> I will aim to provide you with an update by 15 August 2019 once I have sought advice on the scope of the investigation. You may therefore wish to hold off from issuing any proceedings until you receive this update."

27. By further email of 14 August 2019, the Defendant responded, explaining that, having taken legal advice:

> "It remains the GMC's position that the information received from NHS England raises concerns about your fitness to practise as a registered doctor and therefore we will be proceeding with our investigation.
>
> We do accept that we do not have jurisdiction to investigate your conduct in his capacity as a legal professional and therefore some of the concerns that have been promoted into the investigation may not need any further action.
>
> However, we are currently at our collection of information stage and given the information received from NHS England does, in our view, raise concerns about your fitness to practise, we will be proceeding with our investigation."

28. Mr Ojo then being on leave, by email the same day, the First Claimant replied, as follows:

> "As the firm does not accept that you have jurisdiction to investigate me in my capacity as an instructed Solicitor, and the matters, GMC purports to investigate are covered by legal professional privilege, the firm will be seeking declaration as to the power of the GMC to investigate my conduct as a Solicitor.
>
> You have not indicated which aspects of your investigation falls within the GMC remit, and the response from the GMC is wholly inadequate, and vague.
>
> I do not accept that any of the matters raised in the GMC letter falls within the remit of the jurisdiction of the GMC, and until the Court determines this issue, or the GMC articulates its position, I do not agree that the GMC should collect information about me, as this will be unlawful interference with my Article 8 rights."

29. Meanwhile, an investigation had also been pursued into the matters raised by NHSE relating to Drs Agoe and Ali and a hearing before the Defendant's Interim Orders Tribunal ("IOT") had been listed for 16 August 2019. Mr Ojo had been acting for the doctors but was due to be on annual leave on 16 August but his application for an adjournment of the hearing on this basis had been refused. In Mr Ojo's absence, the First Claimant sought to correspond with the Defendant as the legal representative of Drs Agoe and Ali but the Defendant made clear that it considered a conflict arose as the First Claimant himself faced a fitness to practise investigation into matters linked to Drs Agoe and Ali's investigations. Subsequently, at a hearing before the IOT on 7 February 2020, it was determined that the First Claimant would not be permitted to represent Drs Agoe and Ali as the on-going investigation that he faced meant that he was "*not a fit and proper person*" to represent their interests. I will return to this point below, as it is relevant to the Claimants' unlawful interference claim.

30. On 20 August 2019, the Claimants issued the current proceedings under CPR Part 8. The Defendant filed its acknowledgement of service on 5 September 2019, accompanied by a statement from Ms Stephanie Pollitt (the Defendant's Head of National Investigations). It indicated its intention to contest the claim on the basis that it was without merit and/or premature, and objected to the Claimants' use of the Part 8 procedure, rather than pursuing this as a claim for judicial review under CPR Part 54.

31. By letter of 26 November 2019, the Defendant wrote to the First Claimant in the following terms:

> "… a decision has been made by the Assistant Registrar that a number of allegations promoted to our investigation about your fitness to practise have now been closed as they were opened in error.
>
> As you are aware, … the Assistant Registrar made a decision to open an investigation in accordance with Rule 4 of the GMC (Fitness to Practise) Rules 2004 following receipt of information from NHS England … . A review of that decision has been undertaken and it has been determined that the following allegations were opened in error and have been closed with no further action.
>
> - Dr Ogunsanya encouraged Dr Ali and Dr A to resist and legally challenge actions taken by the GQC and NHS England.
>
> - Dr Ogunsanya challenged requests from NHS England for Dr KA and Dr A to provide clarification/proof of indemnity cover from 1 to 6 November 2018.
>
> - Dr Ogunsanya relied on arguments by doctors who he wasn't instructed by in the tribunal hearing and was unclear in the tribunal whether he was acting as advocate or witness.

> For the avoidance of doubt our investigation into your fitness to practise remains on-going in relation to the following concerns:
>
> - Dr Ogunsanya stated that he had spoken to one of the former caretakers and they had agreed to provide cover whilst Dr KA and Dr A challenged the CQC findings, but the former caretakers denied this agreement had been made.
>
> - Dr Ogunsanya was rude and spoke with a raised tone and sent a number of forceful emails to NHS England staff."

32. Although, therefore, the First Claimant faced five allegations at the time these proceedings were commenced, it is accepted that I am currently concerned simply with allegations 1 and 5 – the first and fifth allegations made in the email of 8 August 2019 and the two remaining matters that are still the subject of investigation by the Defendant. Mr Coppel QC says that the earlier allegations (and their withdrawal) form part of the relevant context, but he accepts that the Claimants' specific complaints regarding the three withdrawn allegations have otherwise now been rendered academic.

33. As for the Defendant's reasons for considering that allegations 1 and 5 should be investigated further, these were explained by the Rule 4 decision-taker, as follows:

> "It is noted that Dr Ogunsaya spoke to Dr Sonigra in a tone that was rude, and with a raised voice. Furthermore, it is alleged that he sent a number of forceful emails to NHS E staff. Whilst on their own, these allegations may not be concerning, in the context of this enquiry, Dr Osunganya's *[sic]* attitude and manner suggest a failure to show insight into regulation and are concerning.
>
> The enquiry raises a serious probity concern about Dr Ogunsanya. It would appear that Dr Ogunsanya told Dr A that he had spoken to one of the former caretakers and they had agreed to provide cover whilst Dr KA and Dr A challenged the CQC findings. Dr A used this in her evidence to the tribunal. However, NHS E spoke to the former caretakers and they denied they had made any such agreement…."

I return to consider this explanation for the Rule 4 decision when addressing the allegations, later on in this Judgment.

Preliminary Issue – Abuse of process

34. As recorded in my introductory remarks, the Claimants issued this claim under Part 8 of the CPR. The Defendant contends, however, that this is really a challenge to the Rule 4 decision – a finding that the allegations against the First Claimant fell within section 35C(2) of the 1983 Act – which is a public law decision of a statutory body, exercising its statutory duty. Noting that the scope of the Defendant's jurisdiction is quintessentially one of public, rather than private, law and potentially affects other dual registered professionals, the Defendant objects that the claim should have been

brought as an application for judicial review under CPR Part 54; it submits that it is contrary to public policy and an abuse of process for this challenge to proceed by way of an ordinary claim rather than the judicial review procedure, thereby evading the provisions intended to protect public authorities (per Lord Diplock at 285D-E in *O'Reilly v Mackman* [1983] 2 A.C. 237). Accepting that this is not a case where the Claimants have sought to pursue a claim outside the three-month time limit relevant to judicial review proceedings, the Defendant observes that they have, nonetheless, avoided the pre-action protocol requirements and there has been no preliminary consideration of the claim, as there would otherwise have been at the judicial review permission stage.

35. Although I agree that the normal course for any challenge to the Defendant's Rule 4 decision would be by way of application for judicial review, I note that the claim in this case included a private law complaint of unlawful interference, and that the Claimants seek declaratory and injunctive relief. In the circumstances, CPR Part 54.3 might have permitted the claim to be pursued as one of judicial review, but it did not impose a mandatory requirement in this regard (in contrast to the position under CPR Part 54.2). Accepting that it might still be an abuse of process not to use CPR Part 54 when challenging a decision of this nature, I do not consider that is the position here. The claim was brought promptly (within a fortnight of the decision of 8 August 2019) and the emails sent to the Defendant on 8 and 14 August 2019 can be seen as substantively complying with pre-action protocol requirements. Although there has been no permission stage consideration, as Mr Coppel QC observes, unless held to be totally without merit, the Claimants would have been entitled to be heard on their claim whether pursued under CPR Part 54 or Part 8. Keeping in mind the overriding objective, it does not seem to me to be particularly helpful to focus on this procedural dispute (and I note the discussion on the question of procedural exclusivity under the CPR at paragraph 3-119, *De Smith's Judicial Review* (8th edn)) and I would not strike this claim out on the basis that the use of CPR Part 8 constitutes an abuse of process in this case.

The Defendant's Power to Investigate in Circumstances of Dual Registration

36. The Claimants complain that, by purporting to investigate the First Claimant for his conduct in acting as a solicitor, under the instruction of his clients, the Defendant is acting outwith its regulatory, investigative powers under the 1983 Act. In particular, they argue that it cannot be open to the Defendant to investigate matters that would otherwise be covered by LPP. The Claimants note that it is the SRA, not the GMC, that has the statutory responsibility for maintaining the fitness to practise of solicitors (see section 31(1) Solicitors Act 1974) and whilst a medical practitioner's fitness to practise will be regarded as impaired if there is such a finding under an enactment for the regulation of professional practise as a member of a health or social care profession (see section 35C(2)(e) of the 1983 Act), there is no such provision in respect of an adverse finding by the SRA. This jurisdictional divide, the Claimants submit, is for good reason: the SRA has the relevant expertise to investigate the conduct of individuals acting as solicitors and the statutory powers to require the provision of information that take precedence over the common law of LPP (see, e.g. section 44B Solicitors Act 1974); neither is true of the Defendant. More generally, the Claimants submit that it is difficult to see how the conduct of a solicitor, advising or representing a client, could bring the medical (as opposed to the legal) profession

into disrepute. To the extent that circumstances might exist such as to engage the Defendant's jurisdiction with the conduct of a registered medical practitioner whilst carrying out the functions of a solicitor, the Claimants submit that this could only be in exceptional cases and could not be said to extend to the matters alleged against the First Claimant in this case.

37. In its earlier correspondence, the Defendant appeared to concede that it would not have jurisdiction to investigate the First Claimant's conduct "*in his capacity as a legal professional*" (see emails of 8 and 14 August 2019). In her skeleton argument for this hearing, however, Ms Hearnden submits that this put the point too broadly: the scope of the Defendant's jurisdiction is not determined by reference to the professional or personal context of the conduct alleged, but by the application of section 35C(2); the Registrar is required to assess the character of the alleged conduct (whether it is misconduct that would impair the doctor's fitness to practise) and the section does not limit that jurisdiction to conduct in only particular contexts. Ms Hearnden prays in aid the fact that the section can apply to conduct alleged to have occurred outside the United Kingdom (section 35C(3)(i)), notwithstanding the possibility that such conduct might be subject to a separate regulatory regime. The Defendant thus argues that its statutory functions cannot be anchored to the *capacity* in which a person operates rather than the nature of the *conduct* in question. That conduct must be assessed against the overarching objective of public protection, which includes public confidence in the medical profession and the promotion and maintenance of proper standards and conduct for members of that profession, and which (as the case-law makes clear) can extend to conduct outside clinical practice.

38. In this respect, I agree with the Defendant. The touchstone here is section 35C of the 1983 Act, and that does not limit the question of impairment to conduct in a specific capacity. Although the conduct must maintain a link to the profession of medicine (*Roylance*), it may occur outwith medical practice if it is conduct that would bring disgrace upon the doctor and thereby prejudice the reputation of the profession (*Remedy UK*). As Mr Coppel QC accepted in oral argument, if the practitioner in question was qualified in another profession and, *in that other capacity*, acted dishonestly or in a discriminatory way, that could well prejudice the reputation of the medical profession and thus engage the Defendant's jurisdiction for section 35C purposes.

39. The fact that there may be an overlap with another statutory regulatory regime (here the SRA) does not, in my judgement, oust the jurisdiction of the Defendant in this regard. Membership of each profession brings separate regulatory oversight; each regulator has the untrammelled jurisdiction to investigate its own registrants and the Defendant cannot delegate its functions under s.35C(2) to the SRA. It will no doubt be unusual, but that may mean that an individual with dual registration could face separate investigation by two different regulators over substantially the same matter.

40. In such circumstances, it may be relevant for the Defendant's Case Examiners to consider whether it is appropriate for the matter to proceed further in respect of that individual's position as a medical practitioner (and they may determine that it should not, see Rule 8(2)). Moreover, where the conduct in issue relates to the individual's work as a solicitor, it may be necessary to have regard to the potential unfairness that might arise due to LPP issues. At the Rule 4 stage, however, the question for the Registrar is merely whether the allegation in issue is capable of producing a finding of

misconduct (*Rita Pal*); if so, then the Registrar is mandated to refer that matter to Case Examiners, pursuant to Rule 4(2).

41. The question for the Registrar is not defined by the context of the conduct in issue, but by its impact upon public confidence in the medical profession. It is the Defendant that is required to determine this question and it plainly has the relevant expertise to do so. A Rule 4 decision will not be susceptible to challenge merely because it relates to conduct that could also be the subject of investigation by another regulatory body and the real question is thus whether the decision in this case is outwith the Defendant's powers because the specific allegations in issue cannot properly be said to be capable of producing a finding of misconduct for section 35C purposes. That, in turn, requires a more detailed consideration of those allegations.

The Allegations in this Case – the Claimants' Case

42. The Claimants contend that the allegations in this case are not such as to engage the Defendant's jurisdiction. First, because NHSE was making a complaint against complainants (Drs Agoe and Ali) in litigation brought against it; in the circumstances, the Defendant needed to be careful not to allow the Fitness to Practise procedure to be used as a litigation tool. It had, however, (i) extended the investigation to the conduct of the First Claimant (although he had not been a direct subject of the NHSE complaint), and (ii) trawled through the FtT decision to support further allegations (not made by the NHSE) against him. Second, because this was not a case where either the NHSE or the Defendant had suggested that a complaint would be made to the SRA, which must be the regulatory body with primary interest in the conduct of a solicitor. Third, because there were defects in the reasons provided by the Rule 4 decision-taker, who seemed to be under the mistaken impression that the First Claimant had given evidence before the FtT. More generally, although the Claimants had not pursued a complaint under the Equality Act 2010, it was also apparent that they had concerns as to the potentially discriminatory nature of allegation 5 (which related to the First Claimant's "tone") and there was some basis for thinking that doctors from black and minority ethnic ("BAME") backgrounds were disproportionately more likely to face investigation by the Defendant.

43. More specifically, allegation 1 accused the First Claimant of having stated that he had spoken to one of the former caretakers (Dr Jowett), who had agreed to continue to provide cover whilst Drs Agoe and Ali challenged the CQC findings, when Dr Jowett had denied this. The First Claimant had, however, not given a witness statement or evidence before the FtT, but had solely acted as the doctors' legal representative. The Rule 4 decision-taker had apparently seen this as a matter potentially going to the First Claimant's probity and honesty but the FtT had made no finding as to any conversation he might have had (or not) with Dr Jowett but had entirely rejected Dr Agoe's evidence, such that no reliance could be placed on her statement in this regard. Moreover, given that the First Claimant could not properly defend this allegation without breaching LPP, it was unfair that it should be pursued against him and this further demonstrated why this was not an appropriate matter for the Defendant to investigate. More generally, even if the facts alleged were proven, they could hardly bring the medical profession into disrepute; the allegation was not capable of supporting a finding of misconduct for section 35C purposes.

44. As for allegation 5, by which it is alleged that the First Claimant was "*rude and spoke with a raised tone, and sent a number of forceful emails to NHS England*", it is complained that this appeared to relate to a single conversation between the First Claimant, acting on behalf of Drs Agoe and Ali, and Dr Sonigra of NHSE. The Defendant had not seen any emails to support this allegation at the time of making the Rule 4 decision and there was nothing to support the suggestion that this amounted to conduct which would bring the medical profession into disrepute.

Discussion and Conclusions

45. Addressing each of the remaining allegations against the First Claimant in turn, it is apparent that allegation 1 is the more serious. As the Rule 4 decision-taker's reasoning explains, at its highest, it suggests that the First Claimant dishonestly told Dr Agoe that Dr Jowett had given an assurance (that the former caretakers would continue to provide cover at the doctors' GP practice) when that was not the case. That would potentially raise a question as to the First Claimant's probity, given that it would suggest that he had encouraged the doctors in the continuation of their practice in breach of the CQC suspension, or (at least) had been careless as to whether they so acted. Although the First Claimant was acting in his capacity as the solicitor to Drs Agoe and Ali, I cannot say that this could not provide a proper basis for the Defendant to find that the allegation was capable of producing a finding of misconduct for section 35C purposes.

46. In reaching that conclusion, I bear in mind that the evidence said to support this allegation came from Dr Agoe and not from the First Claimant himself and it is clear that the FtT – which had the benefit of hearing from both Dr Agoe and Dr Jowett – rejected any suggestion that Dr Jowett had given the assurance alleged. The FtT did not, however, make any specific finding as to what the First Claimant may, or may not, have said to Dr Agoe. Mr Coppel QC says that the FtT's comprehensive rejection of Dr Agoe's evidence demonstrates that it found her to be an entirely unreliable witness and it can, therefore, be inferred that it also rejected her account of this conversation with the First Claimant. I am not, however, persuaded that this is the only possible inference to be drawn from the FtT's Judgment and, again, I cannot find that there was no basis for the Rule 4 decision-taker's finding that a question had been raised that potentially went to the First Claimant's fitness to practice.

47. Mr Coppel QC says that it would, in any event, be unfair for the Defendant to investigate the matter further, as it would be impossible for the First Claimant to properly defend himself given the constraints imposed by LPP. I am not, however, sure how issues of LPP would arise in this regard. Had the First Claimant been professionally embarrassed by Dr Agoe's evidence, he would have been unable to continue to act as her representative before the FtT (even if that had not been obvious at any earlier stage, it was a point raised by the Judge's question as to the First Claimant's role at the outset of the hearing). It may be that I have not fully understood the nuance of the First Claimant's position - and Mr Coppel QC was unable to assist me further on this point – but, in any event, this is something that could be raised in the Rule 7 response, to which the Case Examiners will have regard when deciding whether the investigation into this allegation should proceed any further. If there is a way in which LPP issues might arise, which is other than purely fanciful, then that would be a matter that the Case Examiners would need to take into account when reaching their decision under Rule 8.

48. In considering the decision reached on this allegation, I have also had regard to what might be described as the contextual criticisms made by the Claimants. Although NHSE did not expressly raise a complaint against the First Claimant, the letters relating to Drs Agoe and Ali contained information that the Defendant was entitled to see as going to his fitness to practise. As Mr Coppel QC accepted in oral argument, if the Defendant comes across such information, it is not bound to ignore it simply because there has been no direct complaint against the doctor in question. That, it seems to me, would also be true of information contained within evidence submitted with a complaint (here, the FtT decision), although in fact allegation 1 was raised in the body of the NHSE letter. As for the suggestion that NHSE might have acted in bad faith (as the opponent to litigation brought by the Claimants on behalf of Drs Agoe and Ali) and/or that issues of discrimination might arise (whether direct or indirect; conscious or otherwise), it would be open to First Claimant to raise such matters in his Rule 7 response and it would then be for the Case Examiners to evaluate the allegations in the light of these points. The claim before me does not include a complaint of bad faith or discriminatory treatment on the part of the Defendant and I cannot see that these were matters that were to be assumed against NHSE at the Rule 4 stage.

49. Turning to allegation 5, however, I note that in oral argument Ms Hearnden accepted that this might be described as "*opaque*". Other than what appears in the letters from NHSE, no further information was available to the Defendant at the time of the Rule 4 decision: the "*forceful*" emails had not been requested and the Defendant is still yet to obtain a signed statement from Dr Sonigra. Although Ms Hearnden argued that the assertions made in the NHSE letters raised concerns about the First Claimant's conduct, it is notable that the Rule 4 decision-taker observed that "*on their own, these allegations may not be concerning*". Indeed, from the reasoning provided, it seems that, at most, these matters were seen as having evidential weight relevant to the other allegations rather than constituting a stand-alone ground of concern.

50. Having regard to the litigation context in which the First Claimant was communicating with Dr Sonigra as the solicitor for Drs Agoe and Ali, I am unable to see any proper basis for concluding that allegation 5 could result in a finding of misconduct for section 35C purposes; certainly none is identified in the reasoning provided by the Rule 4 decision-taker. To the extent that the matters contained within this allegation might have been clarified by further investigation, I cannot see that it was open to the Defendant to simply assume that which was otherwise obscure (and see the discussion in *Rita Pal* to this effect). In the circumstances, given that the matters contained within allegation 5 all relate to the First Claimant's conduct as a solicitor engaged in litigation on behalf of his clients, and provide no link with his fitness to practise as a medical professional, I agree that no proper basis has been demonstrated for the continuation of the investigation into this allegation.

The Unlawful Interference Claim

51. As recorded at the outset of this Judgment, the Statement of Case also includes an application for a declaration that the Defendant's conduct amounts to unlawful interference in the business and lawful practice of the Claimants' trade. Accepting that this is not a matter capable of immediate determination, the Claimants' seek a direction pursuant to CPR 8.1(3) that this should continue as a Part 7 claim.

52. It is not suggested by the Defendant that this aspect of the claim should be pursued by way of application for judicial review; it plainly raises matters relating to the private law rights of the Claimants. The only question for me at this stage is whether an arguable basis for the claim has been demonstrated such that it would be appropriate for this matter to continue under CPR Part 7.

53. In this respect, it is difficult for me to form any view on many of the broader allegations made by the Claimants in support of this aspect of their claim and, taken at face value, there does seem to be a clear basis for the Defendant's concern that a conflict of interest may have arisen in the First Claimant's representation of Drs Agoe and Ali before the IOT. That said, as Mr Coppel QC has observed, under the Defendant's own Guidance (see the Guidance for decision makers on fit and proper persons to provide representation at medical practitioners tribunals, interim orders tribunals and Investigation Committee hearings) it is difficult to see how it was open to the IOT to deny the doctors' entitlement to be represented by a solicitor on the basis that he was not a "*fit and proper person*" for these purposes (that being a question identified under the Guidance as relevant only in respect of representation by "*a family member or other person*").

54. I express no final view on this point; at this stage it is enough that the Claimants have demonstrated some arguable basis for their claim and, in the circumstances, I direct that it may proceed as a CPR part 7 claim.

Disposal

55. For the reasons provided, I dismiss the claim for a declaration in respect of allegation 1 but allow that in relation to allegation 5. I also direct that the complaint of unlawful interference may proceed as a claim under CPR Part 7.

56. The parties are asked to draw up the minute of Order that reflects the conclusions expressed in this Judgment. If there are any consequential applications that still remain to be determined, those should be identified and the parties should file and serve any further written representations in this respect within 3 working days of the handing down of this Judgment.