Neutral Citation Number: [2014] EWHC 1024 (QB)

Case No: HQ12X00737

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2014

Before :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.
(sitting as a Judge of the High Court)

- -

Between :

ROBERT MARK WHETSTONE	
(trading as Whelby House Dental Practice)	**Claimant**
- and -	
MEDICAL PROTECTION SOCIETY LIMITED	
(sued as DENTAL PROTECTION LIMITED)	**Defendant**

AND

JANE LELLIOTT	**Claimant**
-and	
(1) MARK WHETSTONE	**Defendants**
(2) NIGEL SUDWORTH	
and	
MEDICAL PROTECTION SOCIETY LIMITED	**Third Party**
(sued as DENTAL PROTECTION LIMITED)	

- -
- -

Simon D. Butler (instructed by **Attwaters Jameson Hill**) for Mr. Whetstone
Philip Jones (instructed by **Stone Rowe Brewer LLP**) for Mrs. Lelliott
Alexander Hutton Q.C. (instructed by **Clyde & Co. LLP)** for Medical Protection Society Ltd.
Mr. Sudworth did not appear and was not represented

Hearing dates: 18, 19, 20, 21, 24 and 25 March 2014

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Judgment

His Honour Judge Richard Seymour Q.C.:

Introduction

1. The claimant in action HQ12X00737, who was also the first defendant in action HQ13X03579, is usually known as Mark Whetstone. He is a dentist and practises as such under the name *"Whelby House Dental Practice"* from premises at 33, London Road, Old Harlow, Essex. For many years, since, I think, 1987, Mr. Whetstone has been, and he remains, a member of Medical Protection Society Ltd. (*"MPS"*). MPS was the defendant in action HQ12X00737 and the third party in action HQ13X03579. MPS was sued in both actions under the name Dental Protection Ltd. (*"DPL"*). DPL is a wholly-owned subsidiary of MPS, but its only role, as I understand it, is to promote to dentists the benefits of membership of MPS. No point was taken in either action with which this judgment is concerned that in fact the proper party was MPS, rather than DPL, but for the avoidance of confusion it is appropriate to refer in this judgment to MPS rather than to DPL.

2. Mr. Whetstone owned, and owns, beneficially the practice (*"the Practice"*) which he carries on as Whelby House Dental Practice. However, from about 1998 until 29 July 2009 another dentist, Mr. Nigel Sudworth, the second defendant in action HQ13X03579, was an *"associate"* of that practice.

3. Mrs. Jane Lelliott, the specimen claimant in action HQ13X03579 for the purposes of this trial, was a patient who was treated by Mr. Sudworth.

4. It was common ground before me that Mr. Sudworth had treated some of the patients whom he saw whilst an *"associate"* of Mr. Whetstone's practice negligently. A complaint was made against Mr. Sudworth by Mr. Whetstone to the Professional Conduct Committee (*"the Committee"*) of the General Dental Council (*"GDC"*) which included allegations of what was described in the charge against Mr. Sudworth as providing *"care and treatment* [which was] *inadequate"*. In the context *"inadequate"* seems to have been a synonym for *"negligent"*. The charge contained ten counts of negligent treatment, but each count was divided into a number of subsections. The allegations related to 19 patients and covered the period 14 August 2000 to 29 August 2009, although most of the individually dated allegations were said to have occurred between about 26 January 2006 and about 13 August 2009. Mr. Sudworth was represented at a hearing of the Committee which commenced on 3 July 2012 and his representative admitted all of the charges against him.

5. One of the counts in the charge, count 2(a), alleged that, *"You practised dentistry without holding professional indemnity cover throughout the period 11 December 2004 to 11 June 2009"*. About that allegation the Committee commented in its written decision, a copy of which was put in evidence, that:-

> "*In respect of your lack* [of] *professional indemnity cover throughout the period 11 December 2004 to 11 June 2009, the Committee decided that this issue had been resolved by your taking the appropriate measure to obtain retrospective cover to ensure that patients seen within that period are covered.*"

6. That notwithstanding, the decision of the Committee in relation to all of the admitted allegations collectively was *"to erase* [Mr. Sudworth's] *name from the Dentists Register"*.

7. By *Dentists Act 1984 s.26A*, introduced into *Dentists Act 1984* by *Dentists Act 1984 (Amendment Order) 2005*, SI 2005 No. 2011, it is provided, so far as is presently material, that:-

> "*(1) A registered dentist must be covered by adequate and appropriate insurance throughout the period during which he is registered in the register.*
>
> *(2) In this section "adequate and appropriate insurance" means insurance of a type and amount which rules under this section specify as adequate and appropriate.*
>
> *(3) A person seeking registration in the register must supply the registrar with evidence that, if his name were to be entered in the register, he would be covered by adequate and appropriate insurance commencing, at the latest, on the date on which his name was so entered.*
>
> *(4) A registered dentist seeking the retention of his name in the register must, before the commencement of the period for which he is seeking the retention of his name in the register, supply the registrar with evidence that he is covered by adequate and appropriate insurance.*
>
> *(5) A person seeking the restoration of his name to the register must supply the registrar with evidence that, if his name were to be restored to the register, he would be covered by adequate and appropriate insurance commencing, at the latest, on the date on which his name was so restored.*
>
> *(6) ...*
>
> *(7) ...*
>
> *(8) If a person fails to comply with the requirements of this section, the registrar may –*
>
> *(a) refuse to register his name in the register;*
>
> *(b) refuse to restore his name to the register;*
>
> *(c) erase his name from the register; or*
>
> *(d) refer the matter to the Investigating Committee under section 27(5)(a) as if the person's failure to comply with the requirements of this section constituted an allegation that his fitness to practise as a dentist is impaired by reason of misconduct for the purposes of section 27.*

> *(9) …*
>
> *(10) In this section "insurance" means –*
>
> *(a) a contract of insurance providing cover for liabilities which may be incurred in carrying out work as a dentist; or*
>
> *(b) an arrangement made for the purpose of indemnifying a person against such liabilities.*"

8. It does not appear that any rules have been made pursuant to the power in *Dentists Act 1984 s.26A(2)*. Consequently, for the purposes of that section there is no definition of the expression *"adequate and appropriate insurance"*. However, it is plain from the definition of *"insurance"* in *Dentists Act 1984 s.26A(10)* that what has to be *"adequate and appropriate"* is arrangements for indemnity *"for liabilities which may be incurred in carrying out work as a dentist"*, that is to say liabilities which a dentist may incur as a result of providing dental treatment, rather than, for example, liabilities which a dentist may incur as a result of employing other people to provide dental treatment.

9. MPS is incorporated as a company limited by guarantee not having a share capital pursuant to the provisions of *Companies Acts 1862 to 1890*. It is a not for profit mutual organisation which provides various benefits and services to members. What those benefits are are set out in its Memorandum of Association (*"the Memorandum"*), most recently modified on 13 June 2007, in clause 3, and include:-

> "*The objects for which the Company is established are:*
>
> *…*
>
> *(D) To advise, assist and provide services for, and to procure the provision of advice, assistance and services for, members of the Company ("Members") or those eligible to be Members (whether for reward or not) with regard to any matter affecting in any way (whether directly or indirectly) their professional character, professional interests or professional affairs, including, but without limitation, risk management, quality management and educational or financial services.*
>
> *(E) To grant such indemnities to such persons as the Council may from time to time think fit in respect of any claims, demands, losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses as may be prescribed by the Council from time to time;*"

10. It does not appear that the Council of MPS has prescribed any particular matters for the purposes of clause 3(E) of the Memorandum. However, the Articles of Association of MPS (*"the Articles"*), as amended on 13 June 2007, include:-

> "*40(1) An indemnity pursuant to clause 3(E) of the memorandum of association of the Society may be granted by*

the Society to any qualifying applicant in respect of a qualifying claim and all losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses connected with a qualifying claim. The grant of an indemnity shall be entirely in the discretion of the Council, who shall have the power to impose such terms and conditions on the grant of any indemnity as it thinks fit, and may in its absolute discretion limit or restrict such indemnity or decline altogether to grant the same.

(2) A qualifying applicant is any Member or the personal representative of such Member acting in that capacity. A Former Member and a Suspended Member (or their personal representatives acting in that capacity) may be a qualifying applicant in respect of any qualifying claim relating to the period prior to the termination or suspension (as the case may be) of the membership of the relevant Member.

(3) A qualifying claim is, subject to any restrictions which may be stipulated or imposed as a condition of membership in any particular case or by reference to any particular class of membership, any action, proceeding, claim or demand by or against the qualifying applicant affecting directly or indirectly the professional character, professional interests or professional affairs of any person who either:

(a) is or was a Member; or

(b) is or was a member, officer, servant or agent of a body which is or was a Member or made in respect of the conduct in a professional capacity of a deceased such person.

(4) The Council shall have power to decide the manner in which such indemnities are to be granted, and may from time to time prescribe classes of qualifying claims in respect of which any specified person approved for the purpose being either:

(a) the Secretary or an employee of the Society; or

(b) the Secretary or an employee of a body to whom the powers of the Council, in respect of such claims, shall have been delegated under Article 21(1),

may on behalf of the Council grant indemnities within the limits of fixed amounts prescribed by the Council, but nothing contained in this Article shall inhibit the power of the Council to impose terms and conditions on the grant of any particular indemnity or to restrict such indemnity or to withhold altogether the grant of the same.

(5) …

> *(6) A qualifying applicant shall, in relation to any qualifying claim in respect of which an indemnity has been requested and/or granted comply absolutely with the directions of the Society, and shall not (without the consent of the Society) take any steps in relation to such claim and shall (at the Society's request) co-operate fully with the Society, its representatives and any appointed advisers in the handling of such claim, in particular, but without limitation, by pursuing and fully assisting the Society in the pursuit of any rights of recovery available from third parties.*"

11. I think that it was common ground before me that the benefits conferred by clause 3(E) of the Memorandum of MPS satisfied the definition of *"insurance"* in *Dentists Act 1984 s.26A(10)*. However, as I shall explain, there was a significant difference between the position adopted on behalf of Mr. Whetstone and the position adopted on behalf of MPS as to what, on proper construction, the benefits of that insurance were.

12. Whatever arrangements had originally been agreed between Mr. Whetstone and Mr. Sudworth, by an agreement (*"the Sudworth Contract"*) in writing dated 18 April 2008 and made between Mr. Whetstone *"/Whelby Ltd."* (collectively called in the Sudworth Contract *"the Principal"*) and Mr. Sudworth, who was referred to in the Sudworth Contract as *"the Associate"*, provision was made, so far as presently material, as follows:-

> "*WHEREAS*
>
> *a. The Principal carries on the practice of dentistry at the premises hereinafter mentioned and intends to carry on such practice notwithstanding this Agreement*
>
> *b. The Principal wishes to introduce patients to the Associate and to make available* [to] *the Associate equipment and services in connection with the practice of Dentistry at the premises by the Associate upon such terms and conditions and for such consideration as hereinafter respectively appear*
>
> *IT IS HEREBY AGREED*
>
> *1. The Principal hereby grants to the Associate a non-exclusive licence and Authority (during the operation and subject to the terms and conditions of this Agreement) to carry on the practice of Dentistry at the premises and surgery of the Principal at 33 London Road, Old Harlow, Essex CM17 0DB which said premises and surgery is hereinafter referred to as "the premises". The Associate shall follow the policies of the practice relating to Clinical Governance and patient centred care as laid out in Whelby House procedures and policies folder. This is located in the office on the 2nd floor. Responsibility and accountability is in accordance with appropriate operation manuals and position contracts.*

2. The operation of this Agreement shall commence on the 18/4/08 and shall continue until determined as hereinafter provided.

3. This Agreement is personal to the parties and shall not be capable of assignment charge or other disposition except termination.

4. Nothing in this Agreement shall constitute a Partnership between the Principal and the Associate and as far as possible each party shall be seen to be an independent practitioner.

5. The Principal shall provide for the use of the Associate such equipment and materials as are customarily used in the profession of dentistry and such staff as are necessary for the function and administration of a dental practice. The Associate will be free to choose their own laboratory (acceptable to the practice owner) if they are within reason not satisfied with the work of the laboratory used by the practice.

6. The Associate shall indemnify the Principal against all costs of any repair or replacement of equipment occasioned by the negligence of the Associate.

7. a. The Principal shall cause the premises to be available during normal business hours as laid out in Schedule 1.

The Associate shall have reasonable access to the premises for the emergency treatment of patients for other proper purposes connected with the performance of his duties hereunder.

The Associate will make himself available for the agreed hours, except in case of annual leave.

b. The Associate will make himself available by agreement with the Principal to provide dental services outside normal working hours for one quarter of the time that the practice is on call with regard to emergency treatment.

8. In any calendar year the Associate shall not take more than equivalent of seven weeks of holiday from the practice of Dentistry at the premises and where such holiday shall last more than five working days the Associate shall give to the Principal at least four weeks prior notice. Also those days agreed with the Principal that can be made up at alternative times.

9. The cancelling of booked patient appointments will be avoided except in emergency or serious illness. Cancellations of patients with undue cause at Principle's [sic] *discretion*

there will be a deduction on monthly schedule of £80 per hour net of missed surgery.

10. Any staff provided by the Principal and which work with the Associate shall be subject to the Associates [sic] *day to day supervision in the course of their work notwithstanding that the Principal shall be the sole employer of the said staff.*

11. The Principal may introduce to the Associate patients desirous of dental advice or treatment but the Associate shall be under no obligation to accept for advice or treatment any patient so introduced.

12. The Principal shall not place any restrictions on the patients that the Associate may attend or the types of treatment he may provide so far as they are qualified to do so, the treatments are evidence based along governing body or N.I.C.E. guidelines, and follow Whelby House treatment protocols. The associate [sic] *shall work within the agreed clinical competencies referred to in schedule 5.*

13. The Associate shall at all times during the currency of this Agreement be properly insured in respect of claims that may arise as a consequence of professional negligence.

The Associate shall abide by the Whelby House practicing [sic] *privaliges* [sic] *policy.*

They will: *Maintain professional registration*

Provide documentation in accordance with schedule 3 within 1 month of request

Fulfil their required Continued Professional Development and provide documentation of such.

Conduct themselves in an ethical and moral way in accordance with GMC/GDC guidelines always putting the patient first.

Maintain records of treatment in accordance with Whelby House record management policy.

Deal with complaints in accordance with Whelby House complaints policy.

Act in accordance with Whelby House consent policy.

14. In respect of all patients attended by the Associate at the premises either under private contract or National Health

Service arrangements the Associate shall supervise the maintenance of full and accurate books and records of all patients attended treatment provided and fees due and the Principal shall be afforded every facility to inspect and copy the said books and records. The Associate is responsible for the accurate recording on computer system of all treatment (with correct fees) undertaken by them.

The Associate will use fee scales and hourly rates laid out in schedule 4 and Will [sic] *ensure the patient is fully informed by written quotation of any treatment requiring further booked appointments. They will also ensure that the patient has received adequate information about proposed treatment for them to give informed consent.*

15. The Principal shall supervise the collection by practice staff of payments due from patients to the Associate in respect of dental attendance at the premises under private contract.

The Associate shall be responsible for the maintenance of their National Health Service Claims including responses and disputes in relation to their own NHS contract.

16. The Associate shall request and authorise the Health Authority and for the Dental Practice Board as appropriate to pay to the Principal all sums due from time to time to the Associate under his Agreement with the Authority/Board to provide general dental services.

17. In consideration of this licence the Associate shall make payments to the Principal in the following manner:

a. On the first day of each month the Principal shall prepare for the Associate [a] *statement of laboratory costs incurred on behalf of the Associate since the corresponding date of the previous month.*

b. The Associate will guarantee their own dental work for a suitable length of time relating to work done they will be responsible for the corrective care or reimbursement.

c. In respect of patients attended by the Associate at the premises under NHS, Insurance and private contract the Principal shall prepare for the Associate a statement of fees due to the Associate from the 20th day of the preceding month to the 20th day of the current month

d. The Principal shall then deduct from this total of fees due any amounts that have not been paid in connection with the Associates [sic] *treatment under private contract and*

laboratory fees in accordance with the statement referred to in a.

e. The Principal shall pay the Associate the % of fees referred to in schedule 2. The Principle [sic] *shall pay the agreed monthly NHS remuneration referred to in schedule 2 where appropriate.*

18. ...

24. Upon determination of this Agreement all books and records shall be retained by the Principal provided that the Associate shall (at her [sic] *expense) be entitled to take copies of the said books and records subsequently required in accordance with National Health Service regulations.*

25. The goodwill relating to patients treated by the Associate at the premises shall belong to the Principal and the Associate shall not inform such patients of new practising arrangements after termination of this Agreement.

26. The Associate shall not at any time during the continuance of this Agreement treat any patients of the practice at any other surgery without prior consent of the Principal.

27. The Associate should not for a period of three years after determination of this Agreement (howsoever arising) provide dental treatment to any patient treated by the Associate during the continuance of this Agreement.

28. The Associate shall not at any time during a period of three years from the determination of this Agreement (howsoever arising) without the prior written consent of the Principal carry on the practice of Dentistry as a general dental practitioner within the towns and villages of, Harlow

directly or indirectly either

alone or jointly with or as Agent assistant locum tenens of any other person

...

31. Save as in the Agreement otherwise expressly provided nothing herein shall entitle either party hereto to enter on behalf of the other party hereto into any contract or relationship with any third person or otherwise to act purport to act as agent for or on behalf of that other party in any transaction of any kind whatsoever with any third person either in relation to the conduct of the practice of Dentistry or in any other manner or matter and so that all patients in any way

> *advised or treated by any one of the parties hereto during the subsistence of this Agreement shall be advised or treated by such party on his or her own behalf only and not in any way on behalf of or as servant or agent for the other party hereto.*"

13. At the trial it was, I think, implicitly assumed that the arrangements between Mr. Whetstone and Mr. Sudworth prior to the making of the Sudworth Contract were of the same nature as those set out in the Sudworth Contract, and this judgment proceeds on that basis.

14. In his first witness statement, dated 6 March 2013, made in action HQ12X00737 Mr. Whetstone described the circumstances which he contended had led up to the termination of the Sudworth Contract:-

> "*15. I began to receive complaints over Mr. Sudworth's standard of care in February 2009.*
>
> *16. At first the complaints were dealt with in-house. I arranged a meeting with Mr. Sudworth to discuss the complaints and my concerns. He agreed that he had failed to treat a number of his patients properly. On the 29 June 2009 I sent Mr. Sudworth a letter requesting information and an explanation of treatment undertook* [sic] *by Mr. Sudworth on two particular patients…. It was agreed between us that Mr. Sudworth would review his patients and ensure that they had all received the correct treatment by July 2009.*
>
> *17. On the 1 July 2009 we discovered that Mr. Sudworth may not have had indemnity insurance in place. My assistance* [sic] *Lin Simmons called the Defendant* [that is, MPS] *to find out if Mr. Sudworth had insurance in place. The Defendant confirmed that Mr. Sudworth had applied for insurance after a lapse and refused to give information confirming that it was a forgery.*
>
> *18. I wrote to Mr. Sudworth on the 2 July 2009 and information* [sic] *him that I had been aware that he did not have insurance in place and in my opinion had supplied me with a false indemnity certificate …. I requested that Mr. Sudworth supply me with immediately, amongst other documents the following:*
>
> *a. GDC Registration*
>
> *b. Copies of annual CPD statement*
>
> *19. Mr. Sudworth did not provided* [sic] *the information I requested and on the 22 July 2009, I contacted DPS* [that is, MPS] *again and was informed that Mr. Sudworth would not be covered for any treatment carried out during the period of lapse. Therefore, Mr. Sudworth was not covered from the time of the lapse until June 2009 …. I am not aware of when Mr.*

> *Sudworth's indemnity lapsed, the Defendant will not disclose this information, even though on the 14 October 2009 Mr. Sudworth wrote to the Defendant authorising them to release this information to me ….*
>
> *20. Mr. Sudworth did not comply with any of my requests for reports on treatments or on his professional standards and on the 29 July 2009 I dismissed Dr.* [sic] *Sudworth for gross misconduct, arising from the negligent treatment to the patients. A copy of the letter I sent to Mr. Sudworth terminating his associateship is at ….*"

15. A number of the patients of Mr. Sudworth who had been the victims of his negligent treatment subscribed to something called *"Denplan Care"*. Denplan Ltd., as I understand it, is a company the purpose of which is to facilitate the receiving by individuals of dental treatment on a regular basis in order to maintain their mouths in a condition which appears to be called *"dentally fit"*. It seems that an individual under the Denplan scheme visits a dentist who participates in the scheme for an assessment. The object of the assessment is to evaluate the cost of achieving, and thereafter maintaining, *"dental fitness"* in the case of that individual. Once the cost has been assessed the individual in question enters into an agreement (a *"Denplan Contract"*) with the dentist who has undertaken the assessment to pay the assessed cost of treatment over a period – it seems monthly – via Denplan Ltd. in consideration of the dentist who made the evaluation of the necessary treatment, who appears to be called, for this purpose, the *"goodwill owner"*, undertaking to provide the services set out in the Denplan Contract. The explanation of the roles of those involved and of the services to which the patient becomes entitled under a Denplan Contract was set out in a document incorporated in a Denplan Contract entitled *"The Care Agreement between you and your dentist"* as follows:-

> "*Welcome to Denplan Care. The Agreement you have with your dentist means you can enjoy the benefits of all-round preventive dental care, including an element of Supplementary Insurance.*
>
> *This enables you to easily budget for all your treatment needs.*
>
> *Denplan's role is to provide administrative services to support the Contract between you and your dentist. This includes passing your payments onto your dentist on a regular basis.*
>
> ***Please remember, your Contract is with your dentist** and it is not transferable to another. …*
>
> ***1. Explanation of terms used***
>
> *In this Agreement 'the Contract' means these conditions and the Contract between you and your dentist which you have signed; 'your dentist' means the practice goodwill owner named in the Contract form and 'Denplan' means Denplan Limited.*

> ***2. Treatment to which you are entitled***
>
> *The Contract entitles you to receive all the treatment normally provided by a general dental practitioner to maintain dental health, which may include: examinations; oral healthcare advice; preventive therapy and counselling; radiographs; restorations (i.e. fillings); root canal treatment; scaling and polishing; periodontal and surgical treatment and the provision, repair and maintenance of prostheses including crowns, bridges and dentures (excluding laboratory fees charged by your dentist – see condition 4)*
>
> ***3. Treatment to which you are not entitled***
>
> *The Contract does not entitle you to:*
>
> - *the treatment (if any) which you and your dentist agreed would be excluded at the start of the Contract;*
> - *orthodontic appliance therapy;*
> - *the provision, repair or replacement of dental implants and related superstructures;*
> - *treatment for the consequence of injury (although this may be subject to insurance under condition 5)*
> - *referral to a specialist and specialist treatment which is necessary in the reasonable opinion of your dentist;*
> - *any treatment which is purely cosmetic;*
> - *any treatment which is not clinically necessary in your dentist's opinion;*
> - *treatment carried out anywhere other than at your dentist's practice and by your registered dentist (except in the case of temporary emergency treatment – see condition 5);*
> - *sedation fees*"

16. It appears that each relevant Denplan Contract under which Mr. Sudworth carried out work negligently actually named Mr. Whetstone as the practice goodwill owner, and thus the party bound, in respect of each relevant patient, to deliver the services set out in condition 2 of the Denplan Contract.

17. Although not highlighted initially as his concern, it seems that actually Mr. Whetstone was concerned, having terminated the Sudworth Contract, with his personal position in relation to negligent work carried out by Mr. Sudworth on patients who had entered into Denplan Contracts (*"Denplan Patients"*) or on private patients. He telephoned

the advice service of MPS on 30 July 2009 and spoke to Jillian Jagger. What he wanted advice about was summarised by her in a file note which she made of the conversation:-

> "*Assoc*[iate] *– Mr. Nigel Sudworth age 57 – falsified his insurance document (no indemnity) - \? not insured for 2 yrs memb*[er – i.e. Mr. Whetstone] *has terminated his contract 1) criminal offence c*[ou]*ld go to GDC 2) assoc*[iate] *has p*[ai]*d from june 12th 09 to MPS retrospectively – do we know about this 3) claims and c/o* [complaints] *from p*[atien]*ts – 8 issues not sorted out 4) member wants to withold* [sic] *payment until this sorted out eg implant Member to write in to DPL and to ask assoc*[iate] *to write to DPI with c/o and membership issues. ASAP Member has sent copy of falsified indemnity document to Emma ? at DPL assoc*[iate] *been with member 8 yrs ?false doc*[ument]*s for a couple of yrs Retrospective indemnity w*[ou]*ld be a Board*"

18. Jillian Jagger passed the matter of giving advice to a colleague, Mr. Brian Westbury, a senior dento-legal adviser. The latter expression seems to describe those employed by MPS who are dentists with some legal qualification or experience, although not solicitors or barristers, to give advice to members of MPS. Mr. Westbury gave his advice in relation to the concerns of Mr. Whetstone, insofar as he understood them, in a letter dated 12 August 2009:-

> "*Thank you for speaking to my colleague and for sending in the correspondence regarding your problems with the above ex-associate.*
>
> *However, I am unclear as to what exactly you are asking me to help you with, or whether you are simply reporting this matter.*
>
> *I will however say that your current withholding of payments to Mr. Sudworth may be what you are asking advice about and I am unsure as to whether that would or would not be correct.*
>
> *Certainly as far as you understand he has practiced* [sic] *in breach of his contractual duties to you by not having indemnity, but I am not sure why you would need to retain monies. He would certainly still be responsible for his own actions rather than yourself, and even if there were complaints about his work then you would not have his permission to use the money to deal with those complaints.*
>
> *On the other hand, if the situation is as you say then Mr. Sudworth would not be in a position to take action against you to recover it. However, even if you do not return it to him at this stage and I think you should think carefully about whether you do or do not, then please remember to keep a very clear accounting of what you have done with it and remember that*

> *you do need permission from him to use it towards patients' costs.*
>
> *I hope the above is helpful and I am sorry I did not get through to you on the phone although I did leave several messages.*"

19. Thereafter there were a considerable number of exchanges between Mr. Whetstone and employees of MPS in the advice service.

20. One of the contacts arose out of the case of Mr. John Pluckrose, who was one of the Denplan Patients. Mr. Whetstone wrote a letter dated 27 October 2009 to Mr. Pluckrose which was in the following terms:-

> "*Following your numerous visits for emergency treatment to deal with situations of acute infection, I have now completed an assessment to formulate a treatment plan and costing to make you dentally fit. Once you are dentally fit, we can pass you to another Denplan dentist within the practice removing you from the list of Mr. N.P. Sudworth.*
>
> *I enclose a report and a treatment plan costing for the work you require. I cannot cover this work under your present denplan contract, but once this work is complete and you are again dentally fit your contract will cover further dental maintenance.*
>
> *If you have any queries on these matters please do not hesitate to contact me.*"

21. The treatment plan costing included with Mr. Whetstone's letter dated 27 October 2009 to Mr. Pluckrose amounted to £8,650 and, indeed, Mr. Pluckrose did not hesitate to contact Mr. Whetstone. In a letter dated 20 November 2009 to Mr. Whetstone Mr. Pluckrose indicated that he was not happy:-

> "*Thank you for your letter dated 27 October 2009 and the dental assessment report.*
>
> *I accept your recommendations for treatment and have been aware of troubles in my mouth for quite a long time now. I am happy that you have shown me and explained the numerous problems in my mouth.*
>
> *I do not however, accept the fact that I have to pay to be made 'dentally fit' as you say. I have been paying for your practice to keep me 'dentally fit' and have attended for treatment on a regular basis. I would expect the handover to another dentist to be a formality. Is it not the case that the necessary treatment should have been carried out over the years under my Denplan contract? If this had been done correctly I would not have such severe problems now!*

> *I have been advised that this is a case of supervised neglect and negligent treatment and should pursue compensation.*
>
> *I would welcome your comments on this and what action you are prepared to take in the matter.*"

22. In a letter of 2 December 2009 Mr. Whetstone wrote to MPS concerning the particular case of Mr. Pluckrose:-

> "*I wrote to this patient explaining that if I were to take on his Denplan care from Mr. N.P. Sudworth, he would have to be made dentally fit first. I enclosed a quotation for the work.*
>
> *The patient is clearly not happy with the condition of his dentition and feels he should be dentally fit. He has a case that I feel I cannot defend. I enclose pictures and radiographs. I do however wish to bring Mr. N.P. Sudworth in as a third party as it was under his supervision that the patient should have been made dentally fit under his Denplan contract.*"

23. The initial response of MPS concerning Mr. Pluckrose took the form of a letter from Stephanie Twidale, a dento-legal adviser, dated 8 December 2009, in which she asked for further information. What she said was:-

> "*Thank you for your letter of 2nd December 2009, together with copies of the patient's clinical records, radiographs and photographs and associated correspondence. I apologise for the delay in writing to you and I hope that this delay has not caused you any inconvenience. I am very sorry to hear of the problems that have arisen over Mr. Pluckrose's dental treatment. I will be pleased to assist you in addressing his concerns, however I am afraid that I will need some further information from you before I can assist you effectively:*
>
> - *It is not clear to me whether Mr. N.P. Sudworth is still working at your practice, or whether he has left. Would you please advise on this, and also whether he has been informed of the issues that have arisen. If Mr. Sudworth has left, would you please notify me of a full address, so that I may communicate with him directly, if that is appropriate.*
>
> - *You indicate that another dentist in the practice will take over the care of Mr. Pluckrose, after he has received the necessary treatment from you to make him dentally fit. Would you mind explaining why this is to happen, rather than you continuing to care for him, or alternatively why the eventual dentist undertaking is not carrying out all the initial care?*

> - *Please would you advise me as to when Mr. Pluckrose started his Denplan contract, and who that contract was with Mr. Sudworth, you, the dental practice, or another dentist.*
>
> *I look forward to hearing from you. …*"

24. Mr. Whetstone provided some information, it seems, when Mr. Alan Cohen, at that time head of dental services at MPS, telephoned Mr. Whetstone on 11 December 2009. At the trial there was a dispute as to what exactly had been said on the telephone on that occasion. Mr. Cohen frankly said that he did not recall, beyond what his attendance note of the conversation and his subsequent letter indicated. Mr. Whetstone contended for a rather colourful conversation, but did not contest the evidence of Mr. Cohen's attendance note and letter so far as they went. Mr. Cohen's attendance note was brief:-

> "*1) NPS* [Mr. Sudworth] *has now left practice (left end Aug 2009)*
>
> *2) MW* [Mr. Whetstone] *is Denplan contract holder – and will continue č* [with] *Denplan t*[reat]*m*[en]*t with himself or another assoc*[iate]
>
> *3) M*[em]*b*[e]*r is goodwill owner*
>
> *Denplan says m*[em]*b*[e]*r is responsible!*
>
> *11.12/09 1.45 pm long discussion with m*[em]*b*[e]*r including Denplan responsibilities*
>
> *15.40 HC from Denplan spoke to MW (3/12)ago and didn't get very far*
>
> *?AMC* [Mr. Cohen] *to sum up 3 options 1) Take on chin 2) same but civil suit against NS* [Mr. Sudworth] *3) tell p*[atien]*ts*
>
> [The remaining part of the note was obscured, but it seems likely that it was to the effect set out by Mr. Cohen in his letter dated 16 December 2009 to Mr. Whetstone as the third option]"

25. Mr. Cohen followed up the telephone conversation with a letter dated 16 December 2009, which was in these terms:-

> "***Re: Patient: Mr. John W. Pluckrose***
>
> *I write further to our telephone conversation last Friday 11 December and I am sorry to hear of the situation that you have found yourself in, in respect of the Denplan patients treated by your colleague, Mr. N.P. Sudworth who has now left your practice.*

> *As we discussed, you have a number of options open to you but at this time it seems that you favour the approach which may well compromise your Denplan contractual arrangements, as you do not believe that you are able to fund the remedial treatment requirements of this and other patients yourself.*
>
> *To sum up then, I suggested to you that the following options were available.*
>
> *1. Accept the short-comings of Dr.* [sic] *Sudworth, and within the spirit of the Denplan agreement and to ensure and maintain on-going goodwill of your patients, you accept the remedial costs of treatment for those patients and provide the treatment under normal Denplan arrangements.*
>
> *2. As above, but in order to ensure that you are not out of pocket, you approach Mr. Sudworth to fund your own personal losses.*
>
> *3. Inform patients of the problem that has arisen and indicate that it will be up to them to take action against Mr. Sudworth so that they can obtain the fees from him to fund your treatment.*
>
> *As I have already said this latter approach will be contrary to your Denplan arrangements and may result in litigation in respect of breach of contract either from Denplan themselves and/or the patients.*
>
> *We ended the telephone conversation with you considering these options, and I would of course be most happy to discuss this further with you if you so requested.*"

26. What in fact Mr. Whetstone decided to do was to undertake the remedial work necessary in the cases of some 45 patients who had been treated by Mr. Sudworth and to instruct solicitors, Messrs. Attwaters Jameson Hill (*"Attwaters"*) to advise him in relation to pursuing claims against Mr. Sudworth. It was contended in action HQ12X00737 that Mr. Whetstone undertook the necessary remedial work at a cost to him of a total of £343,390. Mr. Whetstone, who was called to give evidence at the trial, told me that that aggregate total represented not out of pocket costs, but rather what Mr. Whetstone contended he would have been able to charge for the work at his usual charging rates but for his decision not to seek to charge his patients.

27. It was unclear exactly when Mr. Whetstone instructed Attwaters. It was suggested that it was about 11 January 2010. However, it was certainly before 26 January 2010 when Attwaters wrote a letter to MPS which was in the following terms:-

> "***Re: Whelby Dental Practise*** [sic]
>
> *We have been instructed by Whelby Dental Practice and Mr. Mark Whetstone, in relation to a potential professional*

> *negligence and/or breach of contract claim against a Mr. Nigel Sudworth, who used to work at the practice.*
>
> *We understand that Mr. Nigel Sudworth was a member* [of] *Dental Protection, we would be grateful if you could confirm our understanding is correct and if so, provide us with the relevant membership/insurance details that Mr. Sudworth has, including dates the policies/membership ran from.*
>
> *Mr. Sudworth's last known address was 30 Shortcroft, Bishops Stortford, Herts, Cm23* [sic] *5QY.*"

28. Mr. Whetstone and Attwaters continued to correspond with MPS after Attwaters' letter dated 26 January 2010. There came a point at which it was suggested that MPS might be prepared to become involved in settlements between Mr. Whetstone and his patients affected by the negligence of Mr. Sudworth if a form of discharge, prepared by MPS, were offered to each relevant patient for signature. However, apparently on the advice of Attwaters, Mr. Whetstone decided not to seek to interest his patients in the form of discharge prepared by MPS, but rather to write to each a letter dated 4 November 2011 mutatis mutandis in these terms:-

> "***Re: Treatment by Dr. Nigel Sudworth at Whelby House Dental Practice***
>
> *I am sending you this letter as a patient of Whelby House Dental Practice following negligent treatment by Dr. Nigel Sudworth, dental practitioner. Dr. Sudworth was employed at the Dental Practice until 30 July 2009, when I terminated his contract of employment forthwith for performing negligent treatment on patients registered at the practice.*
>
> *I would also like to confirm that I have referred the matter to my professional indemnity insurer, Dental Protection Limited.*
>
> *Following your treatment with Dr. Sudworth I agreed to perform an examination to ascertain whether the treatment was of a standard expected of a competent dental practitioner. I was quite satisfied that the treatment you received was of a poor standard and have undertaken or will be undertaking remedial work in the sum of £* [the amount varied, but in the case of Mr. Pluckrose the figure was £11,000]. *I have not/will not charge you for the remedial work and this letter is not being sent to recover any sums from you.*
>
> *However, I have been asked by my insurer to obtain a declaration from you to confirm that you do not intend to pursue a claim for damages arising from the negligent treatment.*
>
> *Before you sign the attached form I am under a professional obligation to inform you that you would be entitled to claim*

damages for pain, suffering and loss of amenity arising from the negligent treatment. This means that should you wish to pursue a claim for damages then you should either notify the practice by returning the attached form and/or make contact with a solicitor specialising in personal injury litigation.

You may also wish to seek professional legal advice before signing the form.

If you wish to claim damages then read below:

Accordingly, if you would like to pursue a claim for damages, then you may wish to make contact with the following firm of solicitors to act on your behalf:

Philip Holt, Partner

Stone Rowe Brewer Solicitors

Stone House

12-13 Church Street

Twickenham TW1 3NJ

Tel: 020 8891 6141

www.srb,co.uk

Mr. Holt is a personal injury specialist and is part of an accredited apil (Association of Personal Injury Law) practice.

I can confirm that Stone Rowe Brewer Solicitors will not charge you for making contact with them and they will explain the process for claiming damages arising from the negligent treatment.

You do not need to use this firm of solicitors. However, for the sake of convenience I have provided you with the above details so that the claim for damages can be addressed in a professional and convenient manner from a specialist firm of solicitors.

If you wish to pursue a claim for damages, then can you please return and sign the attached form and return [sic] *it in the stamped self-addressed envelope?*

If you do not wish to claim damages then read below:

If you do not wish to claim damages, then can you please return and sign the attached form and return [sic] *it in the stamped self-addressed envelope?*

> *I would like to express my sincere apologies on behalf of the Dental Practice for any inconvenience you may have been caused by Dr. Sudworth. I expect high standards of care and treatment from my associates and employees. On this occasion Dr. Sudworth failed to reach the high standards expected at the Dental Practice.*
>
> *In the meantime, you should also not hesitate to contact the dental practice should you wish to discuss the matter further and/or seek any clarification on the contents of this letter*."

29. The outcome of the sending of letters in those terms was that eleven patients commenced proceedings against Mr. Whetstone and Mr. Sudworth, instructing Mr. Holt of Stone Rowe Brewer LLP (*"SRB"*) to act on their behalf. All of those proceedings have been consolidated in action HQ13X03579 and transferred to this court.

30. Before, it seems, any of the patients who have commenced actions against Mr. Whetstone and Mr. Sudworth did so, action HQ12X00737 was commenced on behalf of Mr. Whetstone against DPL by a claim form issued on 27 February 2012. I shall come to the claims made in that action and the matters relied upon on behalf of Mr. Whetstone, but a curious feature of how matters developed was that no application was made to MPS or DPL by or on behalf of Mr. Whetstone seeking indemnity against any of the alleged consequences of the negligence of Mr. Sudworth before action HQ12X00737 was commenced.

31. After the commencement of the actions of the various patients Attwaters did make contact with MPS by a letter dated 7 September 2012 and informed it of the commencement of the actions. An indemnity was sought on behalf of Mr. Whetstone against the claims of the patients:-

> "*We act for Mr. Whetstone.*
>
> *On the 29 August 2012 we received by way of service 11 claim forms issued against our client and a Mr. Nigel Sudworth for negligent dental treatment. We had not agreed to accept service and are therefore not sure why service was made on us.*
>
> *Our client confirmed to us that he had also received the claim forms and on receipt had forwarded them directly to you on the 28 August 2012. However, we have now established our client forwarded to you the letters before action not the claim form.*
>
> *Having now reviewed both the letter before actions* [sic] *and the claim forms, it seems as if the letters before action and claim form were served on the same day on our client.*
>
> *Our client Dr. Whetstone must file acknowledgment of services* [sic] *in respect of the claims by the 13 September 2012.*

> *We understand that as our client is a member of DP then he will have the benefit of the legal expenses, assistance and indemnity to cover the claims from DP. However, as you maybe* [sic] *aware our client has issued a Claim against DP for Negligence and therefore, a conflict may arise if you where* [sic] *to now act for Dr. Whetstone in respect of the 11 claims issued against him.*
>
> *We therefore propose that you agree for Dr. Whetstone to instruct Attwaters and Counsel, Simon Butler of 9 Gough Square to act on his behalf in respect of these claims. Your agreement would have to include an undertaking that you will indemnify Dr. Whetstone for any damages and costs he may be ordered to pay, together with payment of his own costs.*
>
> *If you are not agreeable to Attwaters acting for Dr. Whetstone, then please confirm by return that you will be dealing with these claims on behalf of Dr. Whetstone and will act in his best interest.*
>
> *We will file the acknowledgment of Services* [sic] *on Monday 10 September in order to protect Dr. Whetstone* [sic] *position, if we do not hear from you by noon on Monday 10 September 2012.*"

32. That claim for indemnity was rejected. The reasons for rejection were set out in a letter dated 26 September 2012 written by Mr. David Wheeler, the general counsel of MPS, to Attwaters:-

> "*We refer to your fax letter of 7 September 2012 informing us that you had received 11 Claim Forms and Particulars of Claim issued against Mr. Whetstone and to your subsequent conversations with Clyde & Co.*
>
> Dr. Whetstone's request for indemnity
>
> *We have understood your letter to be a request, on behalf of Dr. Whetstone, for assistance in relation to these claims. In your letter you propose that we agree for Dr. Whetstone to instruct your firm and Counsel, Simon Butler of 9 Gough Square, to act on his behalf and that any agreement would have to include an undertaking that we would indemnify Dr. Whetstone for any damages and costs he may be ordered to pay, together with payment of his own costs.*
>
> *You also told us that you would file the Acknowledgement of Services* [sic] *at the Court on 10 September 2012 if you did not hear from us by noon on this date.*

We have considered your request to assist Dr. Whetstone in these claims and we confirm that we will not assist him at this stage for the following reasons:

1 Although, the Particulars of Claim are very poorly pleaded it appears from paragraphs 5-8 that the Claimants only name Dr. Whetstone as a Defendant to the claim as they claim he is vicariously liable for the actions of Mr. Sudworth. It does not appear to be alleged that Dr. Whetstone himself has provided negligent treatment to the Claimants, but only that negligent treatment has been provided by Mr. Sudworth for which Dr. Whetstone is somehow responsible in law.

As you are aware, Dr. Whetstone is not entitled to be indemnified by DPL (or otherwise) for negligent treatment provided by independent contractors at the practice, such as Mr. Sudworth. The nature of the indemnity provided to Dr. Whetstone by DPL is a discretionary personal indemnity. Any negligent treatment provided by Mr. Sudworth is Mr. Sudworth's responsibility. Accordingly, there is no entitlement for indemnity for Dr. Whetstone for these claims. As you are aware, DPL specifically informs its members that they should not be expected to be indemnified for the acts or omissions of any other dentist.

2 Dr. Whetstone has instructed your firm, commenced litigation and issued proceedings against DPL. All the Claimants to the current actions are also named in your client's Schedule of Loss in his separate action against DPL. The two sets of proceedings are utterly entangled. There could never be the open discussion between Mr. Whetstone and DPL required for assistance.

3 We believe that Dr. Whetstone has prejudiced any defence to these claims and further that he has actively encouraged the current litigation. We have seen a copy of a letter dated 4 November 2011 addressed to a Mr. Pluckrose. We understand that an identical letter was sent to all of the patients who appear on the Schedule of Loss in the action against DPL.

Firstly, this letter informs patients that Mr. Sudworth had performed "negligent treatment on patients registered at this practice" *and that these patients* "would be entitled to claim damages for pain suffering and loss of amenity arising from the negligent treatment". *This will have certainly prejudiced any defence to the claim.*

Secondly, we are concerned that both the language used in the letters and the provision of contact details for a solicitors [sic] *firm, which Dr. Whetstone was not obligated to provide, would have actively encouraged patients to make these claims.*

Thirdly, we are very concerned by the conduct of Dr. Whetstone's Counsel whom we understand spoke with Stone, Rowe & Brewer to enquire whether they "would be willing to take on the PI claims". *If this is true, it is wholly inappropriate for him to have had this discussion.*

Finally, we note that each of the Particulars of Claim refer to the fact that Dr. Whetstone has admitted liability to the Claimants. Again, this will have prejudiced any defence of the claim. Please provide us with copies of the following [which were letters, respectively, to each of the eleven claimants in action HQ13X03579].

Your conduct

We are concerned that you may have prejudiced the defence of these claims. In your fax dated 7 September 2012, you informed us that Dr. Whetstone has received Claim Forms and that these had been forwarded to DPL. However, Dr. Whetstone had only forwarded Letters of Claim to us and not Claim Forms. We are unclear as to whether Claim Forms and Particulars of Claim were, in fact, served on Dr. Whetstone. We understand that you had not notified the Claimant's [sic] *solicitors, in writing, that you were instructed to accept service on behalf of Dr. Whetstone. If so and the Claimants' solicitors only served yourselves they will not have complied with CPR 6.7. If this is the case, you have filed Acknowledgements of Service when in fact the Claim Forms and Particulars of Claim had not been adequately served and their time for service would otherwise have lapsed.*

Finally, we wish to point out that the Acknowledgements of Service, if they were validly served, were not due until 12 September 2012. Bearing in mind Acknowledgements of Service are filed by email to Salford County Court, we consider it both unreasonable and unnecessary that you provided us with such a short timeframe (one working day) in which to respond to your fax of 7 September 2012. This is particularly so given that you received the Claim Forms and Particulars of Claim on 29 August 2012.

We are surprised by your suggestion that your firm (and Simon Butler) should now be instructed at DPL's expense in defending these claims. Such a suggestion is obviously untenable.

In all the circumstances, DPL will not exercise its discretion to provide indemnity to Dr. Whetstone in respect of the claims. We also reject your request to instruct both your firm and Simon Butler. Further, we do not agree to indemnify Dr. Whetstone

> *for any damages and costs that he may be ordered to pay or for the payment of his own costs.*"

33. At the trial the Claim Form and Particulars of Claim of Mrs. Lelliott were put before me as examples of the Claim Forms and Particulars of Claim in all of the actions consolidated within action HQ13X03579. The Particulars of Claim of Mrs. Lelliott, served on 24 August 2012, included these allegations:-

> "*5. On each occasion that the Claimant attended the Dental Practice, for dental advice or treatment, it was an implied term of the contract between the Claimant and the First Defendant* [Mr. Whetstone] *and his Dental Practice that the Defendants, and indeed any other dental practitioners providing dental advice and treatment at the Dental Practice, would exercise reasonable care and skill in the management of the Claimant.*
>
> *6. Further or alternatively, the Defendants owed the Claimant a like duty in tort.*
>
> *7. Accordingly, the First Defendant owed a duty of care to the Claimant in relation to her treatment and/or advice and/or information provided in relation thereto. Without limiting the generality of this duty, the duty comprised the following:*
>
> *(i) a direct, non-delegable duty of care to ensure that reasonable care was at all times taken in relation to the dental, nursing and other care which the Claimant was provided by or on behalf of the Dental Practice, including the provision of advice and/or information; and*
>
> *(ii) a duty at all times to take reasonable care to ensure that there was a safe system of dental and healthcare provided at the Dental Practice. This duty included a duty to ensure that there were proper and effective means of communication in place including communication of risks and/or information to patients such as the Claimant.*
>
> *8. The First Defendant employed, engaged and controlled the dental, nursing and other staff, including the Second Defendant* [Mr. Sudworth], *who worked in the Dental Practice and, accordingly, the First Defendant is vicariously liable in respect of any breach of duty or negligence on their part.*
>
> *9. The Claimant had been under the care of the Defendants for many years. The available dental records date approximately 10/08/05 to 12/05/10.*
>
> *10. At the time the treatment was (or should have been) provided:*

> *(i) The Second Defendant knew or ought to have known of, inter alia, the possible risks associated with a failure to perform proper dental treatment and periodontal care to teeth and gums which required extensive treatment. Despite visiting the Second Defendant on numerous occasions over the relevant period, he failed to even carry out a proper full mouth examination of soft-tissue, gums and teeth, with x-rays at certain visits. Instead, he left severe periodontal disease and damaged teeth untreated or incorrectly treated them, all of which, which* [sic] *led to a delay in appropriate treatment and/or care and which then necessitated more complicated treatment than would have otherwise been the case.*
>
> *(ii) These risks were material risks in that they were matters which the Claimant should have known or been made aware of in order to make a balanced decision whether or not to undergo further treatment and/or advice.*
>
> *11. At no time either prior to or after any consultation appointment during the above period, was the Claimant informed of the risks referred to at paragraph 10 above.*
>
> *12. The First Defendant, its employees, servants or agents, including the Second Defendant, owed a duty of care to the Claimant to act with reasonable skill and care when advising and/or treating her.*
>
> *13. The matters set out above were caused or contributed by* [sic] *the negligence of the First Defendant, his servants or agents, including the Second Defendant.*
>
> *14. The First Defendant directly admitted liability to the Claimant.*
>
> *…*
>
> [Various particulars of negligence were set out at paragraph 17]"

34. Attwaters and Mr. Butler acted on behalf of Mr. Whetstone in relation to the claim of Mrs. Lelliott. In a Defence served on 8 November 2012 signed by Mr. Butler paragraphs 5 to 12 inclusive, and paragraph 14 of the Particulars of Claim were simply admitted. The plea to paragraph 13 of the Particulars of Claim, at paragraph 11 of the Defence, was:-

> "*Save that it is admitted that the Second Defendant was negligent, Paragraph 13 of the Particulars of Claim is denied. It is denied that the First Defendant performed any negligent treatment.*"

35. In Mrs. Lelliott's action Mr. Whetstone joined MPS, sued as DPL, as a third party pursuant to the provisions of *CPR Part 20*. In Particulars of First Defendant's Additional Claim against the Third Party appeared these pleas:-

> "*2. The First Defendant admits that he is vicariously liable for the actions of the Second Defendant in accordance with well-established principles, as set out in his Defence, a copy of which is also served with this additional claim.*
>
> *3. These Particulars of Claim set out the Defendant's claim against the Third Party.*
>
> *4. The Third Party was at all material times a discretionary mutual organisation practising at Granary Wharf House, Leeds LS11 5PY, providing services to dental practitioners.*
>
> *5. At all material times the First Defendant had in place a contract with the Third Party for an indemnity against costs and damages arising from dental negligence claims.*
>
> *6. The following terms were incorporated into the contract (as set out in the Memorandum and Articles of Association):*
>
> *1.1 Clause 3(E) To grant such indemnities to such persons as the Council may from time to time think fit in respect of any claims, demands, losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses as may be prescribed by the Council from time to time.*
>
> *1.2 Clause 40(1) An indemnity pursuant to clause 3(E) of the memorandum of association of the Society may be granted by the Society to any qualifying applicant in respect of a qualifying claim and any losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses connected with the qualifying claim. The grant of an indemnity shall be entirely in the discretion of the Council, who shall have the power to impose such terms and conditions on the grant of any indemnity as it thinks fit, and may in its absolute discretion limit or restrict such indemnity or decline altogether to grant the same.*
>
> *7. The First Defendant is claiming a contractual indemnity from the Third Party, who agreed to indemnify the First Defendant against liability to the Claimant in the circumstances that have arisen in this matter.*
>
> *8. The First Defendant is seeking fulfilment of the Third Party's obligations.*
>
> *9. The First Defendant contends that he is entitled to be indemnified by the Third Party for the Claimant's claim for*

> *damages, interest and costs, arising from the Second Defendant's negligent treatment.*"

36. A comprehensive Defence of the Third Party was served on behalf of MPS on 11 February 2013. Essentially the position of MPS was that the application for indemnity made by the letter from Attwaters dated 7 September 2012 was properly rejected for the reasons set out by Mr. Wheeler in his letter dated 26 September 2012. However, the Defence did make these points:-

> "*5.5 For the avoidance of doubt, therefore, the MPS is a company limited by guarantee which is not an insurance company and in this regard its position is indistinguishable from the position of the Medical Defence Union Limited (the MDU) at the time of Medical Defence Union v. Department of Trade[1980] Ch 82 per Megarry V-C, where it was held that a member of the MDU did not have a contract of insurance with the MDU because such a member had no right to insurance/indemnity but* "the benefits are discretionary and not obligatory, and the member's contractual right is no more than a right to require the union to consider properly any request for assistance of this kind he makes."
>
> *6. In relation to paragraph 5, it is admitted and averred that, as a member of the MPS, the First Defendant has and had at all material times, a contractual right to require the MPS to consider properly any request he made for assistance to the MPS to provide him with (inter alia) an indemnity in relation to any claim for damages and/or costs made against the First Defendant, including the Claimant's claim herein. It is denied, insofar as it is alleged, that the MPS was obliged to indemnify him against him* [sic] *any such claim: such an indemnity is and was discretionary on the part of the MPS.*"

37. In the light of the provisions of the Defence on behalf of Mr. Whetstone in the case of Mrs. Lelliott, on 16 April 2013 Deputy District Judge Harmer, sitting at Wandsworth County Court, inter alia entered judgment against Mr. Whetstone with damages to be assessed and judgment against Mr. Sudworth, also for damages to be assessed, in default of filing an acknowledgment of service. The Deputy District Judge also ordered:-

> "*4. The claim issued by the Claimant against the First and Second Defendants be stayed pending the determination of the Part 20 Claim between the Part 20 Claimant/First Defendant and the Part 20 Defendant.*"

38. Rather strangely, Attwaters wrote a letter dated 13 September 2013 to DPL in these terms:-

> "*We write on behalf of our client Dr. Whetstone.*

> *Dr. Whetstone is the owner of Whelby House Dental Practice, 33 London Road, Old Harlow, Harlow, Essex.*
>
> *Dr. Sudworth was an employee of Dr. Whetstone and worked at the Dental Practice until 30 July 2009, when Dr. Whetstone terminated his contract of employment for performing negligent treatment on Dr. Whetstone's registered patients.*
>
> *In 2009, Dr. Whetstone contacted Dental Protection Limited ("DPL") for legal advice in relation to patients making complaints at his practice of negligent treatment and to seek an indemnity for the negligent treatment undertaken at his practise* [sic] *by Mr. Nigel Sudworth. Our client undertook the remedial work on your advice.*
>
> *For the sake of clarity, on behalf of Dr. Whetstone we request that our client is indemnified for all negligent treatment carried out by Mr. Sudworth. Please confirm within 14 days that you agree to indemnify our client. In the event that you refuse to indemnify our client please provide reasons for the refusal.*"

39. The timing of that letter was odd. By the date of the letter action HQ12X00737 had been in existence for some 18 months and a trial date was approaching – the originally anticipated trial date was 7 October 2013. It would seem that the letter was the result of someone on Mr. Whetstone's side noticing that actually up to that point the only request for indemnity made by him or on his behalf was for indemnity in respect of the claims in action HQ13X03579. However, the Particulars of Claim in action HQ12X00737 were never amended to refer to the letter dated 13 September 2013. In the event there was a response from MPS to that letter, but not until 17 February 2014. That response was lengthy, running to some 8 pages.

40. As I have recorded, all of the claims by patients like Mrs. Lelliott against Mr. Whetstone and Mr. Sudworth were consolidated into action HQ13X03579 and transferred to this court. By an order made by consent in this court on 7 October 2013 it was provided, at paragraph 3:-

> "*The claims made by Dr. Whetstone against DPL (currently the claim in HQ12X00737 and the Third Party Claim in the case of Jane Lelliott alone in Claim number HQ13X03579) shall be tried on 17 March 2014 with a time estimate of 5 days, with the remainder of the Third Party claims in HQ13X03579 being stayed. The Patients shall be permitted to appear and to participate in that trial in relation to the issue of the vicarious liability of Dr. Whetstone.*"

41. The trial envisaged by paragraph 3 of the order dated 7 October 2013 took place before me. Although not made clear in the order of 7 October 2013, the trial before me was only of liability issues in action HQ12X00737 and of liability issues in the Third Party claim in action HQ13X03579.

Action HQ12X00737

42. Because of the oddity that, although the relief claimed in the Particulars of Claim in action HQ12X00737 included, *"A declaration that the Claimant was entitled to be indemnified in accordance with Clause 3(E) and Clause 40(1) of the Memorandum and Articles of Association"*, prior to the commencement of that action no request for indemnity had been made by or on behalf of Mr. Whetstone to MPS, it is necessary to consider the statements of case of the parties in action HQ12X00737 with some care.

43. The original Particulars of Claim were dated 15 February 2012, prior to the issue of the Claim Form, and seemed to have been served with the Claim Form. Amended Particulars of Claim were served on 16 March 2012. The only amendments were to add two new paragraphs as paragraphs 5 and 6 and to renumber subsequent paragraphs consequentially. In the result I think that it is appropriate to consider the Amended Particulars of Claim, rather than the original Particulars of Claim, not least because the amendments were made before the Defence of MPS was filed.

44. The Amended Particulars of Claim began by pleading the nature of MPS and the nature of the business of Mr. Whetstone. The following paragraphs were then set out:-

> "*4. At all material times the following relationship was in existence between the Claimant, Dr. Nigel Sudworth ("Dr. Sudworth") and the registered patients:*
>
> *(a) The patients were registered with the Claimant.*
>
> *(b) The patients made payment to the Claimant for dental services.*
>
> *(c) The Claimant provided the facilities and staff.*
>
> *(d) Dr. Sudworth was an employee of the Claimant contracted to provide dental services to the Claimant's patients.*
>
> *(e) The patients had made arrangements with the Claimant directly for the provision of dental services.*
>
> *(f) The Claimant instructed Dr. Sudworth to provide dental services to his patients.*
>
> *(g) There was no separate contractual relationship between the patients and Dr. Sudworth.*
>
> *(h) The patients returned to the Claimant to correct the negligent treatment.*
>
> *(i) The Claimant dismissed Dr. Sudworth for gross misconduct, arising from the negligent treatment to the Claimant's patients.*
>
> *5. Further or in the alternative, Dr. Sudworth was performing a service on behalf of the Claimant as his agent, irrespective of whether there is an employer-employee relationship.*

> *6. At all relevant times Dr. Sudworth was acting with the authority of the Claimant, and the Claimant is liable for torts committed by Dr. Sudworth at the dental practice.*
>
> *7. At all relevant times the Claimant had entered into a contract with the Defendant for the provision of services as particularised at paragraph 2 above.*"

45. At paragraph 8 of the Amended Particulars of Claim were pleaded the provisions of clause 3(D), (E) and (F) of the Memorandum and clause 40(1) of the Articles. The statement of case continued:-

> "*9. It was an implied term of the contract and/or it was the duty of the Defendant to exercise all proper skill and care, diligence and competence as legal advisors in providing legal advice to the Claimant.*
>
> *10. Further or in the alternative the Defendant owed the Claimant a concurrent duty of care in tort.*
>
> *11. On or about 11 December 2009, the Claimant consulted the Defendant for advice in relation to negligent treatment performed by Dr. Sudworth, and whether the cost and expense of correcting the negligent treatment would be indemnified.*
>
> *12. On 16 December 2009, Mr. Alan Cohen, Senior Dento-Legal Consultant, sent a letter to the Claimant advising him that:*
>
> *i) The Claimant should accept the short-comings of Dr. Sudworth, and within the spirit of the Denplan agreement and to ensure and maintain on-going goodwill of his patients, he should accept the remedial costs of treatment and those patients and provide the treatment under normal Denplan arrangements.*
>
> *ii) The Claimant should approach Dr. Sudworth to fund his personal losses.*
>
> *iii) Inform the patients of the problem that has arisen and indicate that it will be up to them to take action against Dr. Sudworth so that they can obtain the fees from him to fund the negligent treatment.*
>
> *13. Mr. Cohen also advised the Claimant that if he was to ignore the issues and do nothing then it would amount to professional negligence and the GDC would have to be informed, and this could result in disciplinary action. Mr. Cohen also advised the Claimant that he* [w]*as a member of the GDC.*

14. Thereafter, the Claimant made contact with the Defendant once again following complaints regarding another self-employed dental practitioner. The Claimant was advised by the Defendant that the patients were not legally entitled to bring a claim against the practise [sic] *for negligent treatment as dental practitioners are responsible for their own acts and omissions. The Claimant was advised to send letters to the patients advising them to contact the dentist who carried out the negligent treatment, even though the patients had clearly stated in writing that the Claimant's practise* [sic] *was responsible for the negligent treatment.*

15. On 21 December 2011, the Defendant sent a letter to the Claimant stating "… self-employed dentists are self-responsible for any of the treatment. Certainly practice owners will absorb small areas of complaint, simply to preserve the goodwill of the practise [sic]*, but that is a matter for you."*

16. By reason of the matters aforesaid the Claimant, acting on, and in reliance, on the advice received from the Defendant corrected the negligent treatment at his own expense, when in fact he was entitled to be indemnified for the negligent treatment in accordance with the terms of the contract.

17. In breach of contract and/or negligently and/or in breach of duty the Defendant failed to exercise all proper skill and care, diligence and competence in advising the Claimant.

<u>Particulars of Negligence and/or Breach of Contract</u>

(a) Failing to advise the Claimant that the patients were registered with the Claimant and a contractual relationship arose between the Claimant and the patients.

(b) Failing to advise the Claimant there was no separate contractual relationship between the patients and Dr. Sudworth. Failing to advise the Claimant that, at all relevant times, the Claimant was vicariously liable for the negligent treatment performed by Dr. Sudworth.

(c) Failing to advise the Claimant that the patients would be entitled to pursue a claim against the Claimant for negligent treatment, which would include a claim for damages for correcting the treatment and pain, suffering and loss of amenity.

(d) Advising the Claimant that his patients would need to pursue a claim against Dr. Sudworth for damages.

(e) Advising the Claimant that he would need to pursue a claim against Dr. Sudworth for expenses and losses incurred arising from the negligent treatment.

(f) Failing to advise the Claimant that he is entitled to be indemnified in respect of any claims, demands, losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses arising from the negligent treatment in accordance with Clause 3(E) of the contract.

(g) Failing to advise the Claimant to either refer the patients to an alternative dentist to correct the negligent treatment, and/or failing to advise the Claimant to undertake an assessment of the negligent treatment and costs to be incurred correcting the treatment, so that all reasonable costs and expenses to be incurred correcting the treatment, so that all reasonable costs and expenses to be incurred [sic] *could be approved and discharged by the Defendant.*

(h) Failing to advise the Claimant that the Defendant has also entered into a contract with Dr. Sudworth to indemnify him against any claims for negligent treatment.

(i) Failing to instruct solicitors and/or counsel with the necessary experience to prepare full and proper advice in the relevant discipline, namely professional negligence;

(j) In the premises failing to take sufficient care to protect the Claimant's interests arising out of or in connection with the negligent treatment.

18. Further, in breach of Clause 3(E) and Clause 40(1), particularised as paragraph 5 [8 in the Amended Particulars of Claim, but this reference was not amended] *above, the Defendant has failed to indemnify the Claimant for losses (whether incidental, consequential or otherwise), damages, costs, charges and expenses arising from the claims for negligent treatment performed by Dr. Sudworth, a member of the Dental Protection scheme at all relevant times.*

19. On 30 December 2009, the Defendant sent a letter to the Claimant confirming the following:

"Dental Protection provides advice and assistance to dentists and dental care professionals, including legal advice and assistance in all matters that challenge your professional integrity. This includes indemnity against costs and damages in dental negligence claims. *We are not an insurance company – The benefits of Dental Protection membership are discretionary as set out in our Memorandum and Articles of Association. [Emphasis added]*

> *20. The Defendant's failure to indemnify the Claimant against costs and damages arising from negligent treatment is unfair, irrational and perverse and contrary to objectives of the membership scheme.*
>
> *21. …*
>
> *27. Had the Defendant been provided with the correct advice, and had the Defendant complied with the terms of the contract, the Claimant would not have corrected the negligent treatment at his own expense, thereby sustaining financial loss.*
>
> *28. The Claimant has suffered the following loss:*
>
> *i) Cost of remedial treatment to date =£310,690.00*
>
> *ii) Completed consultations =£18,000.00*
>
> *iii) Minor remedial work =£14,700.00*
>
> ***Total = £343,390.00***"

46. At the trial the only claim in the Amended Particulars of Claim which was still live, although quantum did not require to be considered at the trial, was the claim for the £343,390.00. A claim for alleged psychiatric injury suffered by Mr. Whetstone was not pursued. The claim that was pursued was said to be the loss sustained as a result of the negligent advice alleged and also the sum due in consequence of Mr. Whetstone being entitled to the indemnity which he claimed. However, there were a number of peculiar features in the Amended Particulars of Claim. I have already drawn attention to the fact that it was not alleged that any application for an indemnity had been made to MPS in advance of the service of the Claim Form and Particulars of Claim. Per contra, it seemed from the allegations in paragraphs 16 and 18 of the Amended Particulars of Claim that Mr. Whetstone contended that he was entitled to indemnity, without more, and that was it. Moreover, what was complained of at paragraph 20 of the Amended Particulars of Claim was a *failure* to indemnify, not a challenge to any exercise on the part of MPS of a discretion. There could have been no such challenge because there had been no exercise of discretion because MPS had not been asked to exercise it. The summary of the letter dated 16 December 2009 written by Mr. Cohen to Mr. Whetstone pleaded at paragraph 12 of the Amended Particulars of Claim was a travesty of what the letter, quoted in full earlier in this judgment, actually said. The pleaded allegations of negligence ignored completely the context in which Mr. Cohen wrote his letter, which context I have also set out earlier in this judgment. In summary the context was that Mr. Whetstone wished to charge Mr. Pluckrose, one of the Denplan Patients, for correcting defects in work done by Mr. Sudworth; Mr. Pluckrose was not prepared to pay, contending that the appropriate work should have been done properly under his Denplan Contract in the first place; and the advice which Mr. Whetstone wanted was about how to proceed in those circumstances. He did not seek any other advice. What, in essence, as it emerged at trial, it was contended on behalf of Mr. Whetstone was wrong with the advice given by Mr. Cohen, was that Mr. Cohen had not told Mr. Whetstone to tell Mr. Pluckrose, and other affected patients, to sue Mr. Whetstone so Mr. Whetstone could seek to

recover the costs of remedial treatment from MPS pursuant to an indemnity against the claims of the patients, or at least to make an application to MPS for indemnity against the costs of the remedial treatment. The version pleaded at paragraph 13 of the Amended Particulars of Claim, that Mr. Cohen had told Mr. Whetstone that doing nothing would amount to professional negligence, that GDC would have to be informed, and that Mr. Cohen was a member of the board of GDC, Mr. Whetstone asserted at paragraphs 38 and 41 of his witness statement dated 6 March 2013 served in action HQ12X00737, but in cross-examination he seemed to accept he might have misunderstood, as Mr. Cohen had never been a member of the board of GDC. Mr. Cohen, who was called to give evidence on behalf of MPS at the trial and was cross-examined, denied that he had ever been a member of the board of GDC or had said anything about professional negligence or informing GDC. Later in this judgment I record my view that the evidence of Mr. Whetstone was unreliable and self-serving, and give reasons for that opinion. I reject his evidence that Mr. Cohen ever said anything to him about being a member of the board of GDC, or informing GDC, or about doing nothing in the case of Mr. Pluckrose amounting to the professional negligence.

47. When the advice which Mr. Cohen actually gave is considered in the context in which it was given it is plain, in my judgment, that the criticism of the advice made on behalf of Mr. Whetstone is wholly unsustainable. The advice in the letter dated 16 December 2009, reflecting the advice given on the telephone on 11 December 2009, was not merely such as a reasonably competent dento-legal consultant could have given, but plainly correct.

48. In relation to the claim for indemnity, the critical pleas in the Defence were those in response to the allegations in paragraphs 16, 18 and 20 of the Amended Particulars of Claim, and adopted the same numbering:-

> "*16. In relation to paragraph 16:*
>
> *16.1 No admissions are made to the allegation that the Claimant acted in reliance on the advice provided by the Defendant nor as to whether he corrected any negligence* [sic] *treatment at his own expense and he is put to strict proof of these allegations, which are not within the knowledge of the Defendant.*
>
> *16.2 It is denied that the Claimant was entitled to be indemnified by the Defendant (or otherwise) for negligent treatment provided by independent contractors at the practice such as in relation to any negligent treatment provided by Mr. Sudworth. Any negligent treatment provided by Mr. Sudworth in this respect is Mr. Sudworth's responsibility in law and not the Claimant's.*
>
> *…*
>
> *18. Paragraph 18 is denied. It proceeds on the fallacy the Defendant was obliged in law to indemnify the Claimant in relation to the costs of remedial treatment resulting from*

> *treatment provided by Mr. Sudworth and has wrongly failed to do so. In fact:*
>
> *(1) Indemnity provided by the Defendant is purely discretionary: there is no right to an indemnity as is made clear in the very parts of the Memorandum of Association and Articles of Association quoted in the Particulars of Claim;*
>
> *(2) In any event, if the Defendant were to give an indemnity it would be to Mr. Sudworth in relation to any negligent treatment provided by him and in relation to which legal claims for dental negligence in respect of recovery of damages and other consequential losses were made. No such indemnity is available to the Claimant in relation to treatment provided by Mr. Sudworth: there would have to be legal claims for compensation against Mr. Sudworth for DPL to consider whether to indemnify such claims in its discretion. That indemnity, even if it were provided, would not be provided to the Claimant in respect of treatment by Mr. Sudworth as an independent contractor for which the Claimant is not responsible in law.*
>
> *…*
>
> *20. Paragraph 20 is denied but the legal significance of it is not understood and is the subject of a CPR Part 18 Request for Further Information.* "

49. The Request for Further Information included these questions:-

> "[In relation to paragraph 18 of the Amended Particulars of Claim]
>
> *7. Please specify the legal basis upon which it is alleged that the Defendant is obliged in law to indemnify the Claimant for the losses alleged in the light of the fact (as set out at paragraph 8) that the indemnity provided was in the discretion of the Defendant.*
>
> [In relation to paragraph 20 of the Amended Particulars of Claim]
>
> *8. Please set out the precise basis in law why it is said that the Defendant was obligated to provide such an indemnity.*
>
> *9. What is alleged to be the legal relevance (if any) for the purposes of this claim of the allegations that the failure to indemnify was "unfair", "irrational", "perverse" and "contrary to objectives of the membership scheme (sic)".*"

50. The answer to question 7 of the Request for Further Information was unhelpful, although lengthy. It included:-

> "*The Claimant has entered into a contract with the Defendant to provide indemnity against costs and damages in dental negligence claims.*
>
> *…*
>
> *Had the Claimant been advised by the Defendant that any claim for negligent treatment would be covered by the terms of the policy, then the Claimant would not have undertaken remedial work at his own expense. The Claimant would have referred all the patients to the Defendant for assessment.*
>
> *…*
>
> *The Claimant asserts, as a matter of law and fact, that the exercise of discretion has been used unfairly, randomly, perversely, irrationally and unreasonably, in all the circumstances of the case.*
>
> *The court would imply terms into the contract which are consistent with the Defendant's advice on the website* [which had earlier been quoted in the answer], *namely that it was an implied term of the contract that the Defendant would not exercise the discretion unfairly, randomly, perversely, irrationally, unreasonably or with improper motives.*
>
> *It was clearly the intention of the parties, as explained on the website and collected from the words of the contract, and having regard to all the surrounding circumstances, that the Defendant would act fairly, rationally, reasonably in all the circumstances.*
>
> *In contracts of this nature, where an indemnity is at the discretion of the Association, certain terms will be implied by the court. …*"

51. So anyone hoping to learn whether it was Mr. Whetstone's case that MPS had declined to exercise its discretion at all, or that it had done so on a particular date and in a particular manner which it was sought to challenge, was disappointed by the answer.

52. The answers to questions 8 and 9 of the Request for Further Information were no more useful:-

> "[Answer 8]
>
> *The Claimant is under a non-delegable duty at common law to provide proper treatment at all stages, a duty which he is not*

> *entitled to throw off by entrusting it to employees or independent contractors.*
>
> *The Claimant, as the employer of Dr. Sudworth (whether as an employee or independent contractor), is as much liable for its breach when such a duty exists at common law.*
>
> *The Defendant has conceded that any claims pursued against Dr. Sudworth would have been covered by the policy. The Defendant would have exercised its discretion to cover the cost of remedial treatment and general damages.*
>
> *If the Claimant is as much liable for the negligent treatment, then the Defendant's exercise of discretion is unfairly* [sic], *perverse, irrational and unreasonable in all the circumstances. The Claimant and Dr. Sudworth were standing in the same shoes at the date of the negligent treatment.*
>
> [Answer 9]
>
> *Please see the answers given above.*"

53. The answer to question 8 obviously gave rise to the question, *"what exercise of discretion on the part of MPS is said to have been unfair, perverse, irrational and unreasonable ?"*

54. That question was raised squarely in the Amended Defence where additions were made to paragraph 20 which included, after the existing text:-

> "*Further and in any event:*
>
> *20.1 The Claimant did not make, and has not made, a request for indemnity from the MPS/Defendant in relation to alleged costs and/or damages suffered by the Claimant arising from the allegedly negligent dental treatment provided by Mr. Sudworth at the practice before launching these proceedings. The Defendant/MPS cannot therefore be blamed and/or sued for not providing something which was never requested, quite apart from the matters below.*
>
> *20.2 Secondly, while the negligence appears to be alleged against the Defendant by one of its dento-legal advisers, any request for indemnity would have to be made to the MPS (and not to DPL, which does not provide indemnity). No such request in respect of the matters which are the subject of this claim was ever made to the MPS, and thus there has been no refusal to indemnify;*
>
> *20.3 In any event, any refusal of indemnity by the Defendant/MPS (and if there had been any such request then it would, on the overwhelming balance of possibilities, have been*

> *refused) would not have been unfair, irrational, perverse or contrary to the objectives of the membership scheme (insofar as there is any such obligation on the Defendant or MPS).* [The remainder of the additions to paragraph 20, up to and including paragraph 20.8, set out the considerations which it was contended would have justified refusing indemnity, had it been sought.]"

55. The Reply to the Amended Defence was served on 23 September 2013, 10 days after the letter from Attwaters to DPL seeking indemnity on behalf of Mr. Whetstone which I have quoted earlier in this judgment. At paragraph 16 of the Reply appeared this:-

> "*As to paragraph 20 of the Amended Defence, the Claimant denies that he has not made any request for indemnity. At all relevant times the Claimant by his conduct and representations has been requesting indemnity for the acts and omissions of Dr. Sudworth.*"

56. It is to be noted that no specific request for indemnity was identified. Equally no particular exercise of discretion on the part of MPS was specified which it was contended had been perverse, irrational or was otherwise subject to challenge.

57. In 1978 Medical Defence Union Ltd. (*"MDU"*) offered to members benefits which were, for present purposes, indistinguishable from those offered to members by MPS at the dates relevant for the purposes of action HQ12X00737. The issue arose whether, as contended by the Department of Trade in 1978, the contract between MDU and each of its members to provide benefits amounted to a contract of insurance. MDU issued a summons seeking a declaration against the Department of Trade that it was not an insurance company within the meaning of *Insurance Companies Act 1974*. The summons was heard by Sir Robert Megarry V-C. In his judgment in *Medical Defence Union Ltd. v. Department of Trade* [1980] Ch 82 at page 90 Sir Robert said:-

> "*On the face of the memorandum and articles a member of the union has no right to require the union to conduct legal proceedings for him, and no right to require the union to indemnify him against claims for damages. All that he has is the right to have his request for the union's help under these heads properly considered by the council or by one of its committees. In practice it is rare for such a request to be refused. Yet although the prospects of such a request succeeding are great, all that the member has by way of right is that his request should be properly considered, and, of course, if it is granted, that the union should conduct the proceedings or indemnify him, or both.*"

58. Later, at page 92, Sir Robert said:-

> "*I therefore return to the main point on the footing that the right of a member in relation both to proceedings and to*

> *indemnities is merely a right to have his request fairly considered by the council or one of its committees. Only if the request is granted is the member entitled to have the proceedings conducted by the union and to have an indemnity, subject to the provisions of the articles and not least article 44(3). For the purposes of this case I do not think that it matters whether the right is a right to have the request heard and determined "fairly" or "in good faith". It is common ground that it must not be dealt with by whim or caprice, and it is not contended that such a right is valueless.*"

59. Although Mr. Butler, who appeared at the trial on behalf of Mr. Whetstone, contended in his written skeleton argument, at paragraph 101, that, *"The obiter statement of Megarry VC in* Medical Defence Union v. Department of Trade *[1980] Ch 82, has been overtaken by applying a test of rationality"*, I think that the focus of that submission was how the discretion should be exercised. I did not understand Mr. Butler to contend that Sir Robert's analysis that the right of a member of MDU in that case was to have a request for indemnity considered in the exercise of the discretion of MDU or one of its committees was somehow deficient or had been overtaken by later legal developments. Actually, as it seems to me, Sir Robert's approach was simply to construe the memorandum of association and articles of association of MDU in order to reach a decision as to the nature of the right of a member in respect of indemnity. That approach seems to me to be entirely right, with respect, and I agree with it. Applying it to the Memorandum and Articles leads to the same conclusion as that which Sir Robert reached, that the right of a member who seeks an indemnity from MPS is to have the request considered in the exercise of the discretion of the Council of MPS or any person or body with delegated authority to make the decision.

60. At times in the cross-examination by Mr. Butler of witnesses called on behalf of MPS, and in his submissions, there were hints of a contention that, at least in the case of Mr. Whetstone, but perhaps in all cases involving claims based on vicarious liability, the discretion could only properly be exercised one way, in favour of granting indemnity. The argument seemed to be along these lines. The Memorandum should be treated as included in a new contract with a member each time there was a renewal, in other words annually. In respect of each contract made after the coming into force of *Dentists Act 1984 s.26A* one of the surrounding circumstances to be taken into account in construing clause 3(E) of the Memorandum is the obligation in *Dentists Act 1984 s.26A(1)* to have *"adequate and appropriate insurance"*. *"Insurance"* which did not encompass vicarious liability was not *"adequate and appropriate"*. By clause 3(E) of the Memorandum an object of MPS was to provide indemnity to members inter alia *"in respect of any claims"*. That form of words, on proper construction, in the light of the surrounding circumstances, was wide enough to include claims in respect of alleged vicarious liability. Mr. Whetstone was thus entitled to have the discretion of the Council of MPS exercised in his favour in relation to the indemnity which he sought in action HQ12X00737.

61. I accept that, on the evidence put before me, it appeared that a member of MPS entered into a new contract with MPS on the occasion of each annual renewal. True it was that, in principle, MPS provided indemnity in appropriate cases on an occurrence basis – in other words, it was prepared to consider granting indemnity provided only

that the person seeking indemnity had been a member at the date of the occurrence alleged to give rise to a claim, whether or not that person remained a member at the date of the claim. However, that did not have the consequence, as it seems to me, that a member entered into a contract with MPS once only, when first becoming a member. Rather it meant that a former member could claim a benefit under a contract with MPS after ceasing to be a member.

62. Moreover, I accept that each new contract between MPS and a member falls to be construed in the light of the surrounding circumstances prevailing at the time at which it is made.

63. The whole debate, however, was artificial because the wording of clause 3(E) of the Memorandum is very wide, plainly wide enough to entitle the Council of MPS, if so minded in the exercise of its discretion, to grant indemnity in relation to a claim against a member based on vicarious liability. While, no doubt, one of the surrounding circumstances to be taken into account in construing a contract between MPS and a member made after the coming into force of *Dentists Act 1984 s.26A*, is the obligation placed thereby on dentists in relation to insurance, as I have already explained, what, in my judgment *Dentists Act 1984 s.26A(1)* requires is that a dentist be covered by insurance, as defined, in respect of the liabilities which may be incurred in performing dental treatment, and does not extend to vicarious liability for others who do so. Thus the provisions of *Dentists Act 1984 s.26A* in fact have no relevance to the proper construction of clause 3(E) of the Memorandum because just as a matter of the use of the English language its scope is wide enough to cover providing indemnity in respect of vicarious liability. What is more relevant is that clause 3(E) is included in a memorandum of association of a company incorporated prior to the coming into force of *Companies Act 2006*. That means that what is to be found in clause 3(E), clause 3 being an objects clause, is what MPS is in law permitted to do. The contention that what is to be found in clause 3(E), quite apart from the question of discretion, was what MPS was bound to do is wholly unsustainable. But the essential feature of clause 3(E) for present purposes is that the right of a member thereunder, if he or she seeks indemnity against a claim, is to have the Council of MPS, or some appropriate delegated person or body, consider, in the exercise of its discretion, whether to grant it.

64. Whatever merit the hints of Mr. Butler might have it did not, in my judgment, have the consequence that it was unnecessary for a member who wished to obtain an indemnity from MPS even to ask for it. I find that making a request was an essential first step, triggering the obligation on the part of MPS, by its Council, or other delegated person or body, to exercise its discretion.

65. The consequence is that the failure of Mr. Whetstone to make application to MPS in advance of the commencement of action HQ12X00737 for an indemnity in respect of his alleged own costs of remedial treatment to patients who were the victims of negligent treatment on the part of Mr. Sudworth is fatal to his claim for indemnity in that action.

66. The issue whether it was open to Mr. Whetstone to succeed in a claim for indemnity, not having requested one in relation to his own costs prior to the commencement of action HQ12X00737, was clearly raised in the statements of case of MPS. During closing submissions I suggested that the answer to that issue might provide a quick

route to the exit in that action. I was at one stage attracted to the possibility that it might be appropriate to proceed on the basis that the issue of the Claim Form and service of the Particulars of Claim in action HQ12X00737 was a request for an indemnity in respect of Mr. Whetstone's costs of remedying the consequences of the negligent treatment of Mr. Sudworth, but on mature consideration I do not think that that would be appropriate. The reasons are that, although, particularly in paragraph 20 of the Amended Defence, MPS raised matters which it was contended would have justified it in refusing indemnity, had indemnity been sought, the issue whether Mr. Whetstone had any cause of action for an indemnity, not having made any request for indemnity before the commencement of action HQ12X00737, was squarely identified, and it was not contended in the Amended Defence that the Council of MPS, or any delegated person or body, had actually, after the commencement of the action, considered whether to grant indemnity, and decided not to for reasons which were set out in a statement of case of MPS. So all that one could have considered, on a hypothetical basis, is whether, if MPS had refused an indemnity for one or other or all of the reasons set out in paragraphs 20.3 to 20.7 inclusive of the Amended Defence, that decision would have been defensible.

67. The presentation of the case of Mr. Whetstone in action HQ12X00737 ignored the problem of there having been no request for indemnity. In his written skeleton argument Mr. Butler identified the issues for determination as:-

> "*First issue: is the Claimant vicariously liable for Dr. Nigel Sudworth's negligent treatment?*
>
> *Second issue: was the Defendant's decision to refuse indemnity irrational, namely was the discretion exercised by the Defendant arbitrary, capricious, perverse and irrational in all the circumstances?*
>
> *Third issue: was the legal advice provided by the Defendant negligent and/or in breach of contract?*
>
> *Fourth issue: has the Claimant suffered financial loss as a consequence of the Defendant's negligence and/or breach of contract?*"

68. The first two of those issues did arise in the Third Party claim in action HQ13X03579, but not in action HQ12X0737 in the absence of any request to MPS to exercise its discretion in favour of Mr. Whetstone. The third issue did arise in action HQ12X00737, and I have dealt with it. The fourth issue did not arise anyway, as this trial was concerned with liability only.

69. Mr. Butler's focus during the trial was very much on trying to challenge what was pleaded in paragraphs 20.3 to 20.8 of the Amended Defence. Understandably Mr. Alexander Hutton Q.C., who appeared on behalf of MPS, was anxious to seek to support, at least in principle, taking into account the matters pleaded in those sub-paragraphs. I have considered whether it would be appropriate for me, given the extensive argument before me focused on those sub-paragraphs, and the fact that Mr. Whetstone was called to give evidence and was cross-examined, in particular, about what he knew of whether Mr. Sudworth was a member of MPS over the period 11

December 2004 to 11 June 2009, what steps he took, or caused to be taken, to procure production by Mr. Sudworth of membership certificates concerning MPS, and the systems in the Practice for ensuring that dentists produced evidence of insurance cover, to express any views on the matters raised in paragraph 20.3 to 20.8 of the Amended Defence. The allegations in these sub-paragraphs, omitting that part of paragraph 20.3 which I have already quoted, were:-

> "*20.3 The Claimant's subscriptions to the MPS were based on the risk he posed, not on the basis of any unknown risks posed by unidentified dentists who might practice* [sic] *dentistry at his practice. It was plain from the Subscription Rates booklet that such other dentists were not included as members. Further, guidance was proved* [sic] *to dentist members of the MPS that they should not expect an indemnity for acts and omissions of other dentists at the practice (even if employed by the practice) and thus where the practice would obviously be vicariously liable in law), on the strength of a single annual subscription paid by the practice owner as this would not be fair to other members, i.e. the precise situation here, save that Mr. Sudworth was not even employed by the practice, he was an independent practitioner. Other dentists would be expected to have their own indemnity and answer for their own actions under any such indemnity;*
>
> *20.4 A refusal of indemnity in such circumstances (and it is specifically averred that, on the balance of probabilities, indemnity would have been refused) would not have been perverse or unfair, it would have been entirely consistent with the Subscription Rates charged on the basis of the member's own risks in accordance with the published guidance of the Defendant/MPS;*
>
> *20.5 As for being contrary to the objectives of membership, it is not understood how this is alleged, but is in any event denied. The MPS calculated a Practice Principal's subscription for his membership on the basis of a risk posed by the member and (if named to the MPS), up to five dental nurses, not in relation to the risks posed by unidentified other dentists who might at some stage work at the practice. Further, it would be contrary to the interest of other members of the MPS to calculate their subscriptions on the basis of, inter alia an unknown risk of an unlimited number of other potential dentists carrying out dentistry at the member's practice, since the rates would inevitably be substantially higher for such membership. These other dentists are expected to have their own indemnity arrangements, which the practice principal is expected to check, as set out in the MPS's guidance referred to above;*
>
> *20.6 Further and in any event, if the practice was sued in respect of the negligence of any other such dentist, the practice would have the right in law to obtain indemnity and/or a*

contribution from that dentist, as specifically highlighted in the same section of the annual review. Further, members are actively encouraged (inter alia, in that section of the annual review) to ensure that dentists engaged by the practice owner produce evidence of professional indemnity, which should be checked annually and copies retained.

20.7 In this regard, the Claimant manifestly failed to follow the MPS's guidance to ensure that Mr. Sudworth, an independent contractor dentist at the practice, had produced evidence of his own professional indemnity each year. This is despite the fact that the contract between the Claimant and Mr. Sudworth required Mr. Sudworth to be "properly insured in respect of claims that may arise as a consequence of professional negligence" *and that he was obliged to provide documentation proving this within 1 month of being requested [clause 13]. In fact Mr. Sudworth's membership of the MPS was formally terminated in about April 2006 and he never renewed his membership until after his associateship was terminated by the Claimant in July 2009, so he was practising at the Claimant's practice for about 3 years and 4 months without any professional indemnity:*

(a) Mr. Sudworth was requested by the Claimant's practice (apparently for the first time) to provide evidence of professional indemnity on 17th January 2007, but did not so do within one month (as obliged) or at all and yet the Claimant allowed him to keep practising at the Claimant's surgery. A similar request was made of him in August/September 2007 but this was similarly ignored: however, he was allowed to keep practising.

(b) Mr. Sudworth was then requested by the practice to provide up to date evidence of professional indemnity on 2nd March 2009, 3rd March 2009, 8th April 2009, 12th May 2009, 25th May 2009, 1st June 2009, 11th June 2009, 29th June 2009, 30th June 2009 and yet none was provided (with Mr. Sudworth continuing to practice [sic] *until the practice was suspicious of the document which had eventually been provided on or about 1st July 2009 and checked on 1st July 2009 and it was established from the Defendant that he did not have arrangements for indemnity.*

(c) Mr. Sudworth was allowed to practise dentistry at the Claimant's practice in the meantime for about 3 years 4 months without ever having produced evidence that he had indemnity in that period, in breach of Mr. Sudworth's contractual obligation and also in breach of the clear guidance given by the Defendant/MPS in the aforementioned section of the annual review that a practice principal should "insist on sight of documentation to confirm that professional indemnity has been

> renewed annually". *The Claimant should not have allowed this to happen, and he is the author of his own misfortune in this regard;*
>
> *20.8 If (which is not admitted) and insofar as the Claimant has ever made a request for indemnity in relation to the alleged negligence of Mr. Sudworth, then there is nothing unfair, irrational, perverse or contrary to the objectives of the membership scheme that such an indemnity has not been provided to him in this regard.*"

70. I have already expressed some views about the objects of MPS, and, in particular, clause 3(E) of the Memorandum.

71. The points pleaded at paragraphs 20.3 (in the part quoted in paragraph 69 of this judgment) 20.4, 20.5 (other than in relation to the objects of MPS) and 20.6 all arise in the Third Party claim in action HQ13X03579 and I deal with those questions in the part of this judgment concerned with that claim.

72. What was pleaded at paragraph 20.8 raised the issue of the proper approach to the exercise by MPS of its discretion in regard to granting indemnity, and I deal with that matter also in the section of this judgment concerned with the Third Party claim in action HQ13X03579.

73. That leaves the allegations in paragraph 20.7 of the Amended Defence. I have had regard to the possibility, now that a request – that in the letter dated 13 September 2013 from Attwaters – has been made on behalf of Mr. Whetstone for indemnity covering his alleged own costs of providing remedial treatment to patients of Mr. Sudworth, and a response, in the letter dated 17 February 2014 written by Mr. Kevin Lewis, dental director of MPS, has been given rejecting indemnity for reasons set out at length in that letter, that litigation may yet ensue in relation to that rejection. I am anxious not, by any expression of opinions of my own which are not binding as between Mr. Whetstone and MPS because they do not relate to the matters properly before me, to appear to fetter any judge having to decide any future litigation between Mr. Whetstone and MPS. Nonetheless, as matters turned out, the basic facts alleged in paragraph 20.7 of the Amended Defence were not in dispute. What was in dispute was the explanations and excuses offered by Mr. Whetstone and Mrs. Karen Jones, the general/clinical manager of the Practice. In the circumstances I think that it is appropriate for me to set out that which was not in dispute and to express my conclusions concerning the evidence of Mr. Whetstone and Mrs. Jones.

74. On 17 January 2007 an assistant of Mrs. Jones at the Practice, Lin Simmons, wrote a memorandum to Mr. Sudworth in which she said:-

> "*Can you please let me have the following documents in time for the Healthcare Commission review at the end of February:*
>
> - *Practising Certificate*
> - *Professional Indemnity Insurance*

> *Can you also please sign the attached form confirming that a criminal record check can be made.*"

75. In a memorandum dated 22 August 2007 to Mr. Sudworth Lin Simmons wrote:-

> "*I am really sorry to moan at you but you have **PROMISED** me that you will let me have a copy of your professional indemnity insurance **AND** your Hep B status.*
>
> *What chance do we have with the Healthcare Commission inspections if I can't even provide full documentation for Whelby Staff.*
>
> ***PLEASE, PLEASE, PLEASE** let me have copies of both documents as soon as possible.*"

76. A copy of that memorandum with the addition, in manuscript, of the words, *"re-sent 17.9.07"* was adduced in evidence. It was common ground that Mr. Sudworth's membership of MPS, while it continued, was renewable on 11 December each year. Thus, on the face of the memoranda of 17 January 2007 and 22 August 2007, re-sent on 17 September 2007, Mr. Sudworth had failed to provide a copy of his certificate of membership for nine months after the membership should have been renewed.

77. On 2 March 2009 Lin Simmons sent a memorandum to a number of people at the Practice, including Mr. Sudworth, requesting up-to-date documentation. From the context it appeared that what was being sought included a current certificate of membership of MPS.

78. In 2009 a number of meetings took place between Mr. Whetstone, Mr. Sudworth, Mrs. Jones, and, sometimes, others. Minutes were made of those meetings. The minutes of a meeting on 3 March 2009 included:-

> "*Indemnity – KJ* [Mrs. Jones] *reminded NS* [Mr. Sudworth] *that the updated indemnity was now due and that he should pass to Lin as per the Memo recently sent.*"

79. Lin Simmons sent a letter to Mr. Sudworth dated 8 April 2009 in which she wrote:-

> "*Despite several requests you have not provided me with a copy of your Professional Indemnity Insurance.*
>
> *Please provide your insurance details to me by Monday 20th April 2009.*
>
> *Having spoken to Mark* [Whetstone], *if you do not comply with this request by the date given above, you will be considered to be working illegally.*"

80. Minutes of a meeting attended by Mr. Whetstone, Mr. Sudworth and Mrs. Jones on 12 May 2009 recorded that, *"Indemnity Certificate – still waiting on"*.

81. A document entitled *"Notes for Lin Week Commencing – 25th May 2009"* recorded that one of the tasks to be undertaken was to pursue Mr. Sudworth's indemnity certificate.

82. In a memorandum to Mr. Sudworth dated 1 June 2009 Lin Simmons wrote:-

> "*Can you please let me have your Professional Indemnity Certificate together with your Practising Certificate.*
>
> *If you cannot give me your Prof. Ind. Cert., can you request the provider to send another copy to Whelby.*
>
> *I really need these documents now Nigel.*"

83. Minutes of a meeting held on 11 June 2009 attended by, inter alios, Mr. Whetstone, Mrs. Jones and Mr. Sudworth, included:-

> "*Indemnity*
>
> *We are still not in receipt of this document.*
>
> *Advised by NS that he has applied for this document which will take between 5 to 21 working days to be supplied, therefore a copy should be provided to us by 26th – 30th June.*"

84. That record appeared to note an admission by Mr. Sudworth that, as at 11 June 2009, he did not have any indemnity cover for the then current year.

85. On 29 June 2009 Mr. Whetstone wrote to Mr. Sudworth a letter which ended:-

> "*Lastly, on the 11th June 2009 you advised that you had applied for your professional indemnity certificate the previous week and had been told that it would take between 5 to 21 days to be provided. This time is now up. If you cannot produce the certificate you will be unable to practice. Please ensure that the certificate is provided to Karen by 9.00 am on Tuesday 30th June 2009.*"

86. In a manuscript note to Mr. Sudworth dated 30 June 2009 Mrs. Jones asked him for his indemnity certificate.

87. In his letter dated 29 July 2009 to Mr. Sudworth terminating the Sudworth Contract Mr. Whetstone included this:-

> "*There are still some major outstanding issues in relation to your conduct and contract that have still not been addressed, namely:*
>
> *1. ..*
>
> *2. MPS certificates – dates 01/01/08 – 11/06/09*"

88. The documents evidencing the chasing of Mr. Sudworth for evidence of indemnity cover which I have quoted were not in dispute. However, Mr. Whetstone contended that the Practice had a sound system for obtaining production of evidence that those working at it had indemnity cover. The system, of which Mrs. Jones also spoke in her evidence, was that a copy of the indemnity certificate for each year was held in a folder until it expired, when it was discarded, and the production of a copy of the indemnity certificate for the then current year was then pursued until it was produced. It was, I think, plain, and not really disputed by Mr. Whetstone or by Mrs. Jones in cross-examination, that, for 2007, no certificate was produced by Mr. Sudworth prior to 17 September 2007, and, for 2009, no valid certificate was produced by Mr. Sudworth until after 1 July 2009. It was not in dispute that actually Mr. Sudworth had not had indemnity cover in respect of the period 11 December 2004 to 11 June 2009 until such was granted retrospectively by MPS later in 2009. It followed that Mr. Sudworth could not actually have produced certificates of membership of MPS in respect of the period 11 December 2004 to 11 June 2009 during that period. However, Mr. Whetstone and Mrs. Jones contended that he must have, because otherwise the matter would have been pursued. Mr. Whetstone suggested in cross-examination that Mr. Sudworth produced forged certificates. He asserted that he, Mr. Whetstone, had been shown Mr. Sudworth's then current certificate of membership of MPS on the occasion of the signature of the Sudworth Contract in 2008.

89. I regret to say that I found Mr. Whetstone to be a most unsatisfactory witness. At paragraph 48 of his written closing submissions Mr. Hutton said this, with which I agree:-

> "*It is submitted that Mr. Whetstone was a thoroughly unsatisfactory witness. His various different inconsistent accounts in relation to his knowledge of the MPS's provision of retrospective indemnity for Mr. Sudworth (and his knowledge of Mr. Sudworth's alcohol problem) demonstrated a ready willingness to say whatever he thought would benefit his case. The contrast to what was said during the adjournment application by his counsel, compared to what the documents demonstrated, including his complaint and his draft witness statement to the GDC, where he was simply caught out by the further information from Capsticks, the GDC findings, which he claimed never to have read despite the fact that he was the complainant and they were his 19 patients, etc, was desperately unimpressive. His credibility generally was seriously damaged, and little effort was made to repair it in Closing Submissions on his behalf.*"

90. Mr. Whetstone's oral evidence, not foreshadowed by anything in any of his three witness statements which he verified when called to give evidence at the trial, that Mr. Sudworth had produced his 2008 certificate of membership of MPS to Mr. Whetstone was inconsistent with what Mr. Whetstone wrote in his letter of 29 July 2009 that MPS certificates were outstanding in respect of the period 1 January 2008 to 11 June 2009. In his second witness statement, dated 20 September 2013, made for the purposes of action HQ12X00737, Mr. Whetstone said, at paragraph 28 f:-

> "*For the period 2008 to 2009, we received Mr. Sudworth's certificate in July 2009.*"

91. At the commencement of the trial it was contended on behalf of Mr. Whetstone that the trial should be adjourned inter alia because he had just learned that MPS had granted retrospective membership to Mr. Sudworth as recorded in the decision of the Committee. Mr. Whetstone claimed not to have read that decision, notwithstanding that he was sent a copy of it and he was the complainant. Other evidence that he knew perfectly well what the position was concerning retrospective membership included a draft witness statement which had been prepared by Messrs. Capsticks, solicitors acting on behalf of GDC, for Mr. Whetstone in the context of the proceedings before the Committee. Mr. Whetstone saw Kate Townsend and Antonia Dowgray of Messrs. Capsticks on 14 June 2011, as Kate Townsend recorded in a letter to Mr. Whetstone dated 15 July 2011:-

> "*Thank you for taking the time to talk to Antonia and me on 14th June 2011. Please find enclosed the draft witness statement which I have prepared, based on that interview. It is important that the statement is complete and accurate so please take the time to read it carefully. It is your statement and I would, of course, be happy to add to, amend or delete any part of it. If you are not happy with anything, please let me know.*"

92. The draft witness statement included paragraph 17, of which the material part was in these terms:-

> "*I confronted Mr. Sudworth with this and eventually, Mr. Sudworth admitted that he had forged the certificate. I have since learned that the DPU* [that is, MPS] *has provided him with retrospective indemnity insurance.*"

93. In cross-examination Mr. Whetstone contended that Kate Townsend must have misunderstood what he told her in preparing paragraph 17, and that actually he never really considered the draft witness statement because he was told that his evidence was not required. Malheureusement he was then shown a copy of the witness statement which he had modified and sent to Antonia Dowgray as an attachment to an e-mail on 14 October 2011 which showed that he had altered in red various parts of the witness statement, but not paragraph 17.

94. Mr. Sudworth was persuaded to write a letter dated 15 October 2009 to MPS in these terms:-

> "*I, the above-named person, hereby give authorisation for you, the Medical Protection Society, to verify that I had insurance cover from 2005 to August 2009 to Karen Jones, General Manager at 33 London Road, Old Harlow, Essex CM17 0DA by telephone or e-mail:*"

95. On the copy of that letter produced at the trial was written in manuscript the telephone number of MPS and:-

> "*26/10/09 Joyce – can confirm 12/12/07 – to date*
>
> *- still payments outstanding for periods before this*"

96. When Mr. Whetstone was asked about that letter and that note he professed to know nothing about it. He even said that he did not know whose handwriting appeared. Mr. Whetstone has employed Mrs. Jones since 1998, according to her witness statement. When she was cross-examined about the letter and the hand-written addition, she said that the handwriting was hers and that she had made the call to MPS which had elicited the information recorded. She asserted that she could not recall whether or not she had reported what she had discovered to Mr. Whetstone. I am afraid that that, as it seemed to me, disingenuous response cast a shadow over the accuracy of her evidence. The common sense of the position must be that Mr. Sudworth was persuaded to sign the letter dated 15 October 2009 because Mr. Whetstone wanted the information to which that letter related, and that Mrs. Jones made the call to get that information. It defies belief that Mrs. Jones did not report the information which she had obtained to Mr. Whetstone. She had no personal or business interest herself in the information.

97. As to the suggestion that Mr. Sudworth habitually produced forged certificates of membership of MPS to Mr. Whetstone or to Mrs. Jones or to Lin Simmons, in Mr. Whetstone's letter dated 28 September 2010 referring the case of Mr. Sudworth to GDC appeared this paragraph:-

> "*Of grave concern was his failure to produce suitable CPD records and professional indemnity documentation. It transpired that he was working without professional indemnity in place for a considerable length of time and had presented me with a forged certificate of membership to MPS professional body. When questioned on the issue of the fraudulent documentation he said he was desperate at the time and confirmed that he had forged the certificate. For this and other reasons I terminated his contract with the practice.*"

98. What Mr. Whetstone there complained of, knowing that in fact Mr. Sudworth had not had indemnity cover *"for a considerable length of time"*, was the forging of a single certificate of membership, not a succession of such certificates.

99. In my judgment it is plain that actually Mr. Whetstone was content not to pursue Mr. Sudworth for production of evidence of his current membership of MPS until the possibility of professional negligence claims arose in 2009. While I accept that the system which Mrs. Jones described to me was in place, it was wholly inadequate because no sufficient steps were taken to ensure that Mr. Sudworth produced evidence of his membership of MPS in the period covered by the charge before the Committee. I find that Mr. Sudworth did not produce any certificate of membership of MPS, real or forged, in the period between 11 December 2004 and 1 July 2009, until 1 July 2009, when he produced the one copy which he had himself forged. Moreover I find that Mr. Whetstone was entirely happy for Mr. Sudworth to continue to treat patients at the Practice without having produced evidence of indemnity cover, until it became

clear in 2009 that it was actually important in practical terms whether Mr. Sudworth had such cover.

100. So, for the reasons which I have given, the claims in action HQ12X0737 fail and that action is dismissed. I turn to consider the Third Party claim in action HQ13X03579.

Action HQ13X03579

101. In contra-distinction to the situation in action HQ12X00737, so far as the Third Party claim in action HQ13X03579 is concerned there had, indeed, been an application for indemnity, by the letter from Attwaters dated 7 September 2012, which had been refused for the reasons set out in the letter dated 26 September 2012 written by Mr. Wheeler. Thus in relation to that Third Party claim potentially an issue arose as to whether the refusal was capable of being challenged. Strangely the Particulars of First Defendant's Additional Claim against the Third Party did not raise that issue. However, in the Defence of the Third Party, at paragraph 8, it was asserted in terms what were the reasons for the refusal, and, implicitly, that those reasons justified the refusal. It is thus appropriate for me to consider whether those reasons did indeed justify the refusal.

102. It was accepted by Mr. Hutton on behalf of MPS that Mr. Whetstone was liable in contract to Denplan Patients for negligent treatment given to them by Mr. Sudworth. However, the Particulars of First Defendant's Additional Claim against the Third Party only asserted that Mr. Whetstone was liable to those, and other affected patients, vicariously, so it is necessary to consider whether that contention is well-founded.

103. It was common ground between all of the parties before me that the proper approach of MPS to consideration by MPS of an application from a member for indemnity is that set out in the passages from the authorities cited by Mr. Butler at paragraphs 33 to 38 in his written skeleton argument:-

> "*33. In* Ludgate Insurance Co Ltd. v. Citibank NA *[1998] Lloyd's Rep IR 221, which concerned an agreement by which the London Market Letter of Credit Scheme was operated by Citibank.* [sic] *In certain circumstances the agreement gave to the bank the rights "to retain in the account(s) such additional margin as it considers appropriate in all the circumstances" and "to allocate the drawing(s) … in such manner as the Bank considers appropriate in its sole discretion".*
>
> *34. Brooke LJ said, at para 35:*
>
> *"It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. We were referred to* Weinberger v. Inglis *[1919] AC 606;* Dundee General Hospitals Board of Management v. Walker *[1952] 1 All ER 896;* Docker v. Hyams *[1969] 1 Lloyd's Rep 487, and* Abu Dhabi National Tanker Company v. Product Star Shipping Co. Ltd. *[1993] 1 Lloyd's Rep 397* ("The Product Star"). *These cases show that provided*

that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse, the courts will not intervene.

35. In Cantor Fitzgerald International v. Horkulak *[2004] EWCA Civ 1287. [2004] IRLR 942, the Court of Appeal held that the court's task is to put itself in the shoes of the decision-maker. Potter LJ said, at para 30:*

"While, in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion."

36. In Socimer International Bank Ltd. v. Standard Bank Ltd. *[2008] EWCA Civ 116, the Court of Appeal held that where a party to contract exercises a discretion then the discretion was subject to a limitation it described as "rationality", i.e. that "a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality".*

37. At para 66, Rix LJ said:

"It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury *unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. Gloster J was therefore, in my judgment, right to put to Mr. Millett in the passage cited at para 57 above the question whether a distinction should be made between the duty to take reasonable care and the duty not to be unreasonable in a* Wednesbury *sense; and Mr. Millett was in my judgment wrong to submit that it made no difference*

> *which test you deployed. Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the* Wednesbury *rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself. A similar distinction was highlighted by Potter LJ in para 51 of his judgment in* Cantor Fitzgerald. *For the sake of convenience and clarity I will therefore use the expression "rationality" instead of* Wednesbury-*type reasonableness, and confine "reasonableness" to the situation where the arbiter on entirely objective criteria is the court itself.*
>
> *38. In* Hayes (FC) v. Willoughby *[2013] UKSC 17, Lord Sumption observed, at para 14, that:*
>
> *"... Rationality is a familiar concept in public law. It has also in recent years played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose: see* Ludgate Insurance Co. Ltd. v. Citibank NA *[1998] Lloyd's Rep IR 221, para 35, and* Socimer International Bank Ltd. v. Standard Bank Ltd. *[2008] Bus LR 1304, para 66."*"

104. What, I think, one derives from these citations is, first, that the person exercising the discretion is the decision-maker, and not the court. Second, although the court will intervene in an appropriate case, the scope for interference is extremely limited, essentially to a case in which it appears either that the person entrusted with the discretion has not exercised it at all in any real sense – for example, rigidly adhering to a policy regardless of the particular circumstances – or that the exercise is tainted with dishonesty or bad faith, or that, viewed objectively, the decision was capricious, arbitrary, perverse or irrational. There remains legitimately within the scope of the person exercising the discretion the assessment of what matters to take into account, or to leave out of account, and what weight to attribute to each matter, provided that the ultimate decision is not irrational or perverse.

105. Mr. Butler suggested at one point in his submissions that, if a discretionary decision was based on a number of grounds and one of them can be demonstrated to be erroneous, the decision cannot stand. In my judgment that is not the case. The focus of attention is whether a particular exercise of discretion is irrational or perverse, viewed objectively, not whether every part of the decision making process is unimpeachable. As it seems to me, as long as there exists at least one ground of the decision which objectively justifies the result, that is sufficient to prevent interference by the court.

106. In his letter dated 26 September 2012 Mr. Wheeler identified three particular matters as having led to the conclusion that *"we will not assist him at this stage"*. Later in the letter, at the very end, Mr. Wheeler, stated that, *"In all the circumstances, DPL will not exercise its discretion to provide indemnity to Dr. Whetstone in respect of the claims"*. The first of the particular matters identified in the letter as reasons that MPS would *"not assist him at this stage"* was neatly summarised at the end of numbered

paragraph 1 of the grounds given in the letter as, *"DPL specifically informs its members that they should not be expected to be indemnified for the acts or omissions of any other dentist"*, or, in other words, the established policy of MPS was to provide indemnity only in respect of the dental work undertaken personally by a member, which policy had been communicated to members. The second was that Mr. Whetstone had already commenced action HQ12X00737 and had instructed solicitors and counsel, so that, *"There could never be the open discussion between Mr. Whetstone and DPL required for assistance"*. The third was the contention that Mr. Whetstone had prejudiced any defence to the claims of the patients and had actively encouraged them to sue. Separately Mr. Wheeler identified prejudice to the defence of the claims by Attwaters, rather than by Mr. Whetstone, by accepting service of the Claim Forms of the patients when not instructed to do so.

107. Mr. Butler ridiculed the commencement of action HQ12X00737 as a reason for not granting indemnity. However, I think that that was unfair to Mr. Wheeler. In the letter dated 7 September 2012 Attwaters had sought assistance from MPS as well as indemnity. The point about there not being able to have an open discussion was made specifically in the context of what was *"required for assistance"*. It was not put forward as a reason for not granting indemnity.

108. The first matter identified in the numbered paragraphs of Mr. Wheelers' letter Mr. Butler characterised as the contention that Mr. Whetstone was not liable vicariously for the negligence of Mr. Sudworth. Although that was the submission on behalf of MPS at the trial, to which submission I shall come, that was not, as it seems to me, the point that Mr. Wheeler was seeking to make in his numbered paragraph 1. The point was that which I have summarised, and it requires some further consideration.

109. Each year MPS circulated to members a document called *"Annual Review"*, followed by the relevant calendar year. Each such document included a section entitled *"Getting the best out of your membership"*. Although the precise language varied a bit from time to time, this passage taken from the Annual Review 2006 can be taken as typical for present purposes:-

> "*<u>Vicarious liability</u>*
>
> *If an employee commits a negligent act or omission whilst acting in the course of their employment, the employer can be held to be vicariously liable for any resulting claim. This can apply even in situations where the negligent act was expressly forbidden by the employer, or where the omission represented a failure to follow reasonable instructions given to the employee by the employer.*
>
> *However, there is an implied term in most contracts of employment, that employees will exercise reasonable skill and care in the performance of their duties. Where an employee's negligence results in a claim against the employer, the employer is generally entitled to seek 'contribution and indemnity' from the employee, which may take the form of demanding a financial contribution from the employee towards the expenditure (including legal costs) incurred by the*

> *employer. Indeed, even when the employer has the benefit of a contract of insurance and is not personally at risk, many commercial insurance contracts specifically include a clause which gives an employer's insurer the right to pursue such a financial contribution and indemnity from the employee, if the insurer considers it appropriate to do so.*
>
> *Assistants, partners and deputies*
>
> *Practitioners are responsible for their own professional acts or omissions. The fact that employers may also be held to be vicariously liable for the acts of their employees in no way decreases the employee's personal responsibility. Partners are jointly and severally liable in legal actions brought against the partnership and it is essential that each partner and every assistant is a member of a recognised protection or defence organisation, and/or appropriately indemnified/insured.*
>
> *Before engaging any full time or part time employee or locum you are advised to satisfy yourself as to their credentials, and seek evidence of registration (if applicable) and professional indemnity, as well as any other statutory requirement (e.g. work permit, if applicable).*
>
> *Dental Protection's subscriptions are calculated on the basis of the risk represented by a single member. Members should not expect to be indemnified for the acts and omissions of any other individuals dentists* [sic] *employed by the practice, on the strength of a single annual subscription being paid by the practice owner.*
>
> *Practice owners should ensure that they have a written agreement with any dentists, hygienists, therapists or other individuals they employ and when employing any registered person,*
>
> *a) Make it a condition of employment that appropriate professional indemnity should be maintained at all times …*
>
> *b) Ensure whenever possible that the person's professional indemnity is occurrence-based …*
>
> *c) …*
>
> *d) Insist on sight of documentation to confirm that professional indemnity has been renewed annually.*"

110. What, in my judgment, is important about that passage is that, to the knowledge of any member who elected to read the Annual Review, subscriptions payable by members were fixed on the basis that the risk he or she presented related to the dental work which he or she personally carried out. MPS, recognising the risk of vicarious

liability, and the potential of partners to be jointly liable, had chosen, with a view to minimising the amount of subscriptions from members, not, at least in the ordinary way, to provide indemnity against vicarious liability, and had told members that. Those considerations seem to me to have been highly material to the consideration whether to provide indemnity to Mr. Whetstone in respect of his alleged vicarious liability for the negligence of Mr. Sudworth. Mr. Whetstone had paid subscriptions assessed by reference to the risks presented by his own dental work. In a sense, therefore, he was seeking, by Attwaters' letter dated 7 September 2012, indemnity for which he had not paid and which he had been warned, if he had chosen to read the Annual Reviews, would be unlikely to be provided. The issue for those deciding whether to offer indemnity in respect of the claims of the victims of Mr. Sudworth's negligence was essentially whether to make an exception in the case of Mr. Whetstone.

111. The other matter mentioned in Mr. Wheeler's letter in the numbered paragraphs was the prejudice which Mr. Whetstone had caused to the defence of the claims by actively encouraging patients to make claims. I regret to have to say that the sending by Mr. Whetstone to all of the patients who were treated negligently by Mr. Sudworth of the letters dated 4 November 2011, of which I have quoted an example, seems to me to have been perfectly disgraceful. Although characterised by Mr. Butler as entirely proper letters from a professional man explaining fully and frankly to his patients the position in which they found themselves, actually the clear message to each recipient was: *"There is a pot of money here. You can have some of it if you sue."* It was the most blatant incitement to recipients of the letter to make claims, in circumstances in which otherwise the risk of claims might have been slight because of the remedial work undertaken or promised by Mr. Whetstone at no charge. While it is sheer speculation on my part, I do find it difficult to see any motivation behind the sending of the letters other than to manoeuvre for advantage in relation to Mr. Whetstone's wish for indemnity from MPS for his own alleged costs of remedial treatment, perhaps by provoking claims from patients on which Mr. Whetstone's claims could be presented as parasitic. The sending of the letters was a flagrant breach of the obligation in Article 40(6) of the Articles not to take steps in relation to a claim without the consent of MPS.

112. In my judgment the sending of the letters dated 4 November 2011 inciting claims would, on its own, justify MPS in refusing Mr. Whetstone indemnity in respect of the claims thus provoked.

113. Far from being irrational or perverse, it seems to me that MPS was amply justified in refusing Mr. Whetstone indemnity in respect of the claims in action HQ13X03579. The Third Party claim fails and is dismissed.

Vicarious liability

114. I have reached my conclusion that the Third Party claim in action HQ13X03579 should fail without having to consider the issue whether Mr. Whetstone was in truth vicariously liable for the negligent treatment meted out by Mr. Sudworth. However, if Mr. Whetstone were not, as was contended on behalf of MPS, vicariously liable anyway, that would be another reason for dismissing the Third Party claim. It is therefore appropriate for me to consider the issue of vicarious liability.

115. The law of vicarious liability has been developing of late especially, but not uniquely, in the context of claims against various organs of the Catholic Church in respect of the behaviour of members of the clergy.

116. Traditionally the focus of vicarious liability was the liability of an employer for the torts of an employee committed during the course of his employment. The position of MPS before me was, in essence, that, on proper construction of the Sudworth Contract Mr. Sudworth was not an employee of Mr. Whetstone, and thus Mr. Whetstone was not vicariously liable for the negligent treatment by Mr. Sudworth of his patients. I have set out extensively the terms of the Sudworth Contract. It is, I think, clear, from clauses 1, 4, 7a, 11, 12 and 31 of the Sudworth Contract that Mr. Sudworth was not in truth an employee of Mr. Whetstone. However, there was a degree of artificiality about the Sudworth Contract. It had been carefully constructed so as to ensure that, as between themselves, Mr. Whetstone and Mr. Sudworth were not in an employment relationship. However, to the outside world, unaware of the actual terms of the Sudworth Contract, how some of those terms worked was likely to create a different impression. By clause 1 Mr. Sudworth was to follow the policies of the Practice as laid out in the Whelby House procedures and policies folder. A copy of those policies was adduced in evidence. They were highly prescriptive. By way of example, the first section was *"Greeting the patient and communication"*, and the first item was, *"Greet the patient whilst standing facing them, be polite and put them at ease"*. The equipment and materials provided pursuant to clause 5 of the Sudworth Contract apparently included a uniform which Mr. Sudworth was required to wear. By clause 7a Mr. Sudworth was to make himself available for work during agreed hours, rather than work whatever hours he chose. By clause 8 Mr. Sudworth's holiday entitlement was limited, rather than a matter entirely for him. The effect of clauses 15 and 17 of the Sudworth Contract was that Mr. Whetstone collected the fees for work done by Mr. Sudworth and refunded Mr. Sudworth's share, notwithstanding that the contract was structured as a payment of a licence fee by Mr. Sudworth for the opportunity to earn fees. The actual fees charged were fixed by Mr. Whetstone, not by Mr. Sudworth. Clauses 24, 25, 26 and 27 of the Sudworth Contract were extraordinary if, in truth, Mr. Sudworth were an independent contractor providing services to his own patients, rather than to the patients of Mr. Whetstone. If Mr. Sudworth were an independent contractor one would not expect that he should hand over his patients' books and records to Mr. Whetstone (clause 24), not have any goodwill in relation to his own patients (clause 25), not be able to treat his own patients wherever he liked (clause 26), and not be able to treat his own patients after the termination of the Sudworth Contract (clause 27). Provisions of those types are normally only found in contracts of employment.

117. As the law of vicarious liability has developed very recently – since, indeed the commencement of the actions with which this judgment is concerned – vicarious liability is no longer confined to circumstances in which the liability is imposed upon an employer in respect of the torts of his employee committed during the course of his employment, but extends to a situation which is *"akin to employment"*.

118. In *E v. English Province of Our Lady of Charity* [2013] QB 722 the material issue was whether trustees standing in the place of a diocesan bishop who had appointed a priest who had assaulted the claimant whilst she was in a children's home were

vicariously liable for the activities of the priest. The leading judgment was that of Ward LJ. In the course of his judgment he made these observations:-

> "*50. The doctrine of vicarious liability does give rise to a clash of two broad policies upon which the law of torts is founded, one that there ought to be an effective remedy for the victim of another's wrongful act, and the other that the defendant should not generally be held liable unless he was at fault. Only policy considerations can explain the triumph of the former over the latter. Identifying the relevant strands of policy and evaluating their importance is not straightforward.*
>
> *…*
>
> *59. In my judgment the time has come to recognise that the context in which the question arises cannot be ignored. If the case is one where an employee seeks a remedy against his employer, for example for unfair dismissal, then the case does require that the true relationship of employer/employee be established in order to found the claim. It is after all a claim based on that relationship. Likewise liability for income tax ultimately depends upon the proper construction of the specific provisions in the relevant tax legislation. The statutory definition will demand a true relationship of employer/employee. If the case is brought under the sex discrimination legislation, then a different test applies: see the* Percy *case [2006] 2 AC 28. On the other hand the remedy of an innocent victim against the employer of the wrongdoer has a different justification rooted, as we have seen, in public policy. The fluid concept of vicarious liability should not, therefore, be confined by the concrete demands of statutory construction arising in a wholly different context.*
>
> *…*
>
> *70. Whilst it may be useful to carry out some sort of comparative exercise for the purpose of ascertaining how close the relationship of Father Baldwin and the bishop is to a relationship of employer/employee as opposed to that of employer/independent contractor, my judgment is that one should concentrate on the extent to which, if at all, he is in a position akin to employment. The cases analysed in the immediately preceding paragraphs should be noted with a view to abstracting from them, if it is possible, the essence of being an employee. To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss.*

> *71. Whilst it is useful as part of an overall exercise to use the traditional distinctions between employer and employee to see whether vicarious liability may fairly and properly be extended to this particular relationship, it is also necessary to include a consideration of the policy factors which enable a judgment to be made as to the justice – or injustice – of extending liability.*
>
> *…*
>
> *73. I confess I have found this difficult to decide. I see the force of the arguments both ways. I can conclude that the time has come emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service. The test I set myself is whether the relationship of the bishop and Father Baldwin is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable.*
>
> [Ward LJ then went on to consider, in the context of the case before him, issues of control of Father Baldwin by the bishop, of whether there was an organisation in which Father Baldwin worked for the benefit of the organisation, of whether the activities of Father Baldwin were integrated in the organisation, and of whether the activities of Father Baldwin were in the nature of activities of his own business. The upshot of this consideration was]
>
> *81. The result of each of the tests leads me to the conclusion that Father Baldwin is more like an employee than an independent contractor. He is in a relationship with his bishop which is close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability. Justice and fairness is used here as a salutary check on the conclusion. It is not a stand alone test for a conclusion. It is just because it strikes a proper balance between the unfairness to the employer of imposing strict liability and the unfairness to the victim of leaving her without a full remedy for the harm caused by the employer's managing his business in a way which gave rise to that harm even when the risk of harm is not reasonably foreseeable.*"

119. Tomlinson LJ dissented in that case, but Davis LJ agreed with the view of Ward LJ. Davis LJ pointed out, at paragraph 117 of his judgment, that, *"The matter has to be decided by reference to and application of general principles of vicarious liability: cases involving sexual harassment or sexual abuse do not fall into any special category: see para 48 of the judgment of Lord Clyde in the* Lister *case [2002] 1 AC 215."*

120. The issue of vicarious liability was considered in the Supreme Court very soon after the handing down of the judgments of the Court of Appeal in *E v. English Province of Our Lady of Charity*, supra. In another case involving organs of the Catholic Church,

Various Claimants v. Catholic Child Welfare Society [2013] 2 AC 1, the sole speech was that of Lord Phillips of Worth Matravers, with which the other members of the Supreme Court agreed. So far as is presently material – the actual core issue in that case is not relevant to this case – what Lord Phillips said was:-

> "*34. Vicarious liability is a longstanding and vitally important part of the common law of tort. A glance at the table of cases in* Clerk & Lindsell on Torts, *20th ed (2010) shows that in the majority of modern cases the defendant is not an individual but a corporate entity. In most of them vicarious liability is likely to be the basis upon which the defendant was sued. The policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim. Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread. It is for the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability. Where the criteria are satisfied the policy reasons for imposing the liability should apply. As Lord Hobhouse of Woodborough pointed out in the* Lister *case [2002] 1 AC 215, para 60, the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.*
>
> *35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.*
>
> *36. In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase "master and servant", the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a*

> *contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.*"

121. Lord Phillips considered the judgments of the Court of Appeal in *E v. English Province of Our Lady of Charity* at paragraphs 49 to 54 of his speech without adverse comment.

122. A very recent decision of the Court of Appeal concerning vicarious liability is *Cox v. Ministry of Justice* [2014] EWCA Civ 132, in which the judgments were handed down on 19 February 2014. In that case one of the questions was whether the Ministry was vicariously liable for the acts of a prisoner working in a prison kitchen which had injured the claimant. The leading judgment was that of McCombe LJ. He identified the approach to be adopted to determining whether vicarious liability should be found in particular circumstances at paragraph 42 of his judgment:-

> "*For my part, I accept Mr. Weir's submissions. It seems to me that, adopting a principled, coherent and incremental approach, which Mr. Morton urges us to adopt, requires us carefully to apply (as Lord Phillips did) the features of the traditional relationship giving rise to vicarious liability (for which the paradigm is employment) and ask whether the features of the present case fall within them so that it is fair and just to impose vicarious liability. To do this is, I think, to ask the same thing as whether the relationship in question is one "akin to employment".*"

123. In considering whether the circumstances of the case in *E v. English Province of Our Lady of Charity*, supra, were *"akin to employment"* Ward LJ addressed the questions of control of the activities of Father Baldwin by the bishop, whether the activities of Father Baldwin were undertaken for the purposes of an organisation operated by those whom it was sought to hold vicariously liable for those activities, whether Father Baldwin was integrated into such organisation, and whether his activities were for the purposes of a business of his own, rather than for the purposes of a business of the bishop. I respectfully agree that those are the principal considerations which arise when the issue is, is the relationship between a wrongdoer and the person or persons whom it is contended should be held to be vicariously liable for the activities of the wrongdoer *"akin to employment"*. In the circumstances of the present case, as I have pointed out, Mr. Whetstone exercised a high degree of control over Mr. Sudworth and his activities. Not only was Mr. Sudworth bound to follow the policies prescribed by Mr. Whetstone, but he was to attend to provide his services at times prescribed by Mr. Whetstone, and to charge fees for his services fixed by Mr. Whetstone. Mr. Whetstone certainly had an organisation, the Practice, which undertook the provision of dental treatment to patients, and Mr. Sudworth participated in that organisation and was integrated into it. He was provided with the physical means to undertake the provision of dental services, both in terms of the necessary equipment, but also in

terms of the necessary support staff. In no meaningful sense was Mr. Sudworth an independent dental practitioner merely taking advantage of premises provided by Mr. Whetstone. Mr. Sudworth could not decide of his own choice when to work, or what to charge for his services. When the Sudworth Contract came to an end he could not take *"his"* patients or their records with him. It seems to me that the relationship between Mr. Whetstone and Mr. Sudworth was as *"akin to employment"* as one could get in a relationship deliberately structured by contract to avoid an employment relationship.

124. In the result I find that Mr. Whetstone is vicariously liable to the claimants in action HQ13X03579 for the negligent treatment of them by Mr. Sudworth.

125. In the course of his submissions Mr. Butler contended that Mr. Whetstone owed to the patients of Mr. Sudworth a personal non-delegable duty of care to ensure that Mr. Sudworth was not negligent in his treatment of them. I do not think that that point was open to Mr. Butler on the Particulars of First Defendant's Additional Claim against the Third Party, and so I do not need to consider it. However, it is, perhaps, ironic, that, if this contention were sound, it would mean that there was no obvious policy reason for imposing vicarious liability on Mr. Whetstone for the negligence of Mr. Sudworth.

Conclusion

126. For the reasons which I have explained, both action HQ12X00737 and the Third Party claim in action HQ13X03579 fail and are dismissed.