Neutral Citation Number: [2009] EWHC 2093 (Admin)
Case No: CO:/5716/2009

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 06/08/2010

Before :

THE HONOURABLE MR JUSTICE KING

- -

Between :

MR CHATENYA CHAUHAN **App**

- and –

GENERAL MEDICAL COUNCIL **Respo**

- -

- -

Mr Mark Sutton and Ms Andrea Chute (instructed by **William Child and Ian Sadler of Radcliffes le Brasseur**) for the **Appellant**

Tom Weisselberg (instructed by Deborah Yates of GMC legal) for the **Respondent**

Hearing dates: 24th November-27th November 2009, 9th December 2009 and 10th December 2009.

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Judgment

The Hon. Mr. Justice King:

1.
This is an appeal pursuant to Section 40(1)(a) of the Medical Act 1983 as amended from the decision and findings of the Fitness to Practise (FTP) Panel ("the Panel") of the Respondent delivered on 11th May 2009 following a hearing held over seven weeks between 30th March and 11th May 2009. By their decision the Panel determined to erase the name of the Appellant from the Medical Register. The decision was reached in three stages. In stage one the Panel made findings as to which of a number of allegations amounting in effect to charges against the Appellant set out in the Notice of Hearing, had been found proved. This was essentially a fact finding exercise. The majority of the charges were found proved. In stage two the Panel determined on the basis of the facts found proved, whether the Appellant's behaviour amounted to misconduct and whether if it did, the Panel's fitness to practise was impaired by reason of such misconduct. This was the impairment stage. The Panel found such misconduct and impairment. In stage three the Panel determined sanction which as indicated was that of erasure.

2.

The Panel itself consisted of a lay Chair-person (Mrs Carr) sitting with two medical practitioners whose backgrounds were in general practice and two lay members. The medical practitioners were respectively Dr. Sheldon and Dr. Sinclair. The two lay members were The Reverend Lloyd-Richards and Mr. Simanowitz. I attach as an annex to this judgment (as Annex One) the biographical details of the Panel.

3.
I turn first to the applicable legal principles material to this appeal.

The Appellate Jurisdiction of the Court.

4.
Section 40(7) permits the court to dismiss the appeal, to allow it and to quash the direction appealed against, to substitute a different direction or to remit the case. The appeal is governed by CPR 52.11 and the material Practice Direction (PD 52) at paragraph 22.3(2). Hence it is by way of a rehearing. However, I am mindful of the guidance given in Raschid v GMC [2007] 1WLR 1469 (paragraphs 16-20) and Meadow v GMC [2007] QB 462 and of the analyses to which these decisions have been subjected in subsequent appeals in the High Court, for example that of Cranston J. in Cheatle v GMC [2009] EWHC 645. Although it is a rehearing, the evidence is not called afresh and the appeal is based upon a review of the evidence disclosed in the transcript of the hearing and material before the Panel. The test on appeal is whether the decision of the Panel can be said to be wrong. The basis of intervention is broader than that on a judicial review. A court is not confined to grounds of error of law or irrationality. A distinction is however to be drawn between the court's approach to findings of fact made by the Panel and those of its findings which reflect a professional judgment, as for example with regard to fitness to practise. As regard the latter, the court will exercise a distinctly secondary judgment. Respect has always to be given to a professional disciplinary tribunal such as a Fitness to Practise Panel although I agree with Cranston J (at Cheatle paragraph 15) that the degree of deference will depend on the circumstances and one factor may be the composition of the tribunal. In this case, as already indicated, the medical members had a background in general practice. None of the members had had any involvement in the training of hospital doctors whether in orthopaedics or any other speciality. As regards findings of fact, the court will correct any material errors of fact that is to say findings not supported by the evidence or which represent a mistake of material fact. However as with any appellate body, there will be a reluctance to characterise findings of fact as wrong where findings turn upon the credibility or reliability of a witness "an assessment of which may be derived from his or her demeanour and from subtleties of expression which are only evident to someone at the hearing" (per Cranston J. in Cheatle at para.15). Further, as regards the finding of secondary facts by drawing inferences from primary facts, this is akin to a jury question to which there may reasonably be different answers and again I accept that the court should be slow to interfere with such secondary findings as were reasonably open to the Panel on the evidence before them.

5.
As regards the giving of reasons, I accept (see the guidance of Lord Rodger in Gupta v GMC [2001] UKPC 61 at paragraph 14) that generally speaking reasons on factual matters are unnecessary but that there may be cases where the principle of fairness may require the tribunal to give reasons on matters of fact. As was said by Wall LJ in Phipps v GMC [2006] EWCA Civ 397 at paragraphs 85 and 86, such a course will be required if necessary to enable the parties to understand clearly why they have won or lost. I however accept the submission of the Respondent that "the Panel's findings on

particular heads of charge when considered in the light of the transcript of the evidence, may reveal sufficiently clearly the reasons for its decision."

Ambit of Charges

6.
A primary ground of appeal in this case is that the Panel made findings of fact and dishonesty outside the ambit of the particular charges which the Appellant faced, which unfairly informed its decision on the particular charges. The rules governing the procedure before the Panel are contained in the General Medical Council (Fitness to Practise) Rules Order of Council 2004. Material to this ground of appeal are Rules 15 and 17. Rule 15 provides that as soon as reasonably practicable after an allegation has been referred to a FTP panel, a notice of hearing has to be served on the practitioner which "shall (a) particularise the allegation against the practitioner and the facts upon which it is based" (rule 15(2) – the emphasis is the emphasis of the court). Rule 17 sets out the procedure to be following at the Panel hearing.

Procedure before a FTP Panel

17.
- (1) A FTP Panel shall consider any allegations referred to it in accordance with these Rules, and shall dispose of the case in accordance with sections 35D, 38 and 41A of the Act.

(2)
The order of proceedings at the hearing shall be as follows –

(a)
the FTP Panel shall hear and consider any preliminary legal arguments;

(b) the Chairman of the FTP Panel shall -

(i)
where the practitioner is present, require the practitioner to confirm his name and registration number, or

(ii) otherwise, require the Presenting Officer to confirm the practitioner's name and registration number;

(c)
the person acting as secretary to the FTP Panel shall read out the allegation, and the alleged facts upon which it is based;

(d) the Chairman of the FTP Panel shall inquire whether the practitioner wishes to make any admissions;

(e) where facts have been admitted, the Chairman of the FTP Panel shall announce that such facts have been found proved;

(f) where facts remain in dispute, the Presenting Officer shall open the case for the General Council and may adduce evidence and call witnesses in support of it;

(g) the practitioner may make submissions regarding whether sufficient evidence has been adduced to find the facts proved or to support a finding of impairment, and the FTP Panel shall consider and announce its decision as to whether any such submissions should be upheld;

(h) the practitioner may open his case and may adduce evidence and call witnesses in support of it;

(i) the FTP Panel shall consider and announce its findings of fact; .....

I accept the Appellant's analysis that the rules thus require the Respondent to give notice of any particular allegation being pursued against the practitioner and to particularise the facts upon which it is based and it is those facts, where disputed, which the Panel is required to determine in accordance with Rule 17(2). In so far as the Panel, at stage one of its decision process, makes material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, which however are not within the charges as formulated and particularised in the Notice of Hearing, then those findings in my judgment cannot properly or fairly be used by the Panel to support its findings under the Notice and in so far as the Panel has so used them, then the Notice findings are liable to be held vitiated and set aside. I agree with Silber J. in Cohen v.GMC [2008] EWHC 581 (Admin) 581, paragraph 48 that findings in relation to any particular charge at stage one "must be focussed solely on the heads of the charges themselves". The observations of Pill LJ in Strouthos v. Londonunderground Ltd [2004] EWCA Civ 402 at paragraph 12 that a "it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed and that the evidence should be confined to the particulars in the charge" must be equally apposite to hearings before the FTP of the Respondent. An associated principle relied upon by the Appellant is that rehearsed by the Privy Council in Salha v GMC [2003] UKPC 80 at paragraph 14, namely that "it s a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised." I should record at once however that the Respondent disputes any breach in this case of any of these principles.

The Panel's approach to questioning/bias

7.
There is also in this appeal an allegation of apparent bias which it is said vitiates the Decision. Reliance is placed upon the manner in which issues were raised and probed by Panel members and upon what is said to be the Panel's one sided evaluation of the evidence in its reasons.

8.
Two different set of principles are potentially applicable under this head of appeal.

9.
The first go to the fairness of the proceedings. The question here is whether the conduct of the Panel in the course of the hearing by way of intervention in the questioning of witnesses was so excessive that it can be properly said that the Panel had by its interrogation of the witnesses "descended into the arena" so as to give rise to the risk that it had so [word repeated] its ability properly to evaluate and weigh the evidence, as to impair its judgment and for that reason render the hearing unfair. (See Yuill v Yuill [1949] P 15, 20 where Lord Green spoke of the liability of an interventionist judge to have his "vision clouded by the dust of the conflict"; and the Mayor of the London Borough of Southwark v Kofi Adu [2006] EWCA Civ 281). As Jonathan Parker LJ explained in Kofi Adu (paragraph 146), the

answer to this question does not depend on appearances or what an objective observer of the process might think of it.

10.
The second set of principles relate to bias. Where as here apparent (as distinct from actual) bias is alleged, such bias only arises (as explained by Silber J. in Muscat v? Health Professions? Council [2008] EWHC 2798 (QB) at paragraph 59) where a fair-minded and informed observer having considered the relevant facts would conclude that there existed a real possibility that the decision maker was biased by reason of his behaviour. Such a fair-minded observer is "neither complacent nor unduly sensitive or suspicious." Moreover, it must also be borne in mind that "nowadays first instance judges rightly tend to be much more proactive and interventionist than their predecessors" (per Jonathan Parker LJ in Kofi-Adu at paragraph 145). Further, in the context of a professional disciplinary tribunal, the Court of Appeal in CRHCP v GMC andRuscillo [2005] 1WLR 757 has indicated that whereas in a criminal trial the procedure is adversarial and the judge plays a passive role in the factual inquiry, "the disciplinary tribunal should pay a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and the relevant evidence is place before it." (para. 80)

The Background to the charges

11.
Before considering the charges faced by the Appellant, I turn to the background which led to their being raised against him. The references below to extracts from the evidence are references to the transcript of the particular day and the internal pages of the transcript.

12.
The Appellant is now some 45 years of age (date of birth being 7th March 1965). He had obtained his Bachelor degrees in medicine and surgery in 1989, had attained his Fellowship of the Royal College of Surgeons in 1994 and FRCS in orthopaedic and trauma surgery in 2001; He is in post as a consultant orthopaedic and trauma surgeon employed by the Southend University Hospital NHS Trust (Southend) (the Trust). The charges he faced stem from his application for this position and then to his time at Southend.

13.
The Appellant had submitted a written application for this position in July 2002. In the application he stated amongst other matters that he had an interest in lower limb surgery and had "a broad surgical ability (the emphasis is that of this court) in lower limb arthroplasty and revision arthroplasty and this extends to hip resurfacing, unicondylar replacements and patellofemoral joint replacement.…" In his Curriculum Vitae which he attached to the application, under the heading "Career Goals and Future Plans", the Applicant repeated that he had a "broad surgical ability in lower limb arthroplasty and revision arthoplasty and this extends to hip resurfacing." In the same CV under the heading "Experience in Lower Limb Surgery" the Appellant further wrote that he had "amassed experience in lower limb surgery" and that " This includes experience in "primary and revision arthroplasty of the hip and knee" and that "This was further extended to (amongst other listed matters) hip resurfacing…"

14.
As will be seen, the Panel in their determination at stage one (see the Decision at paragraph 16) when considering whether the Appellant had misled his employers, reached the "common sense conclusion" that the expression "a broad surgical ability" meant "to anyone reading your CV that you had

experience of performing the procedures as sole or lead surgeon" and this "led your employers at Southend Hospital to believe that you were more experience that you were." Whether this was a legitimate conclusion for the Panel to draw as "matter of common sense" in relation to hip resurfacing and the procedure known as Birmingham Hip Resurfacing (BHR) in particular, has been an issue of some controversy in this appeal given that none of the Panel had experience of the specialist training of doctors or of orthopaedics.

15.
Prior to appointment, the Applicant underwent an interview process in which he was interviewed (on 22nd August 2002) by six persons including Mr Packer, the Trust orthopaedic department Clinical Director who himself specialised in upper limb surgery, Mr. Sudlow, a consultant orthopaedic surgeon at the Trust, and a representative of the Royal College of Surgeons and a representative of the Deanery (the Special Advisory Committee (SAC) representative). The evidence of Mr Packer before the Panel was that it was the function of these two representatives to ensure that candidates were appropriately qualified for the advertised post. (Mr Packer, D6/31: "…the college representative would look more at basic training to see that the candidate has crossed all the I's and T's and the SAC representative would look at the orthopaedic training in terms of the post itself, so they have prescribed ……. functions.") No evidence was adduced from either of the Deanery or SAC representatives however as to the meaning if any they attached to the words "broad surgical ability" in the Appellant's application and CV. Mr. Packer himself said he would understand these words to mean "that the individual would be able to take part in those procedures at an unsupervised level so as to operate independently on those which I would regard as, some of them, fairly advanced procedures."(D6/3), but he conceded that at the interview stage no questions were raised about Birmingham Hip Resurfacing other that that the Appellant was asked by Mr. Sudlow about the recently introduced National Institute of Clinical Excellence (NICE) guidelines in relation to BHR. Mr. Packer's evidence was that at this stage in the hospital in the orthopaedic department, there was no particular interest in the BHR procedure. He spoke of scepticism about the procedure on the part of Mr. White the specialist hip surgeon at the time which was shared within the department.

16.
The Appellant was subsequently offered the post which he took up in the week commencing 23rd December 2002. Prior to the confirmation of his appointment, highly supportive references were received by the Trust from Mr. Grimer and Mr. Tillman who were two of the Appellant's trainers at the Royal Orthopaedic Hospital (ROH) Birmingham and from Mr. Binns who had trained the applicant at Pontefract General Infirmary.

17.
This Southend appointment was the Appellant's first position as a consultant following completion of his Specialist Registrar training. That training had been undertaken at various hospitals under the auspices of the Yorkshire Deanery. In March 1999 the Appellant had interrupted his hospital training with a year's research fellowship at Smith & Nephew in York before, in March 2000, returning to hospital practice and completing a further period of training initially at Harrogate District Hospital (March 2000 – September 2000) and then at Pontefract General Hospital (October 2000 – June 2001) under Mr. Binns. On 31st December 2001, following the completion of five years of specialist training in orthopaedics and trauma, he was granted the Certificate of Completion of Specialist Training (CCST). Mr. Graham Sefton who was to give evidence before the Panel on behalf of the Respondent, was the Regional Advisor to the Yorkshire Deanery at the material time and was responsible for approving the grant of the CCST to the Appellant. It was the grant of that certificate which had

enabled the Appellant to enter the Respondent's Specialist Register as a specialist in trauma and orthopaedic surgery and to apply for the position of consultant. Before applying for such a post however he sought additional experience at the ROH in Birmingham where he spent a fellowship as a Zimmer Knee Fellow under the supervision of consultants Mr. Grimer, Mr. Tillman and Mr. Treacy.

18.
It was at the ROH that the Appellant was introduced to the specialist procedure known as Birmingham Hip Resurfacing to which I have already referred. This had been pioneered at that hospital by Mr. Dereck McMinn, and was continuing to be undertaken there by Mr. Treacy and Mr. Tillman. Mr. McMinn gave evidence before the Panel as to what the training in the BHR procedure would have amounted to and the adequacy of that training, although he had not been responsible for the Appellant's training during the Appellant's fellowship year. It was common ground before the Panel that that training did not involve the Appellant undertaking the BHR procedure as a principal or single-handed surgeon. The training would consists of assisting in operations, "scrubbing in" to observe the procedure, and discussing the management of patients undergoing the procedure both pre and post operatively in addition to managing patients on the wards and in the clinic.

19.
The Appellant did however while at the ROH, undertake a number of standard and revision hip and knee replacements (arthroplasties) as principal surgeon. Mr. Grimer was to tell the Panel that by the end of the Appellant's time at the ROH he, Mr. Grimer, was happy that together with him the Appellant had done a sufficient number of revisions for him, the Appellant, to be safely doing them. (D6/84 Q: did you watch (the Appellant) operate? A: Yes a lot ……I felt he was a very safe competent surgeon …… the more complex procedure that I would have been involved with at that time would mostly have been revision of failed joint replacements and certainly when he started with me I would not have expected him to do any of them, certainly not without my being there. By the end of the time I was happy that we had done a sufficient number together for him to be safely doing those.")

20.
It became an issue before the Panel as to precisely what had been the number of BHR procedures with which the Appellant had given assistance. The theatre records adduced by the Respondent showed that the Appellant had assisted in three (two with Mr. Tillman and one with Mr. Treacy) and had been present in the theatre suite at a further two – although the Panel itself accepted that the Appellant could have been present in theatre without his name being recorded in the theatre logs. The Appellant was to tell the Rapid Response Review Team of the Royal College of Surgeons (the Rapid Response Team) in 2005 that he had assisted in six BHR procedures. He was to tell the Panel in evidence that he had assisted in between 12 and 24 BHR procedures. The Appellant when asked had been unable to produce his operative log book to the Rapid Response Team. The Panel was to reject the evidence given to them by the Appellant.

21.
Whatever the precise number was, however, it is convenient, given the nature of the charges which the Appellant was to face concerning his experience in revision surgery and hip resurfacing, and whether he had sufficient experience to carry out the Birmingham Hip Resurfacing technique himself as sole or lead surgeon, (and which included a charge that in effect he had misleadingly and dishonestly held himself out as sufficiently experienced to undertake the BHR technique himself) if I rehearse the thrust of the evidence upon this issue from those specialists who had experience of these techniques, namely Mr. McMinn himself and from Mr. Lake. Mr. Lake was the consultant trauma and

orthopaedic surgeon called as the Respondent's expert witness. It is important to note that Mr Lake had had the opportunity to review all the Respondent's evidence before the Panel.

22.
What emerges from both of them is that the training the Appellant had undertaken at the ROH in relation to the BHR technique was typical of how most surgeons were trained at the time; that it could not have been expected that training would involve the person undertaking the technique as the primary surgeon with or without supervision, and it was their respective opinions the nature of that training could not be said to be insufficient to enable him to undertake the procedure as a single handed consultant .

23.
Mr. McMinn was called on behalf of the Respondent specifically to give an account of the training requirements of BHR. At D1/29 Mr. McMinn confirmed his statement that "given the normal training which occurred from 1997 until today it is obvious [the Appellant] was more adequately trained to do the BHR than most surgeons worldwide". Subsequently, to the question " Providing Mr Chauhan has indeed had the normal training, then provided he has watched some Birmingham hip resurfacings you would be content for him to perform that operation? ", Mr. McMinn gave the answer "Content, yes, certainly." As regards what that normal training should amount to, Mr. McMinn told the panel that he would expect the surgical training background of a trainee to be someone doing "hip arthroplasty on a regular basis …… some joint replacement hip operations on a regular basis" (D1/25), and that compared with an established consultant who came along to be trained in the BHR technique for the day, a trainee in the position of the Appellant at the ROH "as a senior trainee, a fellow" was "absolutely ideally placed to get trained." On this theme he continued "It is not just surgery .You are seeing the patient pre-operatively on the ward, post-operatively, in the outpatient clinics, at complication meetings at teaching meetings, so you get the full package of training ….. it is a much more rounded training" (D1/34). Mr. McMinn further accepted that upon the establishment of BHR as a new procedure in a hospital, the consultant who had been for training on his return to his particular hospital would often, to begin with, be the sole practitioner.

24.
Mr Lake explained in evidence that he had experience of undertaking resurfacing arthroplasty although with a different type of implant from that used by Mr. McMinn, and that his training had involved visiting a centre to see a demonstration of the procedure and being provided with an instructional manual and DVD. He agreed with Mr. McMinn's evidence that training as a specialist registrar or a fellow in a centre where BHR was performed routinely was qualitatively better than the visit to a centre in order to gain an understanding of the procedure. He stated it was unlikely that the Appellant at the time that he had been trained could have expected to be trained as primary surgeon with or without supervision in BHR, that there would have been only handfuls around the whole of the UK that would have been in that "fortunate circumstance" and "I think in fairness to Mr Chauhan, how he was trained is probably very typical of how most surgeons at that time were trained. Very few would have done primary surgery ". (D8/53)…

25.
On the sufficiency, in these circumstances, of the Appellant's experience to undertake BHR on his own without supervision upon his coming to Southend, Mr. Lake was asked by a Panel member (D8/53) what more "should" the Appellant have done before he was sufficiently experienced for these purposes. The reply of Mr. Lake was in these terms: "Well, the Panel here has a difficult problem which I can only help you with by suggesting a few things. I went through the log book and found that

(the Appellant) had been involved in 157 hip replacements of various sorts. Now that is not inconsequential, that is an acceptable number I would think on a training programme." Mr. Lake then referred to Mr. Packer's "advice" (which Mr. Packer had told the Panel he had given to the Appellant once he had arrived at Southend) that the Appellant should "build up a large core of primary standard total joint replacements before he moved into Birmingham hip replacements" and to the fact that the Appellant had felt he was already experienced enough to carry on and do that because he had seen the technique at Birmingham. Mr. Lake continued:

> "The panel has to decide if with that background that was a justifiable action and I cannot really answer your question directly and say 'No, he should not have done that' because he had all the training he could have in it. The only thing he could improve was his general experience in joint replacement surgery….. some people might have waited a bit longer than him, but I could not sit here and honestly advise you this was an unreasonable thing to do ."

26.
Mr. Lake stated very near the end of his evidence (D8/58) in response to questions from the Panel Chair that it was "as important to watch and assist at an operation as it is to do it" and that this was an important part of training. Critically, Mr. Lake, when then asked "you are aware of the level of training that Mr. Chauhan had in BHR and the number of hip replacement operations he had done either as a principal or an assistant. Would you say that this was an acceptable level of training and experience to go off and do a BHR in isolation or in a unit you have no support in? ", replied " I do not think I would profoundly object to him doing it " and "My honest advice is that I could not seriously object that Mr Chauhan was experienced enough to do BHRs, you know. I think he might have been marginally better had he done several hundred more hip replacements, but it is a difficult procedure how ever many he did…..He is a young man. He is perfectly capable of adapting himself, so personally I would not have a strong objection to him."

27.
I should record at once however that Mr. Lake did qualify his last answer by reference to the fact the Appellant's "clinical director told him one thing and he did another", a further reference to Mr. Packer's evidence accepted by the Panel of the advice he had given to the Appellant in a discussion after the Appellant's appointment. Mr Lake did say in this regard "Perhaps the only concern I expressed was that his clinical director advised him to improve his experience by doing standard hip replacements.". I should also add thatthere was evidence from Mr Skinner, consultant orthopaedic surgeon at the Royal National Orthopaedic Hospital in Stanmore, the Appellant's own expert witness, that the views of the Clinical director or medical director are relevant before a surgeon decides to undertake specific types of surgery.

<u>Background Events following the appellant's appointment</u>

BHR

28.
The appellant once appointed expressed an interest in undertaking the BHR procedure. It was a matter of controversy at the FTP hearing whether the Appellant had in fact been advised by Mr. Packer, his Clinical Director, to first get himself established within the department on routine procedures before embarking on this more advanced procedure. Be that as it may, the Appellant from July 2003 began performing this procedure on patients referred to him by his colleagues. The first such operation at Southend was on the 17th July 2003 on referral from Mr. Sajavi. The Appellant had

in fact begun performing BHR in April 2003 (31st March) at the BUPA Wellesley Hospital where he carried out private work. It was to emerge in evidence (although only after Mr Packer had completed his evidence) that Mr. Packer himself had by letter dated the 22nd of July 2003 referred a private patient to the Appellant for consideration of BHR at the Wellesley. In July 2004 the Appellant was asked not to perform further BHR procedures pending the production of a protocol and the institution of audit arrangements for such procedures. This intervention in the Appellant's practice was said to have been triggered by a concern raised at the Wellesley as to certain of the Appellant's clinical outcomes. Thereafter Mr. Villar, a consultant orthopaedic surgeon at Addenbrokes Hospital, (to whom the Trust referred BHR patients prior to the Appellant's appointment), at the request of the Trust, reviewed the Appellant's BHR practice. He reported his views both in a telephone discussion with Mr. Packer and in a report of October 2004. His view was that the Appellant should not be denied the facility to do BHR operations. He had orally described the Appellant's practice as "being on a knife edge". However these words did not appear in his report. In a letter of 13th January 2005, Mr. Villar described the Appellant as being well into his learning curve, an initial "undue enthusiasm for the procedure" having given way to "a note of caution". On the 21st January 2005 the Appellant was informed that the Trust had decided not to offer the procedure; subsequently in April 2006, after the Appellant's suspension from practice in July 2005 (as to which see below) the Trust gave approval to a proposal from Mr. Packer that BHR be resumed at Southend.

29.
It will be seen that although the charges faced by the Appellant raised the question whether he had sufficient experience to carry out the BHR procedure, the Panel was asked to determine this not by reference to the manner in which the Appellant had carried out any of these procedures or as to the clinical outcomes of the BHR procedures but by reference solely to the nature and extent of his training in BHR.

Autolologous Cartilage Transplantation (ACT)

30.
The ACT technique involves the harvesting of living cartilage cells, typically by way of an arthroscopically performed excision biopsy. The harvested cells are then submitted for cell culturing, undertaken by a private laboratory. The successfully cultured cells are then re-implanted into the cartilage defect by means of one of two implantation techniques, ACI and MACI, the comparative outcomes of which was the subject of the trial at the Royal National Orthopaedic Hospital, Stanmore (RNOH) referred to below. It was common ground that the Appellant had undertaken research into this technique during his year at Smith & Nephew. At the time of his appointment and subsequently it appears that the Appellant made known to the Trust that he was interested in the technique. A clinical trial was being carried out at the RNOH. The trial involved surgeons who had been trained and approved to undertake ACT, performing the procedures at outside collaborating centres and feeding their results back to the trial centre at RNOH. The material guidance from the National Institute for Clinical Excellence on the use of ACT was that ACT was not currently recommended for routine primary treatment of articular cartilage defects of the knee joint in the NHS (Guidance paragraph 1.1) and that ACT should only be used as part of a properly structured clinical trial. NICE however provided for an exception to this edict in the following terms (Guidance 1.3) "Exceptionally, ACT treatment may also be undertaken in centres participating in clinical trials of this procedure when other treatments for articular cartilage defects of the knee joint have already failed". There was evidence before the Panel (from Mr. Packer) that the Appellant in 2003 had indicated to his Clinical Director (Mr. Packer) that it was no longer the case that ACT had to be part of a clinical trial, and that

Mr. Packer had in April and May 2003 written to the Appellant to query the accuracy of this. The Appellant was to tell the Panel that in saying this he had in fact had in mind the NICE exception, although of course even that exception required the ACT to be undertaken in a centre participating in clinical trials which, at all material times, Southend was not. Moreover the Appellant did by letter dated the 14th May 2003 expressly state that "I apologise if I misled you regarding entry into clinical. ……It has always been my intention to adhere to NICE guidelines which have been in place for a couple of years now. I have agreements in place with Stuttgart University and the EURCAST study (European Cartilage Repair Study) which is a multi centre trial based in Germany and the UK."

31.
By November 2004 the Appellant had obtained Trust research and development committee approval, and Trust ethical committee approval for the undertaking of ACT at the Trust, but he had not secured funding approval. There was evidence before the Panel that the Appellant had sought funding from the Trust for an ACT procedure on a patient in October 2003 but this had not been forthcoming which had prevented the Appellant from going ahead.

The operation on patient A – 26th November 2004.

32.
On the 26th November 2004 the Appellant extracted a loose particle of cartilage from the knee of a 16 year old patient, known as Patient A. The patient was on the Appellant's trauma list for that day. The patient had been referred by his GP to the Appellant in October 2004 with a longstanding recurring locking of the knee. The Appellant had reported back by letter of the 22nd October 2004 that the complaint was of a loose body and that an arrangement had been made for an arthroscopic assessment of the knee and removal of the loose body. The operation on the 26th November was pursuant to that arrangement. The evidence was that immediately following the operation the Appellant contacted Verigen (through its Managing Director Mr. Edwards), the company which undertook cell culturing, and the RNOH (Dr. Skinner) to establish whether Verigen would be able to attempt cell culturing from a loose body of cartilage tissue as distinct from an excised biopsy, and whether RNOH would be willing to receive the patient for the purpose of performing ACT. Both parties having agreed, the sample was submitted for cell culturing and ultimately sent to the RNOH where it was successfully implanted into an osteochondral defect in the knee of Patient A. The evidence before the Panel ultimately established that prior to submitting the cells for culturing, the Appellant had checked and had confirmed that there would be no cost consequences for the Trust in respect of the patient's ACT treatment, the cost being borne between Verigen and the RNOH.

33.
The Appellant's case was that that he had made an "on the table decision" to hold onto the particle and to make the contacts over a possible ACT which the patient would need, and that nothing had been pre-planned. Hence absent such planning, he had made no note pre-operatively of any such ACT procedure. As will be seen, some of the charges he faced over this ACT related procedure were contingent on the proposition that this was all pre-planned but not pre-noted. Also in particular issue was whether he had obtained the consent of Patient A prior to the sending off of the particle for culturing.

<u>The trauma case: June 2005</u>.

34.
On the 11th June 2005 the Appellant performed an orthopaedic procedure on the left leg of a patient, Patient B following a severe crushing injury that the patient had sustained in a car accident. The

Appellant closed the wound contrary to advice he had received from a consultant plastic surgeon, Mr. Britto. On the 13th June the patient's leg was reviewed by the Appellant with a consultant vascular and general surgeon, Mr. Jakeways. After further debridement had been carried out, the consultant advised the Appellant to leave the wound open. The Appellant decided not to do so. The leg subsequently became infected and required amputation.

Suspension

35.
Following the trauma case the Trust restricted the Appellant to the undertaking of out patient work and day surgery.

36.
On the 16th June 2005 the Trust referred the Appellant's case to the Royal College of Surgeons, in particular to its Rapid Response Team, who undertook an investigation into the Appellant's BHR practice, the procedure performed on Patient A in the context of ACT and the trauma case. The RCS produced its report on 21st April 2006. Mr. Albert – one of the RCS case investigators – attended before the Panel as a witness and explained his findings and conclusions.

37.
On 22nd August 2006 the Respondent's Interim Orders Panel restricted the Appellant's practice pending the full hearing before the Fitness to Practice Panel, so as in effect to preclude the Appellant from undertaking major orthopaedic surgery without supervision.

38.
On 13 September 2006 the Trust suspended the Appellant.

Retraining programme

39.
Thereafter it was arranged following liaison between Dr. Tosh, the Trust Medical Director and Mr Briggs, Medical Director at the RNOH, that the Appellant would undertake a programme of re-training and re-mediation in orthopaedics and trauma surgery with a view to re-integration into practice. Mr Briggs was to be responsible for the facilitation of such re-training and to act as the Appellant's supervisor. Mr Briggs gave evidence at the FTP hearing. His evidence was to the effect that the Appellant had undertaken a substantial portion of his re-mediation programme to the satisfaction of his supervisors and had been signed off as being competent in orthopaedic surgery to the requisite standard. As at the date of the FTP Panel hearing the final component of the Appellant's re-training programme, in trauma surgery, remained to be completed, although arrangements were in place in Barnet Hospital for this to be achieved.

Disciplinary Proceedings Brought by the Trust

40.
The Trust instituted disciplinary proceedings against the Appellant adopting the statutory procedure under the Department of Health Circular HC (90) 9 – providing for the setting up of an independent panel of inquiry to make findings of fact and if considered appropriate to make recommendations to the Trust as to disciplinary action. The ambit of this enquiry was confined to the issue of BHR. The Trust made no disciplinary complaint in relation to the issue of ACT or the trauma case. The Inquiry Panel were instructed to determine whether the Appellant was appropriately trained to undertake

BHR before joining the Trust, whether he misled the Trust as to the level of his training in the procedure and whether he performed the procedures to a competent standard at the Trust.

41.
Following a 14 day hearing before an inquiry panel chaired by Queen's Counsel (Miss Beverley Lang) sitting with an orthopaedic surgeon, John Carvel FRCS, and a Human Resources Manager from another NHS Trust, Rosemary Bolton, that Inquiry concluded that the Appellant had not engaged in any conduct justifying disciplinary action. In particular it dismissed the allegation that the Appellant had acted dishonestly in claiming to be appropriately trained in BHR, and concluded that his performance of the procedure at the Trust was commensurate with that of a surgeon at the Appellant's stage on the learning curve.

42.
The Inquiry heard evidence which, to an extent, overlapped with that heard by the FTP Panel, namely from the Appellant, Dr. Tosh, (the Trust Medical Director), Mr. Packer (the Clinical Director), Mr. McMinn, who as indicated was the designer of the BHR implant, and Dr. Skinner, who as already indicated was called before the Panel as the Appellant's expert, and was himself an experienced BHR practitioner. In addition it heard from Mr. Sudlow the departmental consultant colleague who as already indicated had interviewed the Appellant and was the only person to have questioned the Appellant about BHR in the course of the application process. He was not a witness before the FTP, and there were other differences between the evidence called at the two hearings, a point made by the FTP Panel when declining to admit the evidence of the Inquiry's report at the impairment stage. For example although the Panel received a witness statement from Mr. Sefton, Mr Sefton did not make himself available to give oral evidence and to be cross examined. This did occur before the FTP. The Appellant did not contend that the Inquiry report was relevant at the fact finding phase of the Panel the members of which, it was accepted, were required to make its own findings on the evidence called before it. As will be seen, the Panel reached a very different view as to the credibility of the Appellant to that reached by the HC (90) 9 Inquiry.

43.
In a report promulgated on the 7th April 2009 during the course of the fact finding phase of the FTP Panel, the Inquiry recommended amongst other matters that no disciplinary action against the Appellant was warranted and that he should be permitted to "undertake a period of re-training and observation… to take account of the fact that he has been suspended for some time".

The charges

44.
I append to this judgment by way of annex (Annex 2) the complete charges as set out in the Notice of Hearing and as amended during the hearing and with the findings of the Panel at the end of the fact finding phase. This analysis makes clear those facts admitted by the Appellant from the outset.

45.
The Appellant faced effectively three sets of charges, those relating to the BHR procedure, (charges 2–7), those in respect of the ACT related procedure in respect of Patient A carried out in November 2004 (charges 8-9) and those in respect of the trauma case of June 2005 (charges 10–12). A further set of charges (charges 14–16) relating to compliance with restrictions on practice were not upheld.

46.

The Appellant did not dispute the principal charges against him in respect of the trauma case, in particular that he had twice closed the wound contrary to basic surgical principles and contrary to the best interests of the patient. The Appellant concedes that this in itself amounted to an admission of relatively serious errors of clinical judgment.

The grounds of appeal

Stage one: fact finding: BHR/ACT

47.
The Appellant seeks to challenge the findings and determinations of the Panel at all three stages of its decision making process. However, the challenge on this appeal to the determinations of the Panel at the stage one fact finding phase is confined to those relating to BHR and ACT.

48.
The essence of this challenge is threefold:

i)
First that the FTP Panel failed to confine itself to the proper ambit of the charges which the Appellant had been called upon to face in the Notice of Hearing and that accordingly it unfairly took into account a number of extraneous issues and placed reliance upon that which were for the purposes of the determination of the charges, not material matters. The Appellant says he did not anticipate these would be raised against him and were not addressed in his defence;

ii)
Secondly that the Panel in reaching its conclusions on the facts under these charges failed to weigh the evidence fairly and that the Panel's written reasons, explaining its determination on the facts at stage one, overlook "significant" areas of evidence central to the Appellant's defence. This in effect combines two grounds – findings not supported by the evidence and an inadequate reasons ground;

iii)
Finally there is an allegation of apparent bias which it is said vitiates the decision. Reliance is placed on the manner in which issues were raised and probed by Panel members and on what is said to be its one sided evaluation of the evidence in its reasons.

49.
Overall it is said that the Panel did not conduct a fair hearing.

Stage two: Impairment

50.
The challenge to the finding of impairment is twofold: first that the panel founded it decision on findings of fact that had been reached erroneously. This of course depends on whether the appeal against the stage one findings succeeds. Secondly it is said that the panel unjustifiably decided to exclude from its consideration at this stage the detailed findings of the Inquiry Panel set up by the Appellant's employing trust to which I have already referred.

Stage three: sanction

51.
The challenge to sanction is on the ground it was wholly disproportionate and excessive.

52.

I turn to consider the challenge to the stage one findings.

BHR

53.
The BHR charges (2-7) as amended were as follows:

> " 2(a) On 15 July 2002 you applied for the post of consultant in trauma and orthopaedic surgery at the Southend University Hospital NHS Trust.
>
> 2(b) During the application and interview process you stated….. that you had broad experience in revision surgery and hip resurfacings.

3.
Your actions as set out at 2(b) were (a) misleading (b) dishonest."

4.
Once appointed, you expressed an interest in undertaking the procedure of Birmingham Hip Resurfacing and implied that you had sufficient experience to undertake that technique yourself.

5.
Your actions as set out at 4 were (a) misleading (b) dishonest.

6(a) In 2003 you began performance of the technique of Birmingham Hip Resurfacing at Southend University Hospital NHS Trust.

6(b) You had insufficient experience to carry out Birmingham Hip Resurfacing as sole or lead surgeon.

7.
In 2005 you were interviewed by the Rapid Response Review team on behalf of the Royal College of Surgeons who were carrying out investigations on behalf of the Trust. During the interviews (a) you were asked for your operative log book in order to evaluate your operative experience which you were unable to produce (b) when asked about your experience of Birmingham Hip Resurfacing you admitted that prior to your appointment at Southend NHS Trust you had personally taken part in only six operations and had not performed the entire procedure as sole or principal surgeon."

54.
It is to be noted that these charges were divided into four. Charges 2 and 3 concerned what the Appellant had said before his appointment about his "broad experience" in "revision surgery and hip resurfacing". Charges 4 and 5 concerned what he had implied about the "sufficiency of his experience" to undertake the technique himself after his appointment. These were the only charges alleging dishonesty. Charge 6 concerned the sufficiency of the Applicant's experience to carry out the technique "as sole or lead surgeon" at the time he began performance of the technique in 2003 at Southend. Charge 7 which was admitted concerned his interview with the Rapid Response Team. This made no allegation of dishonesty.

(i)
Charge 2-3:

55.
Thus, charges 2 and 3 concerned that which the Appellant had stated during the application and interview process for the consultancy post at Southend. The Applicant admitted 2a, i.e. that he had stated he had broad experience in revision surgery and hip resurfacings. The only issues for the Panel

were whether this was misleading (3a) and dishonest (3b). The panel found both these facts to be proved.

56.
It is to be noted that there was no express allegation that the Appellant had stated he had had broad experience in hip resurfacing as sole or lead surgeon. Equally given the limitations on what was said at interview about BHR which I have already noted, this charge can only have been referable to what was said about experience in the application form and accompanying CV. I have already set out the material parts in this regard. These did not in terms hold the Appellant out as having completed or assisted in or observed any particular number of BHR procedures.

(ii)
Charges 4-5

57.
As regards charges 4 and 5, the Appellant admitted that following his appointment he had implied he had sufficient experience to undertake the BHR technique himself. Hence again the only issues for the Panel were whether this was misleading (5a) and dishonest (5b). Again the Panel found these facts to be proved.

58.
Again it is to be noted that there was no express allegation that the Appellant had falsely implied to Dr. Tosh or anyone else that he had been trained in the technique by Mr. McMinn himself. There was no express allegation that he had deliberately withheld from the Trust that prior to coming to Southend he had not previously carried out the procedure on his own, for fear of not being given permission to carry out the technique.

(ii)
Charge 6

59.
As regards charge 6, again given the admission of the Appellant that he had begun the performance of the BHR technique in 2003 at Southend, the issue for the Panel was whether the Appellant had sufficient experience to carry out this technique as sole or lead surgeon. The Panel found this to be proved.

60.
Again, it is to be noted that there was no express allegation that the Appellant had begun the procedure without first informing his Clinical Director of his intention to do so, or had deliberately concealed those intentions in the course of a peer appraisal conducted at Southend on 2nd July 2003 or had begun the procedure contrary to the permission or advice of his Clinical Director or without the prior approval of the Trust or contrary to any policy of the Trust applicable to new techniques. I have already observed that the Panel were invited to determine this charge not by reference to the manner in which the Appellant had carried out any of these procedures or as to the clinical outcomes of his BHR procedures, but by reference solely to the nature and extent of his training in BHR.

61.
Moreover with regard to charge 6, there was no qualification to the charge that the Appellant had insufficient experience to carry out the BHR technique as sole or lead surgeon, that this was having

regard to the particular requirements of the Southend Hospital Trust, e.g. that he had first to become established in the department in normal procedures.

(iv)
Charge 7 (admitted)

62.
Charge 7 was the only charge expressly relating to the logs kept by the Appellant. As regards logs, it was confined to an allegation admitted by the Appellant that he had been unable to produce his operative logbook. There was no allegation that the Appellant had acted dishonestly or misleadingly in relation to the maintenance of his training logs.

63.
It is also to be noted that there was no allegation made that the Appellant had miss-stated the extent of his experience in lower limb surgery generally and although the charge under 2 and 3 referred to the Appellant's claim to have broad experience in revision surgery as well as hip resurfacings, it is very clear to me having regard to the history of events leading up to the matter being referred to the Respondent, and having read the transcripts of the evidence and the way the matter was opened to the Panel by counsel for the Respondent, that charge 2 and 3 - and certainly in respect of dishonesty - was all about the Applicant's asserted experience in BHR. If it be important, it is clear to me based on the evidence of Mr. Lake and Mr. Grimer to which I have already referred (and apparently accepted by the Panel) it would be difficult to find that the Appellant had dishonestly misled anyone in respect of his experience in revision surgery.

64.
With these observations in mind I turn to consider the challenge made to the findings of the Panel under these separate charges. I set out in an annex to this judgment (as Annex 3) the entirety of the Panel's Decision with paragraph numbering.

The Panel's Reasoning on the facts in dispute under Charges 2 to 6 .

65.
The Panel's reasons for finding the disputed facts under paragraphs 3(a) and 3(b), and under 5(a) and 5(b), and paragraph 6 proved are set out in the one section of their Decision at paragraphs 10 – 26.

66.
Paragraphs 10 to 19 on their face would appear to relate to the allegation under paragraph 3(a) and (b) relating to what had been said in the application and interview process. They culminate in the finding expressed at paragraph 19 that:

"the Panel finds that during the application and interview process

you dishonestly exaggerated your experience and thereby

deliberately misled your employers".

67.
Paragraphs 20 to 26 would appear to consider both the allegations under paragraph 5(a) and 5(b), and under paragraph 6(b). The Decision culminates in paragraph 26 with these words:

> "considering all these factors, the panel has determined that you had insufficient experience to undertake BHR procedures at Southend Hospital. The panel accepts your

> training may have been sufficient for you to undertake BHR procedures in a supportive environment but not at Southend Hospital" (the emphasis is the emphasis of this court).
>
> The court's conclusions on the BHR findings under (i) charge 3(a) and 3(b); (ii) charge 5(a) and 5(b); and charge 6

68.
I have come to the conclusion having regard to the way the charges were formulated, that the reasons given by the Panel on their face mean that their findings under all three disputed BHR charges cannot not be allowed to stand.

69.
Further, on the basis of the charges as formulated and the evidence which can properly be regarded as directed to those, I do conclude that the decision under each head of BHR charge was wrong and the proper conclusion under each of those charges should have been one of "not proved".

70.
My reasoning is as follows:

The charge under 2- 3

71.
I start with paragraph 16 of the Decision which reads:

> "As to whether you misled your employers the Panel considers that you exaggerated the extent of your experience by claiming in your Curriculum Vitae (CV) to have "amassed experience in lower limb surgery". You also claimed in your CV to "have a broad surgical ability in lower limb arthroplasty and revision arthroplasty and this extends to hip resurfacing". The Panel has reached the commonsense conclusion that this meant to anyone reading your CV, that you had experience of performing the procedures as sole or lead surgeon. This led your employers at Southend Hospital to believe you were more experienced than you were. The Panel accepts the evidence of Mr. Tosh, Medical Director of Southend Hospital, that he questioned you about your experience in respect of BHR procedures. You gave Dr. Tosh the impression that you had been trained in Mr. McMinn's unit at the Royal Orthopaedic Hospital in Birmingham. Mr. McMinn was a Consultant Orthopaedic Surgeon who pioneered the BHR procedure. You implied to Dr. Tosh that you had been trained by Mr McMinn himself. This was not true. Dr. Tosh asked you about your training logs from the Royal Orthopaedic Hospital. You could not produce them, telling him that you had had a computer problem".

72.
This was a key passage (which precedes the Panel's conclusions in paragraph 19 on Charges 2–3) in the Panel's reasoning that that which the Appellant admitted he had said in the application and interview process as set out in 2(b) ("broad experience in revision surgery and hip resurfacings") was (a) misleading and (b) dishonest. However I find this reasoning flawed for a number of reasons.

73.
First it focuses upon a charge which was never laid in the Notice of Hearing and was not part of the charge as formulated in the material charge under 2-3. As I have already indicated, the Appellant was not charged with having misled his employers as regards his experience in "lower limb surgery" and in any event on the evidence it would have been difficult to sustain such a charge.

74.
Next the Panel appear to focus on an assertion in the Appellant's CV, namely a claim to a broad surgical ability which again was not within the express terms of the assertion complained of in the charge (and indeed it is always to be remembered that the Panel was never asked to consider the outcomes of the Appellant's procedures at Southend or elsewhere or his competence in the carrying out those procedures). But perhaps more significantly the Panel then introduced the gloss that as a matter of common sense the Appellant in using these words had impliedly held himselfout as having previously performed "the procedures" – but by inference the BHR procedure in particular, as sole or lead surgeon. The Appellant had of course conceded that prior to coming to Southend he had never carried out the BHR procedure as a primary surgeon. Hence the introduction of this gloss was pivotal to a finding of "misleading" and the ultimate finding of dishonesty under this first BHR charge, and seems to have been introduced at the invitation of Counsel to the Respondent during his closing submissions. However in my judgment the Panel were not entitled to act in this way. First, I agree with Mr. Sutton on behalf of the Appellant that out of fairness given the charge was a grave charge alleging dishonesty, this "sole or lead surgeon" qualification should have been particularised in the charge if it were to be relied upon. This is especially so as the words did appear in charge 6, but only charge 6, which was not a charge alleging dishonesty and focused solely on whether as a matter of fact the Appellant had sufficient experience to carry out the BHR procedure on his own. Secondly and just as importantly I agree with Mr. Sutton that "the commonsense" foundation for this implication, certainly as regards BHR procedures, and having regard to the expert evidence received from Mr. McMinn and Mr. Lake, was not one this Panel had the expertise to adopt. This Panel as already explained had no expertise in the specialist training of doctors or in orthopaedics and no evidence was called from those specialists on the interview panel whose function was to ensure that candidates were appropriately qualified and trained in the relevant speciality (the Deanery and SAC members) to explain the meaning they attached to the words in application and CV. There was evidence from Mr. Tosh and Mr. Packer - neither of whom were experts in BHR training or BHR itself - as to what they regarded would have been adequate training for the appellant to carry out the BHR procedure at Southend which they believed did require prior experience of carrying out the BHR procedure on one's own, and I have already set out what Mr. Packer's evidence was at to his understanding of the words "broad surgical ability" in the application form and CV. However none of this evidence is relied on by the Panel in this part of their reasoning, in support of their choosing rather to rely on their own "commonsense". However this in my judgement, given the expert evidence from those with expertise in the field of BHR, was not a matter to be determined by "common sense". The evidence of Mr. Lake, the Respondent's own expert witness was that training in BHR such as that undergone by the Appellant, could not have been expected to involve the trainee undertaking the technique as primary surgeon with or without supervision. Mr Lake's evidence -apparently accepted by the Panel - as regards the ability of the Appellant to carry out the BHR procedure on his own - and it is to be remembered that Mr. Lake had had the opportunity to review the Respondent's evidence before the Panel - was that the Appellant had been sufficiently trained. He "could not seriously object" that the Appellant was experienced enough to do BHR on his own and he would not object to the Appellant doing the procedure on his own (see again my analysis of his evidence above at paragraphs 24 and following).

75.
It follows in my judgment that there was no proper evidential basis for the Panel inferring that for the purposes of the charge under 2 and 3, the Appellant by claiming in his application that he had a "broad ability" in amongst other procedures, BHR, had misleadingly and dishonestly implied at the application stage that he had had experience of performing the BHR procedure as sole or lead

surgeon. The Panel themselves in their findings under Charge 5 and Charge 6 (paragraphs 22, 23 and 26) appear to have accepted that the Appellant was sufficiently trained to carry out BHR procedures as a consultant albeit not at Southend (because it seems of evidence of what Mr. Packer said he had advised the Appellant after the appointment and the need for a ”supportive environment” - a matter to which I shall return -) which makes it difficult to understand how the Panel could properly conclude that at the stage of the application and before any appointment, that the Appellant was making misleading and dishonest claims as to his abilities in BHR and hence as to his experience. I have sympathy with Mr. Sutton’s submission that in this regard the panel seem to have made contradictory findings.

76.
On these grounds alone I consider that the Appellant was entitled to a “not proved” verdict on both aspects of charge 3(a) and (b) – this being on the basis of the evidence properly directed to this charge of what the Appellant had said in his application.

Trained by Mr McMinn

77.
There are however other aspects of the Panel’s reasoning under charge 3(a) and (b) which in my judgment go to undermine their findings. The paragraph to which I have already referred, paragraph 16, records the significant finding that the Appellant had falsely implied to Dr. Tosh that the Appellant had been trained by Mr. McMinn which I have no doubt informed the Panel’s findings both under this charge and under charge 4-5. My immediate observation is that what the Appellant had implied after his appointment cannot be directly relevant to the allegations under charge 2-3 which relate to what was said before. Further I agree with the submission that this was an allegation which ought to have been properly formulated as a separate charge. The charge to which it most closely relates is that that under charge 4-5 (once appointed, misleadingly and dishonestly implying that he had sufficient experience to undertake the BHR technique himself) but I agree with Mr. Sutton that on authority (see again Salha) allegations of dishonesty need to be “unambiguously and adequately particularised” even if it may be said (as the Respondent suggested in oral submission) that further particulars can always be sought. This particular allegation was not foreshadowed in the Notice of Hearing.

78.
Moreover I have considered the evidence on this issue. In chief Dr. Tosh had been non specific and vague. (D1/46 :Q: Did he give you any indication as to who had provided him with that training? A: He did not go into specifics as to who provided the training… Q: Can you remember what if anything specifically he said about whether he had any dealings with Mr McMinn? A: Only in the context that he had worked in Mr. McMinn’s unit and that he had on occasions discussed cases with Mr. McMinn since he had started performing the hip resurfacing at Southend). It was only under questioning from the Panel member, Dr. Sinclair that any evidence emerged of such an implied statement being made. However I agree with Mr. Sutton that the way it emerged through a proposition put to him with which he was asked to agree and the way he ultimately agreed but with the qualification that he “wanted to be fair” and was “talking about a meeting many years ago”, made it a poor and in my judgment inadequate evidential foundation for such a strong finding to be incorporated into the Panel’s determination on the facts.

79.
The questioning of Dr. Tosh by Dr. Sinclair on this issue is a free standing ground of appeal based on apparent bias. However I make clear that at this juncture I find only that there was an inadequate

evidential foundation for the finding of fact on this issue which was in effect that the Appellant knowingly and deliberately misled Dr. Tosh on this matter. I set out below the interchange between Dr. Sinclair and Dr. Tosh which is the high water mark of the evidence on this issue. (D2/42):

Q: Did he give you the impression he had been trained by Mr. McMinn?

A: I do not think he actually stated that but he implied it and went on to say he would still discuss cases with Mr. McMinn…… cases he had operated on in Southend .

Q: Perhaps more difficult to answer - and you may not be able to answer - these three questions. Do you think he wanted you to believe he had been trained in resurfacing in Birmingham?

A: Yes.

Q: Do you think he wanted you to believe he had been trained in Mr. McMinn's unit?

A: I believe so, otherwise there would be little point in him bringing up the name.

Q: By Mr McMinn?

A: I think that is - I want to be absolutely fair here. Yes, from my perspective it would appear that he was keen to make that inference but I do not think he actually made that claim, but I am talking about meetings of many years ago"

The significance of the appellant's training logs: informing the Panel's findings of dishonesty on those charges alleging dishonesty:

80.
There are further examples in my judgment of the Panel unfairly introducing into their considerations in determining dishonesty had been established on the two charges in which it was alleged, evidence directed at behaviour not the subject matter of any charge.

81.
These relate to the evidence of Mr. Sefton who gave evidence as to the accuracy of the Appellant's log books in relation to his non- revision non-BHR work procedures before the grant of his CCST certificate, in particular at Harrogate. He criticised the manner in which the Appellant had kept his log book and gave evidence as to discrepancies between the Appellant's log book and the Harrogate theatre records. It is now common ground between the parties that this evidence was unanticipated by the Appellant. Although this evidence was not challenged by the Appellant's counsel at the time, the court has been shown an exchange of e-mails between counsel for the Appellant and counsel for the Respondent at the time of the hearing, which makes clear that before the Hearing had even begun the Respondent through counsel made clear that the log book references in witness statements were relevant only to the charges relating to the Appellant's training in BHR, that after Mr. Sefton had given evidence this issue was addressed between counsel so that in the event the question of the Harrogate log books in non-revision work was not raised with the Appellant in cross examination, and nor was it mentioned in closing submissions. Yet is clear from the following paragraph 13 in the Panel's Decision that what was undoubtedly a damaging allegation made by Mr. Sefton was adopted as a fact by the Panel and I have no doubt formed a plank in the Panel's findings of dishonesty. Reference indeed is to be found to these discrepancies in the Panel's determination on sanction (Decision paragraph 109).

"13.

> As part of the investigation by the Southend Hospital into your training, Mr. Sefton was asked to review theatre records against your log. Mr. Sefton told the Panel that he only reviewed the Harrogate Hospital theatre records. ….. He said a comparison between those records and your logs showed that you had undertaken four lower limb arthroplasties as principal surgeon and that there were eight other cases in which you had been one of the surgeons. Your log recorded that you had undertaken 17 lower limb arthroplasties. The discrepancies between your logs and theatre records, during your training period at Harrogate Hospital in 2000, indicate an exaggeration by you of your experience. Accurate training logs are an essential part of the trainee assessment process. These logs will have formed the basis of your trainers' impression of your experience".

82.
It is sufficient for me to record again that there was no charge that the Appellant had missstated his experience in lower limb surgery generally or in his pre-CCST training and certainly no charge that he had acted dishonestly or misleadingly in the maintenance of any training log. The Panel (see paragraph 17 of the decision) may well have been entitled to form a view over the way the Appellant had chosen to produce the evidence he did to the Panel in relation to his training logs relating to revision surgery and BHR procedures which was detrimental to the Appellant and to form an adverse view (which they undoubtedly did) on the Appellant's credibility on his assertion of missing data. However, what they were not entitled to do in my judgment was to make prejudicial findings on serious allegations relating to the Appellant's pre-CCST experience which had never been the subject of a charge specified in the Notice of Hearing and then use those findings to inform their decision on those allegations which were the subject of a charge. I agree with Mr. Sutton that this is an example of the Panel improperly and unfairly going outside the ambit of the charges in 2-6 which goes to vitiate their determination at stage one on those charges.

83.
The sting moreover in the last two sentences of paragraph 13 ("Accurate training logs are an essential part of the trainee assessment process. These logs will have formed the basis of your trainers' impression of your experience ") is that the Panel considered the Appellant had deliberately misled his trainers and thereby obtained a Certificate of Completion of Specialist Training (the CCST) to which he was in truth not entitled, especially as the Panel in the preceding paragraph 12 had chosen to emphasise the evidence of Mr Sefton that he had felt compelled to " write to all your trainers asking them whether they felt it appropriate for him to sign your Certificate ….(CCST)……something he had never felt the need to do before with any other trainee ". I agree with Mr Sutton that for the Panel to use such a consideration in their determination of the express charges which the Appellant did face, is contrary to natural justice. As has been said on behalf of the Appellant, had such an allegation been expressed in the Notice of Hearing, it would have been open to the Appellant as part of his defence to call evidence from those responsible for training and assessing the Appellant in the course of his Specialist Registrar training, to rebut the allegation.

84.
I should record also that I reject the submission of the Respondent in oral submission that the Respondent was entitled to introduce such evidence even if strictly outside the ambit of the charges, as propensity evidence i.e. of the Appellant's propensity to dishonestly exaggerate the true extent of his medical experience, or that it is sufficient to repair the inherent unfairness in adopting such an approach (without any notice to the Appellant) in a disciplinary proceeding where the Appellant faced

serious allegations of professional dishonesty, that it should have been clear to the Appellant during the course of the hearing that the Respondent was inviting the Panel to make findings wider than those strictly related to the Appellant's BHR/revision experience.

85.
In the light of my findings already made, I do not find it necessary to deal with the associated complaint of the Appellant that the Panel in paragraph 12, appears to have accepted as fact - in preference to the evidence of Mr. Binns – Mr. Sefton's view as to the content of the Appellant's training when he re-did his 5th year training at Pontefract Hospital under Mr. Binns, which Mr. Sefton described as "back to basics". I have to say that on one reading of this paragraph the Panel were doing no more than recording Mr. Sefton's state of mind. I have however already made clear that it was no part of the Panel's task on the charges before them to determine whether the Appellant had exaggerated his experience in lower limb surgery generally and in so far as they were purporting to do so (see again paragraph 16) their Reasons are flawed

The Panel's reasoning under (ii) Charge 4-5; (iii) 6(b)

86.
It is however necessary for me to explain further why I do not consider the Panel's reasons and determination of the facts under charges (ii) 4-5 and (iii) 6 can be allowed to stand. Given the admission of the Appellant to allegation 4, the issue the Panel had to decide under charge 4-5 was whether the Appellant acted misleadingly or dishonestly in implying once appointed and expressing an interest in undertaking the procedure of BHR, that he had sufficient experience to undertake BHR himself. Again in my judgment on this question, all the considerations which have led to me conclude that the Panel were flawed in their concluding in relation to charge 3 that the Appellant was holding himself out as having previously carried out the procedure as a sole or lead surgeon, must apply equally here. In my judgment there was no proper evidential foundation for the Panel using in its consideration of this charge that the Appellant had deliberately misled Dr. Tosh into believing that he had been trained by Mr. McMinn, which in any event should have been the subject of an express allegation. Given Mr Lake's evidence - accepted by the Panel - that the Appellant had sufficient experience to undertake BHR on his own, I find it impossible to accept there was a proper evidential foundation for finding that that the Appellant had been both misleading and dishonest in relation to charge 4-5 as formulated. To explain further my conclusions on the Panel's findings on both charge 5 and 6, it is necessary to set out Panel's Decision at paragraph 20 onwards:

> "20.
> Once you had been appointed to your post at Southend Hospital, you expressed an interest in undertaking BHR procedures and implied that you had sufficient experience to undertake that technique yourself.
>
> 21.
> The Panel accepts the evidence of Mr. Packer, Consultant Orthopaedic Surgeon and Clinical Director of Orthopaedics at Southend Hospital, who gave evidence that he had a discussion with you regarding your interest in undertaking BHR procedures. Mr. Packer's advice as your Clinical Director was that you should establish yourself within the Orthopaedic Department (the Department) and then it would be discussed again. Despite this advice and without any further discussion with your Clinical Director, you went ahead and started to undertake BHR procedures. The Panel notes that you participated in a peer appraisal on 2nd July 2003, with your Clinical Director in

attendance. The appraisal record shows a specific question about what clinical issues you would like to address over the next 12 months and you made no mention of your intention to perform BHR procedures that same month.

22.
The Panel considered the evidence of Mr. Lake, Consultant Trauma and Orthopaedic Surgeon, the GMC's expert witness, in relation to the sufficiency of your experience to undertake BHR. Mr. Lake told the Panel that he was of the opinion that he would not profoundly object to you performing BHR procedures. However, Mr. Lake's concern was that your Clinical Director had advised you that you should build up a large core of primary standard total joint replacements before you moved into BHR procedures. Mr. Skinner, Consultant Orthopaedic Surgeon based at the Royal National Orthopaedic Hospital in Stanmore, the expert witness called on behalf of the defence, indicated that the views of the Clinical Director or Medical Director are relevant before a surgeon decides to undertake specific types of surgery.

23.
Whilst the Panel notes the evidence of Mr. Lake and does not disagree with that evidence, it considered it in the context of what was happening at Southend Hospital at the time, and the specific needs of your employer and the Department. You had been clearly advised to become established within the Department and bolster your experience in terms of undertaking total hip replacements before moving on to more complex procedures.

24.
The Panel notes that before taking up your Consultant post at Southend Hospital, you had never performed the BHR operation as lead surgeon either supervised or unsupervised. The Panel accepts that newly appointed consultants do undertake procedures which they may not have performed before as lead surgeon. However, the Panel accepts the evidence of your Clinical Director that, had he been aware of this in relation to BHR procedures, arrangements would have been made for you to receive further training. The Panel notes that at that time the Department was sceptical of the BHR procedure and whether it should be undertaken, at all, at Southend Hospital.

25.
You knew that had your employer known the truth, you would not have been permitted to undertake those procedures. In cross-examination, you were asked three times whether you had told anyone that, prior to your arrival at Southend Hospital, you had never undertaken a BHR procedure on your own. You evaded this simple question. The Panel considers that this characterises your deliberate attempts to conceal the truth about your lack of experience.

26.
Considering all these factors, the Panel has determined that you had insufficient experience to undertake BHR procedures at Southend Hospital. The Panel accepts that your training may have been sufficient for you to undertake BHR procedures in a supportive environment but not at Southend Hospital."

87.

I agree with Mr Sutton that this reasoning demonstrates that in finding charges 5(a) and 5(b) and charge 6(b) proved the Panel were in effect re-formulating the charges, going outside the ambit of the charges, and finding the Appellant guilty of charges of which he had never been charged.

88.
I take each in turn.

Charge 5(a) and(b)

89.
In my judgment in these passages, the Panel, rather than addressing the Appellant's admission that he implied he had sufficient experience to undertake BHR himself, do demonstrate - as submitted by Mr Sutton - that having apparently accepted the evidence of Mr. Lake that the Appellant did have sufficient experience to undertake the procedure, decided that the Appellant was dishonest on a basis or bases that had never been the subject of any charge, namely that he had commenced undertaking the BHR contrary to the advice of his Clinical Director that he should first establish himself within the orthopaedic department and without any further discussion with the Clinical Director; that he had in effect deliberately concealed his intention to undertake BHR procedures in the course of the peer group appraisal conducted at Southend on the 2nd July, a matter of weeks before he carried out the procedure for the first time on 17th July 2003 on a patient referred to him by one of the Clinical Director's colleagues, Mr. Sajavi; that he had commenced the procedure without obtaining the prior permission of the Trust and the Clinical Director in particular; and that he had deliberately concealed from the Trust and the Clinical Director in particular, that he had never previously undertaken a BHR procedure on his own when he knew that had this been known, he would not have been permitted to carry out these procedures.

90.
For present purposes, I am prepared to accept (contrary to the submission of Mr. Sutton) that there was evidence to sustain each of these propositions. In particular I accept (having read the transcript of the material part of the Appellant's cross-examination) that the Panel were entitled to find the Appellant had been evasive under cross examination on the question whether he had told anyone prior to his arrival at Southend that he had never undertaken a BHR procedure on his own. But the fact remains that the Appellant was not charged with having carried out the BHR procedure without obtaining the requisite permission and he was not charged under charge 5 with deliberately and dishonestly withholding this information from his employer. He was charged with misleadingly and dishonestly implying that he had sufficient experience to undertake the BHR technique himself. In the light of the accepted evidence of Mr. Lake I repeat that I find it impossible to find a proper evidential foundation whereby this charge could be found proved by the Panel.

91.
In paragraph 22 of his skeleton argument, Mr Weisselberg on behalf of the Respondent, made a significant submission, maintained in oral argument, as follows :

" Charges 4-5 and 6(b)

22.
When considering Charges 4-5 (misleadingly and/or dishonestly implying that he had sufficient experience to undertake the BHR technique) and charge 6(b) (having insufficient experience to carry out BHR) the Panel concluded that (decision para 25):

1.
the Appellant had not informed the Trust that he had never undertaken BHR procedure as lead surgeon (either supervised or unsupervised); and

2.
the Appellant knew (on the basis of discussions that he had had with Mr. Packer, the Clinical Director at Southend Hospital) that if the Trust had known that to be the case, he would not have been permitted to undertake any BHR procedures.

These were findings that plainly fell within the ambit of the Charges, in that the Appellant was found to have insufficient experience (by reference to the requirements of Southend Hospital) to undertake the BHR procedure" (the emphasis is the emphasis of this court).

92.
This submission in fact introduces a fundamental amendment to the charges under both heads which was never made in the Notice of Hearing, and highlights the error of the approach of the Panel to the charges both under charge 5 and under 6(b). Under charge 5 the Appellant was not charged with misleadingly and dishonestly implying that he had sufficient experience to carry out the BHR technique himself "having regard to the particular requirements of Southend Hospital" (which no doubt would have had to have been particularised). For the reasons already given I do not consider it was open to the Panel on the evidence before them and accepted by them (in particular that of Mr. Lake) to find proved, the charge under 5(a) and 5(b) as formulated.

Charge 6

93.
Similarly with charge 6(b) which as formulated raised the sole question whether in 2003 the appellant had "insufficient experience to carry out Birmingham Hip Resurfacing as sole or lead surgeon". It was not modified by any qualification referring to the particular requirements of Southend Hospital nor was any attempt made to amend the charge in this way, although charge 6(a) had been amended to refer to Southend. The Panel in paragraph 26 in effect introduce a gloss on the charge by finding that "your training may have been sufficient for you to undertake BHR procedures in a supportive environment but not at Southend".

94.
What the Panel meant by "supportive environment" is wholly unclear.

95.
In so far as it meant that the Appellant at the time he commenced the procedure at Southend, did not have the support of the department or of his Clinical or Medical Director in particular then I agree with the Appellant that there was no sound evidential basis for this conclusion in the light of the evidence that it was department colleagues who were referring BHR cases to the Appellant (Mr. Sajavi, whom Mr. Packer conceded was a close colleague, in particular in respect of the first procedure of 17 July 2003), and e-mails passing between the Clinical Director, the Medical Director and the Appellant in September and October 2003 clearly demonstrate that the fact the BHR was being undertaken by the Appellant was known within the department and was being given a positive reaction. When Mr. Packer was asked in evidence why when he discovered the Appellant was undertaking BHR at Southend, he did not object, his reply was to the effect that it was afait acompli and he could not follow a new procedures policy once something had started to which the Medical Director had given the green light. The reference to a new procedures policy was to a policy which the

Trust had governing the introduction of new techniques which in some instances required the prior approval of the Trust. It was common ground however that the Appellant was not informed of the existence of this policy in the course of his induction in 2003 and Mr. Packer himself told investigators that back in 2003 he had been aware that the policy existed but was not sure of any more than that.

96.
In so far as it meant that the Appellant was not sufficiently trained to work in an isolated unit with no colleagues to call upon for support in case of difficulty, this had not been the evidence of Mr. Lake. See again the specific question asked of him by the Chairman of the Panel set out at paragraph 26 above.

97.
For all these reasons I conclude that on the basis of the charges as formulated and the evidence which can properly be regarded as directed to those charges, that the decision under each head of BHR charge was wrong and the proper conclusion under each of those charges should have been one of "not proved", notwithstanding I accept that at various stages in their Decision the Panel have recorded their assessment of the Appellant as a witness whose credibility they did not accept and which is an assessment with which I am in no position to interfere. See for example at paragraph 15, 18, 25 and 109.

98.
Before turning to the general issue raised as to the apparent bias of the Panel, it is convenient if I record my conclusions on the specific challenges made to the findings on ACT.

ACT.

99.
I have already set out in paragraph 30-33 the background to these charges which appear at paragraphs 8 and 9 of the Notice of hearing, as amended , as follows (for convenience I have set them out with the record of admissions and findings as in Annex 2):

8
In 2002 and 2003 you expressed an interested in performing Autologuous Cartilage Transplant (ACT) at the Southend University Hospital NHS Trust.

a.
You informed Mr. Packer (Clinical Director orthopaedics) that such surgery did not have to be part of a clinical trial, **Admitted and Found Proved.**

b.
You were aware or ought to have been aware that such surgery did have to be a part of a clinical trial under NICE guidelines, **Found Proved.**

c.
You were made aware that Southend University Hospital NHS Trust did not have funding to perform ACT operations, **Admitted and Found Proved.**

d.
On 26th November 2004 you conducted an arthroscopy of **Patient A** who presented with a osteochondral defect of the femoral condyle of the knee. **Admitted and Found proved.**

e.

You made no adequate record pre-operatively of a treatment plan, F**ound Proved.**

f.

(i) During the procedure you took a loose fragment from the knee (the sample). Found Proved.

....

(ii)

During the procedure you excised a biopsy from the knee (the sample) for tissue culture. Not Found Proved.

g.

Following the procedure you sent a sample to a private company, Verigen, for tissue culture, and for the purposes of ACT, **Admitted and Found proved.**

h.

You did not obtain patient consent

i.

for the removal of the sample for tissue culture, **Found Proved**.

ii.

to send the sample to a private company. **Found Proved.**

i You made no adequate record of the excision of the biopsy. The Panel made no finding in relation to this paragraph as it did not find that you excised a biopsy.

j.

You made no adequate record of the sample being sent to Verigen, **Found Proved.**

k.

You did not follow trial protocols established for taking andsubmitting a sample for ACT.**Found Proved.**

l.

In removing the sample and treating it as a sample for use in ACT you were aware that the Trust by which you were employed had not agreed to funding for the ACT. Found proved.

m.

You submitted the sample for ACT despite the fact that you were aware that it was not part of a clinical trial. Found Proved.

9

Your actions as set out in paragraphs 8(a) and 8(e) to (m) were

i.

inappropriate. **Found proved in relation to paragraphs 8(a), (e), (g), (h)(i), h (ii), (j), (k), and (m) only.**

b.

unprofessional; **Found proved in relation to paragraphs 8(a), (e), (g), (h)(i), (h)(ii), (k) and (m) only.**

100.
I turn to the challenges now raised to the stage one findings on these charges. As will be seen I have reached different conclusions from those relating to BHR.

Charges dependent upon a finding of pre-planned procedure : charge 8(e); charge 8(h)(i)

101.
The Respondent's case was that the Appellant had carried out a pre-planned ACT procedure on Patient A. The case as opened by counsel for the Respondent and as reflected in charge 8(f) as originally framed, was that as part of that procedure the Appellant had performed a biopsy and extracted a sample of living tissue from the patient's knee, which he had then sent off to Verigen for culturing, as distinct from the loose fragment which it was suggested the evidence would show was dead tissue incapable of yielding usable chrondrocytes for cell culturing. In the event the charge in 8(f) was subsequently amended during the hearing to accommodate the evidence that what the appellant had indeed performed was solely the removal of the loose body and it was that sample which had been sent off as an ACT related procedure in the way already explained; It was this version of events which the Panel found proved, (hence the recorded findings of the Panel in respect of 8(f) as amended: 8(f)(i) during the procedure you took a loose fragment from the knee (the sample), Found Proved; (ii) during the procedure you excised a biopsy from the knee (the sample) for tissue culture, Not Proved).

102.
However the Panel still found that this was all pre-planned. (Decision paragraph 36: "the panel is satisfied that on the balance of probabilities your intention from the outset was to commence an ACT procedure"). Hence it found as proved those charges dependent upon such a finding, namely those in 8(e) relating to no adequate record of a pre-operative treatment plan for Patient A; and 8(h)(i) failing to obtain the patient's consent for the removal of the sample for tissue culture. The reasons for so finding pre-planning are set in the Decision in paragraphs 28 to 36:

> " paragraph 8(e) and (f)(i) have been found proved
>
> 28.
> You admitted in evidence that during the procedure you took a loose fragment from Patient A's knee on 26th November and the Panel finds this proved. In relation to whether you made no adequate record pre-operatively of a treatment plan and whether you excised a biopsy from the knee, the Panel has considered the chronology of events prior to the procedure being carried out.
>
> 29.
> The Panel considered the conflicting evidence in relation to the events that occurred on 26th November 2004, and has had to determine who was more likely to be telling the truth. In relation to these events, the Panel accepts the evidence of Mr. Harvey, who was then an employee of Verigen, a company which undertook cell culturing for ACT. Mr. Harvey was clear in his recollection of events on that day, he was open, he appeared honest and had no apparent motive to be untruthful.
>
> 30.
> You, on the other hand, had every reason to conceal what you were doing. The Panel noted your interpretation of the NICE Guidelines as applied to Patient A. You sought to persuade the Panel that he did not fall within the ambit of the NICE Guidelines at that

time. The Panel has heard evidence that ACT involves three stages; harvesting, culturing and then implanting cartilage cells.

31.
The Panel heard evidence from Mr.Kumar, who was one of the Indian visitors to London and Southend Hospital on 26th November 2004. He was called to give evidence, in particular, about the events of that day. He told the Panel that they were visiting the United Kingdom (UK) for the sole purpose of gathering information in relation to ACT and its potential for development India.

32.
In your response to Linda Underwood, General Manager of Diagnostic Imaging at Southend Hospital, you said that these visitors wanted to see how a trauma list was run in the UK and that they were on a general fact finding mission, with no particular interest. In your evidence, you stated that the Indian visitors, who had been invited to Southend for your hospitability, were free on the afternoon of 26th November 2004. As such, they requested to go with you to Southend Hospital to see how hospitals in England worked. You, therefore, invited them to observe your trauma list. However, in evidence about his visit to Southend on 26th November 2004, Mr. Kumar stated "We were there for that one procedure that Dr Chauhan did and even that whole procedure, once Mr Chauhan performed the procedure, we did not even wait for it to be totally completed, I think we stepped out before that, so there was one procedure that we saw and then we stepped out because we got an idea of the hospital, the infrastructure and we had already seen an ACT procedure in the morning so this was something that came by so we took the opportunity and made the best of it."

33.
The Panel formed the view that Mr. Kumar's evidence was tailored to suit your case, in that there were occasions when he disclosed detail not sought by a question. The Panel was not satisfied with his evidence overall, though elements of it, inconsistent with your testimony, disclosed the falsity of aspects of your evidence.

34.
The Panel notes from all the evidence adduced, including the live evidence from each of the Orthopaedic Surgeons, that Patient A was a prime candidate for ACT. You had specific interest in ACT and had received all the relevant training and had also spent a year at Smith and Nephew participating in cartilage research. You had demonstrated the technique in India and according to Mr. Edwards, the then Managing Director of Verigen, you were part of a "select" group of clinicians in the UK interested in ACT. Given these factors, the Panel finds it inconceivable that you would not have considered the possibility of ACT for Patient A when you reviewed him in the clinics on 20th October and 24th November 2004, and listed him as the first case on your trauma list which took place on 26th November 2004. The Panel accepts Mr Harvey's evidence that on that day he was asked by Mr. Edwards to drive you and the two Indian visitors back to Southend following a meeting at Verigen to discuss the development of ACT in India. Mr .Harvey was very specific in his recollection of events, recalling that you, whom he knew, sat in the front seat of his car. He even recalled where he had parked his car that day when he came to London to collect you and the Indian visitors. You denied that you were at the meeting or in Mr. Harvey's car.

35.
The Panel has determined that it is significant and not simply a coincidence that the visitors from India were present on 26th November 2004.You had set yourself up as an intermediary between Verigen and the Indian Market. You ensured, by placing Patient A on your trauma list, that you would be undertaking his knee procedure in the presence of the visitors from India. It is significant that Patient A was first on the trauma list, despite his operation not being a medical emergency, and you abandoned the remainder of your list to your junior so that you could deal with the loose body ("the sample"). This lends credence to the fact that the Indian Visitors were present only for a pre-planned ACT procedure.

36.
You made no note pre-operatively of your planned operation because, had you done so, you would have been prevented from undertaking the ACT procedure, as had occurred previously with another patient. Mr. Neil Davis, Trauma and Orthopaedic Team Leader in Theatres at Southend Hospital, told the Panel that he was alerted by theatre staff because there was a procedure planned in theatre by you that they were unfamiliar with and they wanted to bring that to Mr. Davis's attention. It was clear from what followed that this procedure was harvesting tissue for culture as part of ACT. Given all the factors set out above, the Panel is satisfied that, on the balance of probabilities, your intention from the outset was to commence an ACT procedure."

103.
The Appellant takes issue with these findings. His challenge is two fold.

104.
First it is submitted that the finding the procedure was pre-planned was "manifestly against the weight of the evidence" and the Panel in its reasons had ignored significant evidence which pointed the other way. Objection is taken to the rejection by the Panel of the evidence of Mr. Kumar without giving adequate explanation for doing so (in particular of their finding that he had tailored his evidence to suit the Appellant's case and had made disclosure of detail not sought by the question). Mr Kumar was the witness called on behalf of the Appellant to support his case that his Indian visitors present at the Patient A operation, had not attended as part of a preconceived plan to witness an ACT procedure, but had simply taken the opportunity to witness his operation list following on their being at the Appellant's home solely for an invited lunch. Like objection is taken to the total acceptance by the Panel of Mr. Harvey's evidence where it conflicted with that of the Appellant when there were certain features of Mr Harvey's evidence which on other uncontested evidence had to have amounted to an error of recollection (for example the time Mr Harvey claims he dropped the Appellant and his Indian guests off at the Appellant's home, namely 4pm, when the hospital records show that Patient A's operation was completed by 3pm; and the identity of patient A's treating surgeon at the RNOH who was Mr. Skinner not Mr. Briggs).

105.
I have considered these submissions with care. I do not list the entirety of the points in the evidence emphasised to me by Mr. Sutton being inconsistent with pre-planning but they include the absence of features which on the evidence routinely and it is said invariably accompanied a pre-planned ACT harvesting biopsy (the attendance of a representative of the culturing company; the taking of patient blood samples; the availability of a harvesting kit in the theatre;) and features of evidence supporting the Appellant's case that he made "an on the table decision" to hold onto the fragment for potential

ACT use (the harvesting kit was recovered from the Wellesley hospital by the Appellant after the arthroscopy had been performed; the evidence from Mr. Edwards of Verigen and Mr. Skinner of the RNOH that they were indeed contacted on the 26th November after the Appellant had removed the loose particle to inquire about the feasibility of using it for cell culturing with a view to it ACT being performed at Stanmore). I have myself reviewed the transcript of the evidence on this issue.

106.
Ultimately however - and in saying this I mean no disservice to Mr Sutton - I have concluded that these are in reality no more than jury points which I have no doubt were drawn to the attention of the Panel in closing submissions and I cannot say that the Panel were not entitled to reject the Appellant's evidence that none of this was pre-planned and that of his witness and to prefer evidence from for example Mr. Harvey. As already explained, this court will always be slow to overturn findings based on assessment of witnesses and the Panel was not required to give a detailed explanation as to how they reached that assessment or the findings they did by express reference to the entirety of the relevant evidence and the arguments placed before them. Their reasons under this head of charge are in my judgment sufficient for the parties to understand why they won or lost (see again Gupta; and Phipps).

107.
Furthermore, unlike my conclusions in relation to some of the BHR charges, I cannot say that there was no adequate foundation in the evidence for theses findings of pre-planning. I say this notwithstanding I accept that in originally placing reliance upon the fact the Appellant had "abandoned" his list, the panel were operating under a mistake of fact. When this however was demonstrated to them after the pronouncement of the stage one decision, the Panel, I note, although declining to revisit its finding under this head of charge, did state it placed no reliance upon such abandonment.

108.
A second basis of challenge to these findings is said to lie in the way the Panel chose in their Reasons to express why they had determined to reject the evidence of the Appellant on this issue of pre-planning, in particular where they state "You on the other hand had every reason to conceal what you were doing" (Decision paragraph.30) and "You made no note pre-operatively of your planned operation because had you done so, you would have been prevented from undertaking the ACT procedure, as had occurred previously with another patient" (Decision paragraph 36). Mr Sutton submits in effect that these amount to findings of dishonesty against the Appellant outwith the ambit of the charges. In this particular instance, I do not agree. They are no more than an explanation which they were entitled to give of why they chose to reject the Appellant's evidence and of their adverse findings on his credibility on the issues they had to determine under this head of charge.

109.
Thus I reject the specific challenges made to the findings under Charge 8 contingent upon the Panel's finding of pre-planning.

Charge 8(h(ii)): failing to obtain Patient A's consent for sending the sample to the private company.

110.
Particular challenge is made to the finding under this head of charge which relates to the alleged failure, once the loose fragment had been removed, to obtain Patient A's specific consent - before it was sent off - for it to be sent to the private company for tissue culture. This was an aspect of the charges relating to ACT which was not dependent upon any finding of pre-planning. The Appellant

called evidence from Patient A himself, the transcript of which I have read. The Panel found this charge proved. Their reasons (paragraph 39) were as follows

> "In relation to your conversation with patient A, the Panel does not accept that you obtained a valid consent for the sample to be sent to a private company for tissue culture. You gave Patient A general information about ACT procedure and asked for his consent to send it for tissue culture whilst he was still under the effects of anaesthesia and analgesia. You told the Panel that the patient's mother was also present and Patient A confirmed this. However, the Panel does not accept that appropriate or informed consent was given at this time. It considers that the first time that Patient A gave verbal consent was at his out-patient appointment on 1 December 2004".

111.
The complaint is made that the Panel were not entitled in reaching their finding that this charge was proved to have regard to the concept of a valid or "informed" consent and that again the Panel was going outside the ambit of the charge as formulated and denied the Appellant the opportunity to call expert evidence on the effects of the medication upon the patient's capacity to consent.

112.
I have again considered this submission with care. However in this instance I do not find there is sufficient substance in it for me to interfere with the finding under this head. I accept the Respondent's submission that "consent" under this head necessarily must mean a "valid" consent which in turn must include the concept of "informed" consent. The Panel were entitled to consider the circumstances in which the patient was spoken to on the ward to decide whether such a valid consent was in fact given before the sample was sent off, in circumstances where no written consent was relied upon. But more significantly, I have considered the transcript of the patient's evidence on when he gave the consent. Mr Sutton submitted that the transcript shows the patient had a lucid recollection of the essential features of the discussions which took place on the day of the operation. What I have noted however from the transcript of his evidence in chief is not only that he said that his mind at that stage was "fairly clear but obviously after an anaesthetic you are quite fuzzy but other than that it was just pain really" but that although he recounted that the Appellant had said the fragment would be sent off to Copenhagen for culture of cartilage, Patient A nowhere stated whether at this stage he gave consent for that to happen. When it came to cross examination, his evidence was he could not remember when he gave that consent. Thus (D14/9) :

> "Q: So the consent that you gave to being part of this whole thing was when? Was that to Mr Skinner?
>
> A: No, it was to Mr Chauhan that I gave consent to have the body sent off.
>
> Q: Are you saying that happened immediately after the operation or What?
>
> A: It could have either been on the day of the operation or when I returned to the clinic.
>
> Q: Did you sign anything?
>
> A: I did yes. I am sure I signed something and my mother countersigned.
>
> Q: You cannot remember when that was?
>
> A: No"

113.
Thus I reject this ground of challenge to the findings under ACT.

114.
Although not identified in the grounds of Appeal, a number of other findings made by the Panel under Charge 8 under the various sub paragraphs were challenged by Mr. Sutton in oral submission as having no foundation in the evidence. Again I mean no disservice to Mr. Sutton if I do not list each and every one of them now said to be against the weight of the evidence. However I have considered the points he made and had regard to the transcripts of the evidence. My firm conclusion is that there is no substance in them. In my judgment there was an adequate evidential foundation for each of them and there is no justification for the court to interfere with them on an evidential basis. For example as regards the charge under 8(a)(b) (informing Mr. Packer that ACT did not have to be part of a clinical trial when aware or ought to have been aware that such surgery did have to be part of a clinical trial under NICE guidelines), I have already referred to the Appellant's explanation in evidence that when saying what he admitted, he had had in mind the exception in paragraph 1.3 of the NICE guidelines. However in the light of the letter the 14th May 2003 in which the Appellant apologised for misleading Mr. Packer, I do not consider the Panel's finding can be properly faulted. The fact is the ACT procedure did have to be carried out in a centre participating in a clinical trial. Similarly (and again for example) the Panel must in my judgment in finding charge 8(j) proved (making no adequate record of the sample being sent to Verigen) have been entitled to be sceptical about the Appellant's evidence that he handed one of the retained sheets from the multi-leaf sample submission form included in the harvesting kit, to the scrub nurse in order for it to be retained with the patient's records which sheet had gone missing. The evidence was that there was no note either on patient A's operation notes or on his patient records of the sending of the sample to Verigen for tissue culture.

115.
In the round therefore subject only to my consideration of the question of apparent bias and the overall fairness of the proceedings, I dismiss the challenges now made on this appeal to the fact finding made by the Panel under the ACT charges.

Apparent Bias/ the Fairness of the Hearing .

116.
The submission under this head concentrates in the first instance on examples of the Panel's questioning of witnesses in the course of the hearing which it is said demonstrates a partisan approach. Two particular examples have been highlighted.

117.
The first is that of the questioning of Dr. Tosh by Dr. Sinclair in relation to whether the Appellant wanted him to believe he had been trained by Mr. McMinn. I have already set out this interchange in paragraph 77 above.

118.
The second is that of the Revd. Lloyd Richards when questioning the Appellant in relation to whether the Appellant considered it was his duty to apprise himself of the New Techniques Policy which Mr Packer had conceded had not been brought to the attention of the Appellant in 2003. The interchange was as follows (D14/7 – 8):

Q. do you think that a working knowledge of local policies, guidance, information ……. the sort of things that someone who is newly arrived at a hospital might think is pretty important an issue of personal responsibility to undertake on arrival and not necessarily wait for someone to tell you?

A: yes. I think it is fair to say that if you are working in a new establishment you should be familiar with procedures …. in this particular hospital ..I had many discussions about this is what I want to do…what I need. There was ample opportunity for management, Clinical Director, Medical Director and colleagues to say "look Chet, this, is how we do it here". Now I accept it is a shortcoming of mine that I did not go out and find a new procedures policy …but at that time it was very, as Mr Packer put it, loosely applied. They were not using that policy.

Q: As an entirely lay person …… do you understand my concern as someone who is appointed to a new post in a hospital would not think ……. to actually make sure that equally at a professional level you were going to be aware of policies and procedures that appertained to that particular post?

A: I accept but if custom and practice at that place of work is such that those policies although existing are not used then one does what custom and practice dictates.

Q: I would not want a conversation with you about custom and practice. We have had no evidence about that but do you accept that the policy existed before you arrived and it would have been available to you?

A: I accept that I was informed that a policy existed a year and a quarter after I started

Q: The question was: do you accept that the policy existed when you arrived?

A.
I am told it existed.

Revd. Lloyd-Richards: Thank you.

It is suggested that this interchange demonstrates a partisan approach on the part of the panel member, given Mr Packer, the Clinical Director, had confessed to not being aware of the terms of the policy not brought to the attention of the Appellant, and appeared to be aimed at "deflecting a criticism properly levelled at the Trust" and "galvanising the complaint against the Appellant".

119.
I do not however consider that these passages can be fairly regarded as showing the partisan approach contended for. The Panel as already indicated was entitled to be asking questions and to be proactive in making sure that the case was properly presented and the relevant evidence placed before it. The fact that this court has found in respect of the Dr Sinclair interchange that the emerging answers to questions put in the way they were, were an inadequate evidential foundation for the findings made by the Panel on a particular issue, does not mean that the interchange was borne of a partisan position or a panel member seeking to fight his own case. Rather the Panel member was seeking to elicit what he bona fide regarded was a relevant piece of information. Equally I do not regard that the questions asked about the New Techniques Policy go beyond the panel member seeking to understand the Appellant's own case as to the existence of policies and procedures within the Trust and how he should go about discovering them.

120.
This Hearing was spread over more than 20 days. I do not consider that put in context the particular passages relied upon by the Appellant even begin to show that Panel members had so descended into

the arena that their judgment had become impaired within the principles explained in Yuill and in Kofi Adu so as to render the hearing unfair.

121.
Nor do I conclude on the basis of these particular passages, that a fair minded and informed observer could conclude there was a real possibility that the decision maker was biased.

122.
Mr Sutton seeks to demonstrate apparent bias by reference to his wider complaints about the way the Panel in its findings went outside the ambit of the charges or failed properly to evaluate the evidence, not only in respect of BHR but in respect of ACT, and emphasises for example his complaint about the Panel's rejection of Mr Kumar's evidence in contrast to what he would regard as the uncritical acceptance of Mr Harvey's evidence. I have dealt with these complaints in considering the particular challenges to the findings under BHR and ACT. In respect of BHR the challenges have been successful. In respect of ACT they have not been. However I reject the submission that the success of any of these challenges means that apparent bias is established. This is a non sequitur in my judgment. I may have found that in certain respects the Panel were wrong in coming to the findings they did for the reasons I have given, and in certain respects went outside the ambit of the charges and unfairly introduced into their considerations on the charges as laid, evidence directed at behaviour not the subject matter of any charge. However, this is not enough to establish bias either actual or apparent. Decision makers may be held on appeal to have gone wrong in this way without the fair minded and informed observer thereby concluding that there existed a real possibility that the decision maker was biased by reason of his behaviour in the course of the hearing.

123.
I accordingly reject the grounds of appeal based on bias.

124.
I equally reject the complaints made as to the overall unfairness of the proceedings.

Overall conclusions on the appeal against the stage one findings

125.
It follows that this appeal has been successful in the challenge to the findings of fact made by the Panel at stage one of their decision making process to the extent that I set aside the findings made in relation to BHR under charges 3(a) and 3(b); and under 5(a) and 5(b) and 6(b). I set aside no other findings. Those made under Charge 8 and 9 in relation to ACT stand. Those relating to the trauma case under paragraphs 10 and 11 of the Notice of Hearing stand.

Impairment

126.
In the light of my setting aside the findings of dishonesty made against the appellant in relation to BHR, it must follow that the findings of the Panel on impairment cannot be allowed to stand. I would invite submissions of the parties as to the course the court should now take on impairment. Impairment is a matter of professional judgment of the Panel and my present inclination is that I should remit the question of impairment to be reconsidered by the same constituted panel if possible in the light of the findings which continue to stand in relation to both ACT and the Trauma case. It would in my judgment be inappropriate of this court on any such remittal to give any indication as to what the professional judgment of the Panel should be in this regard.

127.
I should however refer to the complaint that the Panel were wrong at the stage of Impairment to have refused to admit in evidence the report of the HC (90)(9) Inquiry. I have been reminded of the statement of principle by Silber J. In Cohen v GMC [2008] EWHC 581 Admin at paragraph 62, that:

> "at stage 2 when fitness to practise is being considered, the task of the Panel is to take account of the misconduct of the practitioner and then to consider it in the light of all other relevant factors known to them, in answering whether by reason of the doctor's misconduct his or her fitness to practise (is) impaired".

128.
In so far as that report, as it clearly did, overlapped in its terms of reference with issues upon which the Panel had been called upon to make findings and upon which the Panel at stage one made findings , (on evidence which was not identical to that before the HC Inquiry), different from those made by the Inquiry, then I do not consider that the Panel can be faulted for taking the approach it did. The Inquiry for example had overlapping terms of reference (and made findings contrary to those of the Panel) in respect of the extent of the Appellant's surgical experience, his level of experience and training in BHR procedures at the time he joined the Trust and subsequently, whether the Appellant had sufficient training and experience reasonably to believe he could competently perform the BHR procedures he introduced to the Trust, and whether the Appellant had misled the Trust. On the other hand the Inquiry did deal with an issue not before the Panel, namely whether the Appellant competently performed the BHR procedures which he undertook at the Trust which might be thought to give rise to material relevant to the Panel's consideration of Impairment. Furthermore, I observe that the Panel (D22/39) did not in its determination on this issue rule out the possibility that relevant evidence from the Inquiry report could still be introduced if the Appellant were prepared to indicate the particular passages relied upon and upon which a specific ruling as to relevance might be made. This was a course which the Appellant was invited to follow but chose not to.

129.
In the circumstances however where this court has set aside significant findings of the Panel on BHR, I would invite further submissions from the parties on the relevance of the Inquiry report to the issue of Impairment, and the extent to which on any remittal of the Impairment issue, a direction should be given for the admission of any part of that report.

Sanction

130.
Similarly, I would invite the further submissions of the parties on the question of sanction in the light of this court's determination of the appeal on the stage one findings.

131.
Accordingly, before my final determination of this Appeal, I invite the further submissions of the parties both as to Impairment and Sanction and as to the form of order to be made by the court.

Annex 1

30 March – 13 May 2009

Mr. Chatenya Chauhan

Biographical Details

Mrs Eileen Carr –Chair

Lay Member

Trustee – BASIC (Brain and Spinal Injuries Charity). Justice of the Peace – Chair, Adult Bench, Chair, Youth Bench. Retired NHS Director. Chair of the General Chiropractic Council and a Lay Member of the North Western Deanery

Reverend Robert Lloyd-Richards

Lay Member

Chaplaincy Manager, Cardiff and Vale NHS Trust, Ass. Lecturer Cardiff University, Non-clinical Teacher, School of Medicine, Cardiff. Member of the College of Health Care Chaplains, and The Association of Hospice and Palliative Care Chaplains. Member of the British Horological Institute. Vice chair of Cardiff and Vale Clinical Ethics Committee. Member of the Local Research Ethics Committee.

Dr Michael Sheldon

Medical Member

GP (urban, previously rural). Appraiser. Medical member: FHSAA (Family Health Services Appeals Authority). Fellow of the Royal College of GPS. Chairman of The Whole-Person-Health Trust (Registered Charity No:1098671). Member of Church of England Deanery Synod, Tower Hamlets, London.

Dr David Sinclair

Medical member

General Medical Practice. Member: BMA, RCGP. Honorary Senior Lecturer, Bute Medical School, Saint Andrews university. Previously: GP Trainer, Member of BMA Boards of Science & of Medical Education & of Scottish Council BMA

Mr Arnold Simanowitz

Lay Member

Solicitor, former Chief Executive of Action for Victims of Medical Accidents (now Action Against Medical Accidents), former Chair of Croydon Community Relations Council; Member Clinical Risk and Safety Board Connecting for Health. Trustee, St Wilfred’s Hospice.

Annex 2 & 3

Annex 2