Application for permission to apply for judicial review to challenge decisions made by Dr Peter George Rabey, the Responsible Officer for the Office of the Committee for Health and Social Care. The decisions under challenge relate to Dr Simone Borchardt's medical practice as a General Practitioner on the Island of Sark.

[2025]GRC010

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Civil No. 2567

Between:	**DR SIMONE BORCHARDT**	**Applicant**
	-and-	
	DR PETER RABEY	**Respondent**

In the matter of an application for permission to apply for judicial review

Dates of hearings: 27 June 2024 and 4 July 2024

Judgment handed down: 20 February 2025

Before: Fionnuala A Connolly, Judge of the Royal Court

Counsel for the Applicant: Advocate R Cowling
Counsel for the Respondent: Advocate J Hill

Cases, texts & legislation referred to:

The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987
The Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance, 2017
The Administration of Justice (Bailiwick of Guernsey) Law, 1991

Cotterill v The States of Guernsey, Royal Court, Guernsey Judgment 58/2017
Robert Varley and The Employment and Discrimination Tribunal and the States of Guernsey [2021] GCA 067
Old Government House Hotel Limited v The President of the Island Development Committee and Mighty Mouse Limited [Judgment 58/2003]
Litchfield v Director of Environmental Health & Pollution Regulation [Judgment 37/2014]
R v Monopolies and Mergers Commission, ex parte Argyll Group plc [1986] 1 W.L.R. 763
R (on the application of Rudling) v General Medical Council [2019] P.T.S.R. 843
R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531
Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39
R v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin)
Roger v Roger Guernsey Judgment 10/2003

Christopher John Moran v Lloyds (A Statutory Body) [1981] 1 Lloyd's Rep 423/1981 WL 186799 (1980) (Court of Appeal)
Herring v Templeman [1973] 3 ALL ER 569

JUDGMENT

Introduction

1. Dr Simone Borchardt is a medical doctor who was engaged as the Sark Doctor /General Medical Practitioner on the island of Sark ("the Applicant") at the time of the making of the impugned decisions. By this application, she seeks permission to challenge by way of judicial review decisions made by Dr Peter George Rabey, the Responsible Officer for the Office of the Committee for Health and Social Care appointed by the Chief Pleas of Sark (acting by and through the Sark Medical Committee) ("the Respondent"). The decisions under challenge relate to the Applicant's medical practice as a General Practitioner on the Island of Sark.

2. The case proceeded by way of a rolled-up hearing. I am grateful to Advocate Cowling and to Advocate Hill for their written and oral submissions.

Procedural Background

3. The application for permission to apply for judicial review was lodged on 23 April 2024. It was tabled at Ordinary Court on 26 April 2024. On that date, the case was adjourned to Interlocutory Court on 3 May 2024.

4. By Order made on 3 May 2024, the Court made directions for the permission and substantive applications to be heard as a rolled-up hearing. The Court also made directions for further evidence to be lodged by the Applicant and for replying evidence to be filed by the Respondent.

5. The rolled-up hearings took place on 27 June and on 4 July 2024 respectively. At the conclusion of the hearing on 4 July 2024, the Court directed the parties to lodge an agreed chronology, or if not agreed, separate chronologies on behalf of each party, by 10 July 2024. The Applicant was also granted leave to lodge an Amended Cause by 10 July 2024.

6. In April 2024, separate proceedings were filed by the Applicant before the Royal Court of Guernsey which are relevant to the present application. On 24 April 2024, the Applicant lodged an application for a prohibitory injunction pursuant to Section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 to prevent the Respondent from causing or seeking to cause the dissemination of a report prepared by Dr David Carter dated 12 December 2023 ("the report") or the content of the report pending the return date of the judicial review or further Order of the Court. The issue raised in the prohibitory injunction proceedings was resolved in the context of the present proceedings as, on 3 May 2024, the Respondent gave the following undertakings:

> *"a) not to further disseminate the report of Dr David Carter dated 12 December 2023 or the Respondent's Resolution Notice dated 4 March 2024 or their contents pending*

determination of the judicial review application or Dr Borchardt asking for the undertaking to be withdrawn whichever is the earlier; and

b) that if approached by the GMC Employment Liaison Adviser, Dr Borchardt's Responsible Officer or officers from the Professional Standards Medical Directorate NHS England, not discuss the contents of the report or the notice further, and will indicate that this is because Dr Borchardt is seeking judicial review of his decision that the report raised substantive issues of concern and seeking to set aside the notice,

save that in relation to undertaking a) if Dr Rabey is approached by a prospective employer of Dr Borchardt within the Bailiwick or elsewhere, and in relation to undertaking b) if he is approached by one of the persons/bodies listed and he is of the view that there is further information that he is reasonably required to share and/or discuss, he may withdraw the undertaking on giving 2 working days' notice of his intention to withdrawn the undertaking."

7. There were five affidavits before the Court. There were two affidavits from the Applicant sworn on 23 April 2024 and on 24 May 2024 respectively. An affidavit from Conseiller Frank William Makepeace, sworn on 23 May 2024 and an affidavit from Mrs Sarah Vivienne Beaumont sworn on 24 May 2024 were also relied on by the Applicant. There was an affidavit from the Respondent, sworn on 14 June 2024.

8. I have given careful examination to all of the evidence and submissions in the case.

The Impugned Decisions and the Relief Sought

9. The Applicant seeks permission to apply for judicial review to challenge two decisions of the Respondent; first, a decision that concerns raised in the report in respect of the Applicant about her medical practice in Sark amount to substantive issues and second, a decision to issue to the Applicant a Resolution Notice. Both decisions were made by the Respondent in his capacity as Responsible Officer under the Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance 2017.

10. The primary relief sought by the Applicant is as follows:

    a. an Order *quashing* the Respondent's decision that the report dated 12 December 2023 raises substantives issues;
    b. an order *quashing* the Resolution Notice; and
    c. an order *mandating* that should it be proven that concerns were indeed raised regarding the Applicant's fitness to practice and an investigation is necessary to determine whether these concerns raise a substantive issue, a new investigation shall be carried out with an independent person appointed as Responsible Officer/Authorised Person.

The Grounds in Judicial Review

11. The Applicant's grounds in judicial review as set out in the Amended Cause may be summarised as follows:

    (i) ***The concerns raised about the Applicant***. Whereas Clause 17 of the Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance 2017 applies where a concern about any registered practitioner comes to the attention of a) any practitioner,

b) any designated body, c) the Sark Committee; or d) the Guernsey Committee, notwithstanding several requests, it was unclear as to who raised the alleged concerns about the Applicant and to whom such concerns were raised. There were inconsistencies in the Respondent's correspondence to the Applicant: in his letter dated 28 February 2024, he stated that "an NHS Senior Professional Standards Advisor" raised the alleged concerns but later within the same letter he stated that "the NHS England assessment team" recommended that concerns be investigated. This was contradicted by an email to the Applicant from the NHS dated 13 April 2023 by which she had been advised that her appraisal had been successful and that no further action was required. The alleged concerns were frivolous and vexatious and this is supported by the Respondent's inconsistencies in relation to who or what entity raised any alleged concerns and whether such concerns came from the Sark Medical Committee or from the United Kingdom.

(ii) ***The failures of the Investigation***. The investigation was procedurally flawed and/or irrational which rendered the report unsafe. The report should not have been relied on by the Respondent and it should be set aside. Specifically:

a. Procedural Impropriety. The report deviated from the Terms of Reference ("TORs") and it included Part C which fell outside the scope of the TORs.
b. Procedural Impropriety and irrationality. The report was concluded and finalised before providing the Applicant with the opportunity to respond to the information Dr Carter had received from several witnesses. Subsequent requests by the Applicant to consider and include evidence of her response to the findings of the report were unsuccessful.
c. Irrationality. The shortcomings of the medical infrastructure in the Island of Sark as they relate to the Applicant's practice were not adequately factored into the findings of the report.

(iii) ***The dissemination of the Report***. Despite being made aware that the Applicant's evidence and input was not included in the Report, the Respondent proceeded to provide the report to the General Medical Council ("GMC") Employment Liaison Advisor and the Applicant's United Kingdom Responsible Officer. As a result, the NHS had notified the Applicant (email dated 11 April 2024) that it intended to progress the Applicant's case to the Performance Advisory Group ("PAG") despite the TOR clearly stating that the investigation pertained to issues raised in relation to primary care provision in Sark.

(iv) ***The issuance of the Resolution Notice***. The Resolution Notice was issued by the Respondent based on the report which is flawed and incomplete. Any decision made by the Respondent as to whether substantive issues arose concerning the Applicant was based on the report and was likewise flawed. The report and/or the Respondent failed to set out sufficient and/or adequate reasons for the findings of the existence of substantive issues.

The Factual Background

12. The salient facts and events may be summarised as follows.

13. At the time of bringing the application, the Applicant was a licenced and practising medical doctor engaged as the Sark doctor/General Medical Practitioner by virtue of a contract with the

Chief Pleas of Sark acting through the SMC dated 1 January 2021. The SMC is a Committee of the Chief Pleas of Sark.

14. On 8 October 2020, the Applicant provided the first of two sets of recommendations to the SMC for Health Care Delivery in Sark. This related, *inter alia*, to the computer system, the process for the prescribing and dispensing of medication, personal requirements and working conditions.

15. On 14 October 2020, the Applicant commenced work at the Sark Medical Practice as the Sark General Practitioner.

16. On 10 December 2020, the Applicant provided the second of her recommendations to the SMC for health care delivery in Sark. The recommendations included reference to staffing issues and the prescribing of medication.

Correspondence from the SMC and the Applicant's Appraisal and Revalidation

17. By letter dated 9 February 2023, Conseiller Helen Plummer, Chairman of the SMC, wrote to the Applicant in advance of her Appraisal and Revalidation that was due to take place on 20 February 2023. The Appraisal and Revalidation is conducted every five years and it evaluates whether a doctor evidences that they meet the necessary standards to practice. In her letter, which was copied to the Applicant's UK Responsible Officer, Dr Alison Taylor, Conseiller Plummer set out a number of concerns for discussion with the Applicant's appraiser. Conseiller Plummer advised the Applicant that the SMC had received a considerable number of complaints over the two years since the Applicant had been the local doctor. She stated that the aim of the letter was to be supportive such that the Applicant's appraisal is used as an opportunity to improve not only the medical provision of her services to Sark but also as a way to develop her expertise as a GP. Some of the issues raised in Conseiller Plummer's letter included the use of information technology (IT), the provision of information to help the SMC develop appropriate services in Sark, including basic levels of health information about the population and end of life planning for the population, collaboration with the Committee to develop and train others to support the island infrastructure, the putting in place of Patient Group Directives ("PGDs") if possible, more proactive engagement with the community and finally, the provision of handover information when leaving the island using an agreed methodology.

18. A further copy of the 9 February letter was sent to the Applicant from Conseiller Plummer on behalf of the SMC, copied to Dr Alison Taylor, by email dated 13 February 2023. The Applicant responded by email dated 13 February 2023 to Dr Taylor with copy to Mr Frank Minal, her British Medical Association representative and the Respondent. She expressed her concerns, stating that in her opinion, this was a *"totally improper attack"* and that her *"employer, the SMC … is effectively casting a slur upon my professionalism by innuendo, without offering a shred of evidence in support of such claims"*.

19. On 20 February 2023, the Applicant undertook her annual appraisal with NHS England – South East.

20. In April 2023, Island Health, one of three Practice Groups in Guernsey, published a paper entitled *Primary Care in Sark – An Overview*. The paper provided Sark Chief Pleas with an overview of the options available to it as it considered the future of primary care delivery in Sark. Island Health had been commissioned to review the regime and to provide an insight into the strengths and weaknesses of the system.

21. By email dated 13 April 2023, Ms Hayley Turner, Case Manager at Professional Standards, NHS England, South East (Surrey Heartlands and Sussex) advised the Applicant that her case had been reviewed and had been closed with no further action.

Concerns raised with the Respondent about the Applicant

22. On 20 July 2023, the Respondent was contacted by telephone by Dr Anthony Beaumont, a doctor who was in Sark. Dr Beaumont told the Respondent that concerns about the Applicant's practice had been raised with her UK Responsible Officer but no action plan had been forthcoming. He told the Respondent that Dr Andrew Foulkes, a former Responsible Officer in primary care in the United Kingdom felt the matter had been handled inappropriately and that NHS England now wished to undertake a review of the concerns using due process and to include the Respondent due to his position in local law. Dr Beaumont advised the Respondent that further information would be sent to him about their concerns.

23. Following the call, Dr Beaumont sent an email to the Respondent with copy to Ms Dianne Marshall, officer of the Chief Pleas of Sark and Dr Foulkes. In his email, Dr Beaumont advised that Ms Marshall would be in contact with the Respondent. Dr Foulkes emailed the Respondent on the evening of 20 July 2023 to invite a conversation with him on behalf of the NHS England Responsible Officer, Dr Alison Taylor. Dr Foulkes stated:

> *"NHS England has been aware of concerns from the Sark Medical Committee since January 2023. SMC wrote to NHS England in February 2023 outlining the concerns and a response to the concerns raised was provided to the doctor. The case assessment team felt that the issues were largely contractual and should be investigated by the employing / contracting body, but this was not communicated to the SMC. Prior to that decision the head of primary care professional standards …had agreed that if an investigation was felt necessary, NHS England would assist with this. It was recognised that the SMC would not have the resource or expertise to undertake an independent investigation. Further concerns have arisen which, if proven, would indicate the doctor is not providing all the patients on the island with appropriate and safe care."*

24. On 25 July 2023, the Respondent spoke with Dr Foulkes by telephone in relation to the concerns about the Applicant. Dr Foulkes informed the Respondent that he wished to discuss concerns about the Applicant's practice on behalf of her NHS England Responsible Officer, Dr Alison Taylor. He told the Respondent that the SMC had raised issues with her UK Responsible Officer (UK RO), that no specific action was taken but that it had been intended that the matter be referred back to the "employing" organisation (SMC) to investigate, however the SMC had not been told of this. Therefore, the matters had not been properly investigated. Dr Foulkes had discussed the matter with the Head of Professional Standards for NHS England who supported a plan to now have the concerns investigated. They felt that although local law would put the onus on the Respondent as the local Responsible Officer, NHS England felt a professional duty to the islands and would provide support if required. Dr Foulkes outlined some areas of concern to the Respondent and advised that a Head of Professional Standards would support any investigation.

25. By email dated 25 July 2023, Dr Foulkes sent a document to the Respondent entitled "Summary of concerns – Dr Simone Borchardt (Sark)". The document set out the concerns, mapping them to the relevant GMC Professional Standards and advising that if proven the doctor would appear to be in breach of several GMC standards. The concerns related to the following subjects:

complaints received about the Applicant, end of life care and long-term conditions, relationships with staff, medical handovers, behaviour and refusal to visit a patient, prescribing and self-prescribing and contractual concerns. Dr Foulkes advised the Respondent that in his view, the correct process should be that the SMC should contact the Respondent with their concerns, the Respondent's office should assess the concerns and, with other intelligence and with the Respondent's local knowledge, should decide on whether an investigation was required. Dr Foulkes advised that NHS England recognised the difficulties a local investigation would raise and would be willing to support an investigation if that was required.

26. The Respondent's evidence was that under the Sark Ordinance and in the context of his preliminary assessment of the concerns that had been raised with him by Dr Foulkes, he considered that those concerns potentially raised a substantive issue in that they related to the doctor's performance against GMC standards and that they had not been properly investigated as they should have been.

Meeting of the SMC and Policy and Finance Committee of the Chief Pleas on 31 July 2023

27. On 31 July 2023, the SMC and members of the Policy and Finance Committee of the Chief Pleas in Sark attended a meeting at the Assembly Rooms of the Chief Pleas in Sark.

The Respondent advised the Applicant that concerns that had been raised about her

28. By email dated 1 August 2023, the Respondent requested the Applicant to contact him. She did so by telephone on the same date. The Respondent informed the Applicant that concerns had been raised with him about her by Dr Andrew Foulkes and that they needed to be investigated. He informed her that the SMC had written to her appraiser raising a complaint and that an independent NHS investigator named Dr Foulkes would conduct the investigation into the complaint. The Respondent's evidence was that the Applicant described some of the difficulties she faced working in Sark and he told her that he accepted there were likely to be issues in the system whatever was found in her practice. He advised the Applicant that she was free to practice while the investigation took place.

29. By email dated 1 August 2023, the Applicant sent to the Respondent the email received from Ms Hayley Turner dated 13 April by which she had been advised that the NHS England case against her had been closed with no further action.

SMC Correspondence with the Respondent and the Applicant

30. On 1 August 2023, Ms Dianne Marshall sent an email to the Respondent and to Dr Foulkes on behalf of the SMC which stated:

> *"Sarks Medical & Emergency Services Committee (SMESC) understands that as the Responsible Officer (RO) and representative of the Designated Body, respectively, you have jointly agreed there are sufficient grounds which have reached a threshold to warrant an investigation of Dr Borchardt's performance under the Ordinance of the Chief Pleas of Sark, the Regulations of health Professions (Medical Practitioners Sark Ordinance 2017 (the Law)."*

Ms Marshall attached a draft approved letter addressed to the Applicant. Dr Rabey responded to Ms Marshall by email advising that any communication from SMC to Dr Borchardt should not be prescriptive about how concerns would be investigated as that would be up to him as

Responsible Officer. On the same date, Dr Rabey emailed Dr Foulkes asking for a further call to work on the Terms of Reference ("TORs") for an investigation.

31. By letter dated 2 August 2023, the Applicant was advised by Conseiller Plummer that the SMC *"continues to have concerns regarding your overall performance as a medical practitioner in Sark Medical Practice (previous letter dated 9th February 2023 copy attached). As a result of these concerns, the committee has requested an independent review by Dr Peter Rabey, Responsible Officer Guernsey supported by NHS England"*. The letter stated:

> *"Please be advised that the review is intended to be thorough and impartial with the primary objective of ensuring the highest standards to primary medical care are being consistently upheld. This review has been initiated in the interest of assuring patient confidence, care and welfare.*
>
> *Dr Rabey in his capacity of Responsible Officer will with NHS England determine the precise terms of reference for this review. The committee notes that this is a standard procedure undertaken to maintain, promote and assure a quality healthcare service to Sark patients.*
>
> *During this review process, your full cooperation and transparency will be greatly appreciated. Dr Peter Rabey and subject to confirmation NHS England will contact you directly to schedule suitable time(s) for the review processes to take place, and they/he may request relevant documents and information to aid their assessment. Please ensure timely and complete cooperation to enable an efficient and objective evaluation."*

Conseiller Plummer advised the Applicant that the Chief Pharmacist would be visiting on 8th August 2023 and requested the Applicant to be available to meet with her. Finally, the Applicant was invited to a meeting to discuss matters with the SMC.

32. By email dated 4 August 2023, the Applicant responded to the SMC's letter with copy to Mr Minal and the Respondent dated 9 February 2023. She stated:

> *"As you have stated, this review has been initiated in the interest of assuring patient confidence, care & welfare. One would therefore assume – and I wish to put this on record – that the terms of reference of any such investigation should and would also consider my own input, as island doctor, especially given the historic context and sequence of this matter.*
>
> *Under that understanding, I confirm that I am totally willing to co-operate with Dr Rabey and NHS England and am naturally happy to disclose all information that is required. In addition, it stands to reason that I must have the right to also disclose all information related to all of my working conditions, and the contractual terms and conditions of my employment, as well as the practical realities of work on the island, including the historic precedent under which I have been required to work while in the employ of and under the management of the Sark Medical Committee."*

33. By email dated 4 August 2023, the Respondent formally requested Dr Foulkes to provide support as NHS England in investigating the concerns about the Applicant. Dr Foulkes responded by email dated 4 August. He advised the Respondent that he had discussed the matter with an NHS colleague, that the Applicant's Responsible Officer, Dr Alison Taylor, was aware of the case and that he would assist in drafting the TORs for the investigation.

34. The scheduled visit of the Chief Pharmacist to Sark took place on 8 August 2023.

35. By email dated 14 August 2023, the Applicant informed the Respondent about a significant event from May 2023 relating to a patient who had not been issued with her Apixaban medication in accordance with the patient's hospital discharge letters. The Applicant advised that this incident did not involve her but another doctor. The Respondent's case was that he did not receive this until 9 November 2023 at which point he requested the Applicant to furnish the information relating to the Apixaban matter to Dr Carter and she did so by email dated 10 November 2023.

36. On 23 August 2023, the Respondent met with Dr Taylor and her representative Claire Cochrane-Dyet and agreed that there were concerns which needed to be investigated and that he would lead any investigation in accordance with local law. It was agreed an NHS England investigator would be used and that TORs would be agreed with Ms Cochrane-Dyet. Later that day, the Respondent spoke to the Applicant and updated her on his conversation with the UK Responsible Officer earlier that day, that it was agreed that matters needed to be investigated and that he would draw up TORs for an investigation and appoint an investigator.

37. By email dated 25 August 2023, Dr Cochrane-Dyet, the Deputy Medical Director for the System Improvement and Professional Standards NHS England – South East advised the Applicant that:

> *"… Alison Taylor and I have now met with Dr Rabey (copied in) and we have all consulted with the GMC to be absolutely clear about how the concerns raised by Sark Medical Committee should be considered. We are now in agreement that all and any information regarding your practise on Sark should go through and be considered by Dr Rabey, as the local responsible officer. Dr Rabey will let Dr Taylor (as your responsible officer) know of any significant actions or concerns once he has considered and/or investigated."*

38. The Applicant was subsequently informed by Dr Cochrane-Dyet that Dr Foulkes had been removed from his role.

39. The Respondent agreed the TORs for the investigation with Dr Taylor on 1 September 2023 and he appointed Dr Robin Warshafsky as an Authorised Person on the recommendation of Dr Alison Taylor.

Appointment of Dr David Carter as the Authorised Person by the Respondent

40. By letter dated 5 September 2023, the Respondent advised the Applicant that he had been appointed as the Responsible Officer to investigate concerns raised about the Applicant's fitness to practice and that he had appointed Dr Robin Warshafsky, Clinical Advisor to NHS England as the Authorised Person to conduct the investigation in line with local process. The letter enclosed the terms of reference for the investigation which had been agreed with the Applicant's General Medical Committee (GMC) Responsible Officer, Alison Taylor and it stated:

> *"You will see we have emphasised the distinct nature of Sark, and the system you are working in, and it may be that whatever the findings we need to work with the Sark Medical Committee to assist with developing a sustainable healthcare system. However this investigation is not directly designed to investigate contractual or employment issues…*

You will see that I've asked Robin to try to produce a report by mid-October, but he will notify of any likely delay if that arises.

I've suggested some names for him to speak to; it will be important that those involved feel heard. He may do some of those conversations remotely but he will be visiting Sark in due course. I will leave him to contact you directly about things."

41. By email dated 12 September 2023, Mr Frank Minal advised the Respondent that he objected on behalf of the Applicant to the appointment of Dr Warshafsky as Authorised Person on the basis that 'there is potential for conflict of interest and we are not convinced that he will be unbiased and objective'. In response, by email dated 14 September 2023, whilst he did not believe that the grounds given by Mr Minal were well-founded or amounted to a substantive reasons for a conflict of interest, the Respondent agreed to seek a new investigator.

42. On 26 September 2023, Dr David Carter was appointed by the Respondent as the Authorised Person to conduct the investigation.

43. The Applicant was advised of Dr Carter's appointment by the Respondent by letter dated 5 October 2023. The letter attached revised TORs for the investigation (the revision related only to the time frames for the investigation) and it stated:

"Terms of Reference for an investigation into issues raised regarding primary care provision in Sark

Background:
Dr Simone Borchardt has worked for three years as a single-handed GP in Sark, an island of some 350 to 550 people. She is engaged on a Contract for Services by the Sark Medical Committee. Sark has its own laws and customs and is not part of the NHS nor of Guernsey's Health and Social Care, but any doctor working in the Bailiwick of Guernsey (of which Sark is part) must be registered with the General Medical Council (GMC) and hold a licence to practice; and must therefore comply with GMC regulation and standards. It is accepted that supporting infrastructure for health provision in Sark is very different from the usual settings in which most doctors work. The investigator is asked to consider, as far as possible, the system and context in which the doctor works and her contractual obligations.

The investigation:
The Authorised Person is asked to investigate the following in relation to Dr Simone Borchardt:

1) *Establish if patients with long term conditions are being managed in line with relevant guidelines (NICE etc) and make recommendations for action if they are not.*
2) *Establish if patients at end of life are being managed in line with relevant guidelines (NICE etc) and make recommendations for action if they are not.*
3) *Establish if there is any evidence that Dr Borchardt has not complied with GMC GMP[1] in working collaboratively with colleagues.*
4) *Establish if there (sic) any evidence that Dr Borchardt has not complied with GMC GMP[1] in safe handover of information to relevant colleagues (e.g. GPs acting as her locum).*

5) *Following the visit of The Chief Pharmacist for the Bailiwick in August 2023, establish whether Dr Borchardt has contributed to and maintained safe medicines' management on the island.*
6) *Investigate the circumstances around assessment and management of Patient A in relation to a suspected overdose on 1st December 2022 and 6th December 2022 and whether these were in line with relevant current guidance.*

The investigator is asked to:

Obtain all relevant information from any person or entity which the investigator considers appropriate to evaluate the matters of concern.

It is anticipated that this may include:

- *Dr Borchardt (Sark GP)*
- *The Sark Medical Committee (SMC)*
- *John Guille, Sark Chief Pleas*
- *Christopher Beaumont, Seigneur of Sark*
- *Dianne Marshall, Assistant Chief Secretary, Government of Sark*
- *Andrew Ozanne, (involved in mediation attempt with Dr and SMC)*
- *Anthony Beaumont, Retired doctor who has provided advice to SMC.*
- *Recent Sark locum doctor(s)"*

Dr Carter's Investigation and Report

44. Dr Carter carried out his investigation. During the investigation, the Applicant was interviewed by Dr Carter at his request on 21 October 2023 and on 6 November 2023. The Applicant requested further meetings with Dr Carter which took place on 8 November 2023 and on 13 November 2023. Interviews took place with a total of 33 witnesses other than the Applicant. The details of those interviews and the identities of those persons interviewed were not shared with the Applicant.

45. On 8 November 2023, Mr Frank Makepeace, Conseiller of the Chief Pleas of Sark, provided to the Applicant by WhatsApp messaging ("WhatsApp") an audio recording - which was taken covertly - of the meeting that took place on 31 July 2023 with the SMC and members of the Policy and Finance Committee of the Chief Pleas in Sark.

46. The Applicant provided the audio recording of the 31 July 2023 meeting to Dr Carter to consider during the investigation by WhatsApp on 15 November 2023. By email dated 20 November 2023, Dr Carter advised the Applicant that he had received the recording, that before listening to it he had taken legal advice from Legislative Counsel in Guernsey to ensure him doing so was lawful. He confirmed that he had listened to the entire recording and he said that he had fully examined and considered the recording in the context of the investigation. By email dated 21 November 2023, the Applicant thanked Dr Carter for confirming that he had listened to the whole recording and she made representations about her concerns on the content of the audio recording. She stated *inter alia*:

"What is of great concern is the fact that it is clear that from this recording that there has been a whole series of communications between Dr Anthony Beaumont and Dr Andrew Foulkes and Dr Peter Rabey. Which fits in with all of the other evidence that I had, including the TEAMS meeting between the SMC, Anthony Beaumont and Andrew Foulkes

on 31 July. All of which occurred even before a formal complaint had been lodged by the SMC, which only followed after the 1st August."

47. Dr Carter's report marked "Private and Confidential" is dated 12 December 2023. The report comprises four Parts:

    a. Part A – Findings and Conclusions relevant to the Terms of Reference.
    b. Part B – Recommendations relevant to the Terms of Reference.
    c. Part C - Additional Issues.
    d. Part D – Recommendations relevant to the Additional Issues.
    e. Part E – Appendices, including statements taken by Dr Carter from witnesses.

48. In Part A of his report, Dr Carter stated that he listened to the audio recording of the 31 July 2023 meeting and he stated that in his opinion, nothing included within the recording was directly relevant to the TORs for the investigation. The report is redacted in parts and the names of all witnesses appear as ciphers. The Applicant is referred to as "Dr X". The only document furnished to the Court in relation to Part E is the statement of the Applicant. Evidence to support the investigation was obtained by undertaking interviews, reviewing medical records and reviewing correspondence. The methodology in respect of the witness statements was described by Dr Carter as follows:

    "Interview statements were created from the contemporaneous notes made by the investigator.

    These interview statements were shared with the interviewees to allow for any amendments or corrections. Once the statements were finalised then the interviewee provided written confirmation via email that they were an accurate account. These emails remain in the personal possession of the investigator.

    In the case of the interviewees the interview statement flows in a simple narrative which was prompted by the questions."

49. At Section 1 of Part C of the report, Dr Carter stated:

    "The complexity of this investigation is vast, not least because the contractual, personal and professional issues are intertwined. Given the strength of feeling on the island, and the sheer volume of information provided to me, it would be amiss of me to ignore all that information.

    Dr Rabey has asked me to provide a supplementary report capturing these issues"

50. The issues addressed by Dr Carter in Part C were these: the mental health of the Applicant, the prescribing of medication by the Applicant for herself and family, communication skills, leg ulcer dressings, acute care, indemnity, Joint Emergency Services Control Centre (JESCC), future provision of medical care on Sark and Island GPs being employed in additional roles. On the subject of prescribing for self and family, Dr Carter made findings that the Applicant had been prescribing for herself and for her husband. He recommended that the Applicant *"must immediately stop prescribing for herself and anyone with whom she has a close personal relationship"* and he drew attention to relevant GMC Guidance. The Applicant had no knowledge that Part C had been undertaken until she was furnished with the report.

51. The Applicant was not interviewed in relation to TOR 3. A catalogue of negative findings about the Applicant were reached by Dr Carter on TOR 3:

> *"5.3.1 The Sark Medical Committee is made up of 4 non-medical Conseillers (Chairman Person [redacted], Person [redacted], Person [redacted] and Person E). The inclusion of retired anaesthetist, Person [redacted], as an ex-officio member provides a medical perspective though I note that Person [redacted] does not have experience of working in primary care.*
>
> *5.3.2 Nobody I spoke to think the relationship between Dr X and the SMC is good and both parties must take some responsibility for this (appendix 11).*
>
> *5.3.3 In addition to a dysfunctional relationship with the SMC, multiple colleagues have expressed concern working alongside Dr X.*
>
> *5.3.4 In August 2023 Person [redacted] (the Chief Pharmacist) offered to help to make 'urgent priority' changes (appendix 2) but Dr X did not engage with her.*
>
> *5.3.5 Two witnesses (appendix 5, 19) are worried that Dr X's lack of collaborative working with the island's volunteer community first responders is risking an en masse resignation which would have an enormous adverse effect on the provision of emergency care on Sark.*
>
> *5.3.6 In December 2022 Person [redacted] had a "heated discussion" with Dr X (appendix 12) after she declined to attend a patient, leaving Person [redacted] feeling vulnerable. Whilst the GP's actions [regarding the patient management] may have been appropriate the professional interaction was not.*
>
> *5.3.7 Two members of JESCC (appendix 13, 14) are upset with Dr X's response to their [emergency] messages. They fear a convoluted conversation and the inappropriate use of resources such as the marine ambulance.*
>
> *5.3.8 One nurse (appendix 18) has resigned from the Sark Medical Centre feeling undervalued and addressed as a "subordinate" by Dr X.*
>
> *5.3.9 Multiple witnesses (appendix 15, 18, 19) have raised concerns about Dr X's leadership skills which are often lacking especially in emergency situations. It is important to note that some witness (appendix 9 and 16) regards Dr X as a competent GP.*
>
> *5.3.10 Multiple witnesses (appendix 2, 5, 19) have highlighted Dr X's refusal to work collaboratively in that she would not produce PGDs for the nurses when asked.*
>
> *5.3.11 One witness (Person [redacted], appendix 21) who volunteered to help transform prescribing services into a legal process now often gets ignored by Dr X."*

52. Dr Carter made a series of recommendations in relation to TOR 3 which included the following:

> *"1.2.10 ...Dr X has complex issues with her contract (and therefore the Sark Medical Committee). These are intertwined with personal and professional issues. Dr X often confuses*

the issues. Acrimony between Dr X and the SMC is adversely affecting the running of Sark Medical Centre."

53. At Part B of his report, Dr Carter set out multiple recommendations in relation to each of the TORs that were specific to the SMC.

Dr Carter's Report provided to the Applicant's Responsible Officer and to the Respondent

54. Dr Carter sent his finalised report to the Respondent and to the Applicant's UK Responsible Officer, Dr Alison Taylor on 14 December 2023.

Meeting between the Respondent and the Applicant

55. The Respondent arranged a meeting with the Applicant to inform her of the report and to introduce her to the initial findings. The meeting took place on 15 December 2023. The Applicant was accompanied by Mr Frank Minal. The Respondent avers that the Applicant had indicated that she would have liked to be accompanied by more than one representative at that meeting but that in his view that would have delayed what was simply a preliminary meeting to introduce the report before sending her a copy. He decided that they should proceed with her BMA representative, Mr Minal. The Applicant was advised by the Respondent that she would not be provided with appendices or the list of witnesses because it would be possible to identify individuals from them.

56. Following the meeting, on 15 December 2024, the Respondent sent the report to the Applicant by email. He advised her that he would let her send it to anyone she wanted to share it with but stated "please treat as confidential". He stated:

> *"As we just discussed, I will share necessary information with the Sark Medical Committee including the recommendations relevant to them. I am going to share the report with our GMC Employment Liaison Adviser for advice – this is common practice and does not mean that you have been referred to or are under investigation by the GMC."*

57. On 18 December 2023, the Respondent sent a copy of the report to Ms Jane MacPherson, his GMC Employment Liaison Advisor (GMC ELA).

58. On 20 December 2023, the Respondent consulted with Dr Cochrane-Dyet and agreed with her that although on the face of things there were some issues to address regarding the doctor's practice, they would not require urgent action such as suspension, that a remediation plan looked to be an appropriate level of response and they identified agreed areas of concern.

59. The Respondent had a virtual meeting with Applicant again on 21 December 2023, this time with her medical defence organisation representatives from the British Medical Association and the Medical and Dental Defence Union of Scotland. The Applicant requested 6 weeks to respond to the report which the Respondent agreed to. The Respondent asked the Applicant to respond in more detail to two of the concerns as requested by GMC ELA. He advised the Applicant that he was not proposing to suspend her or impose restrictions on her practice on the basis of the information her UK Responsible Officer and he had at that time and that on the face of it, things looked to be remediable. The Respondent suggested an early meeting with the Applicant and her representative, her UK Responsible Officer and with him to discuss what

remediation might look like. The Respondent asked for responses concerning the matters that had been flagged by the GMC ELA as needing further input.

60. On 22 December 2023, the Respondent sent to the SMC the recommendations of the report that related to the SMC.

61. By letter dated 10 January 2024, the Applicant set out her response to the two concerns in Part C of the report which the GMC ELA had requested. Those concerns related to self-prescription and to an allegation that she had not examined a patient. The Respondent forwarded that response to the GMC ELA on the same date.

Correspondence between the Applicant's Advocates and the Respondent

62. By letter dated 18 January 2024, AFR Advocates wrote to the Respondent on behalf of the Applicant. They stated that the disclosure of the report failed to consider and include relevant and crucial evidence of the Applicant and that the Applicant was at that time preparing a substantive response to the report consequently rendering any dissemination of the Report premature before the Applicant has had an opportunity to properly respond to it.

63. By letter dated 26 January 2024, the Respondent advised the Applicant's Advocates that *"I remain of the view that the report is balanced and fair…I consider the report to have raised substantive concerns about the [Applicant's] practice and that the Report had already been shared with the GMC Employment Liaison Advisor and the Applicant's UK Responsible Officer, notwithstanding AFR's letter of 18 January 2024 and the absence of the Applicant's response to the Report."*

64. By letter dated 30 January 2024, AFR Advocates requested further time to provide a response to the Report. The Respondent agreed to extend time for a response to be provided by 9 February 2024.

65. By letter dated 9 February 2024, AFR set out the Applicant's formal response to the report. In her affidavit, the Applicant sets out some of the issues that she raised in her formal response to the report:

> *"16.7.1 The deviations from the prescribed process set out in the Ordinance;*
>
> *16.7.2 The abuse of process given my successful Appraisal and Revalidation only four months prior to the launch of the investigation;*
>
> *16.7.3 The conflicts of interest regarding the appointment of the Authorised Person;*
>
> *16.7.4 Failure to take into consideration the "system and context in which the doctor works and her contractual obligations" as contained in the TOR;*
>
> *16.7.5 Investigating issues which fall outside the scope of the TOR; and*
>
> *16.7.6 Failure to properly consider her evidence as well as recent independent reviews which had already been conducted into the provision of primary care in Sark such as the Report conducted by Island Health which found many failings with the practice in general but no personal failings on my part, and in fact commended my services to the SMC."*

66. The Respondent replied to the 9 February 2024 letter by letter dated 28 February 2024. On the preliminary stage of the investigation, the Respondent said this:

"Dr Borchardt was informed by the Sark Medical Committee of concerns about her practice as early as February 2023, raised as matters to be considered at her appraisal process. Her UK Responsible Officer was copied into that letter. At the end of July 2023 concerns were raised with me in my role as Responsible Officer for doctors in the Bailiwick by an NHS Senior Professional Standards Advisor. My preliminary assessment of concerns concluded that the concerns might raise a substantive issue regarding the doctor's fitness to practice. I informed Dr Borchardt on 1 August that concerns were being raised with me that would need to be investigated, and on 23 August I informed her that, having obtained further information and discussed matters with her UK Responsible Officer, I would be conducting an investigation in line with the Ordinance."

67. The Respondent stated in his letter that the revised TORs (following Dr Carter's appointment) were the same as the TORs sent earlier apart from the expected date of completion. He stated that the report

"appropriately took into consideration evidence and considerations raised by Dr Borchardt in relation to the terms of reference. The report from Island Health was nothing to do with my investigation of concerns about Dr Borchardt's practice but was provided to the Authorised Person as background information. Furthermore, in my opinion the investigation took into account sufficiently the system and context in which Dr Borchardt worked in Sark, and her contractual obligations."

68. On Part C of the report, the Respondent stated that he considered that Dr Carter had a duty to raise those issues and he said that whilst the Applicant had replied to two of those matters on 10 January 2024, if she felt that she had not had the opportunity to respond to any of the other substantive issues, she was now welcome to address them in writing to him.

69. Again on the preliminary stage to the investigation and his role as Responsible Officer, the Respondent said this:

"The Sark Medical Committee asked that certain matters be addressed by Dr Borchardt through her appraisal process. A case manager from the NHS England (South East) Professional Standards team informed Dr Borchardt that "her case had been closed with no further action" in April 2023. However, it subsequently (late July 2023) was brought to my attention as Responsible Officer for Dr Borchardt that the NHS England assessment team recommended that some issues be investigated by the SMC but that they had failed to communicate that to the SMC, and also that further concerns had arisen since then. As Responsible Officer, I had a duty to take a preliminary view on those concerns….and that led to this investigation. Dr Carter was informed of that case manager's communication as part of the background information about the investigation."

70. Finally, the Respondent advised AFR Advocates that:

"*I stand by the process used to investigate the concerns raised with me. I consider that Dr Carter's investigation was robustly carried out and properly took into account relevant evidence and information provided by Dr Borchardt in a manner consistent with his Terms of Reference, and that Dr Borchardt has a fair and reasonable opportunity to respond to the concerns. This includes issues relating to the Sark Medical Committee, e.g. Part C of the Report, and para 1.3 (Recommendations specific to Sark Medical Committee) of Part D of the Report. Furthermore, I consider that there has been no abuse of process nor failure*

to comply with the Ordinance. I have concluded that the findings of the Authorised Person raise a number of substantive concerns regarding Dr Borchardt's fitness to practice, as evidenced by serious and persistent failure to adhere to the standards set out in Good Medical Practice"

The Resolution Notice

71. The Applicant was issued with a Resolution Notice from the Respondent. The deemed service date was 4 March 2024.

72. The Resolution Notice stated *inter alia*:

> *"Upon considering Dr Carter's report of 12th December 2023 and his findings in that report, I have decided, under section 22 of the Regulation of Health Professions (SIC) (Medical Practitioners) (Sark) Ordinance, 2017 ("the Ordinance"), that the concerns investigated by Dr Carter have raised the following substantive issues:*
>
> *1) Sark patients with long-term conditions have not been managed in line with best practice guidelines.*
> *2) You have not consistently complied with Good Medical Practice in working collaboratively with colleagues.*
> *3) Arrangements for the safe management of medicines have not been in place.*
> *4) You have not complied with Good Medical Practice in prescribing for yourself and your family.*
>
> *I have further decided under sections 22(3) and 24 of the Ordinance to serve this Resolution Notice on you."*

73. The Resolution Notice contained a table with actions, changes or steps that the Applicant was required to complete *"in a manner that is measured and evidenced in accordance with the table if you accept this Notice, and the time by which each must be completed."* A section in the Resolution Notice entitled "Important Information" advised the Applicant that she had up to 14 days to accept the Resolution Notice calculated from the date of service and that if she did not advise the Respondent within that time frame that she accepted the Notice, she would be taken as having rejected it under Section 24 of the Ordinance. This section also advised as follows:

> *"3. If you reject this Notice, or are taken as having rejected this Notice, the concerns raising the substantive issues set out in this Notice are not to be taken as having been resolved, and I will be forced to consider next steps under the Ordinance.*
>
> *4. If you accept this Notice within the 14 days, but do not complete the actions, changes and other steps required of you within the time specified in this Notice for each of these, the concerns raising the substantive issues are not to be taken as having been resolved, and I will be forced to consider next steps under the Ordinance.*
>
> *5. If you accept this Notice in the 14 days AND complete the actions, changes and other steps set out within the time specified in this Notice for each of these, then the concerns will be taken as resolved."*

Rejection of the Resolution Notice

74. By letter dated 16 March 2024, AFR Advocates advised the Respondent that the Applicant *"refutes the integrity of the [Dr Carter's] Report itself and the consequential Resolution Notice*

is equally refuted." The letter stated that if the Resolution Notice was not set aside or the Applicant's invitation to meet and discuss matters is not accepted, she would have no option but to seek relief from the Royal Court.

75. The Respondent arranged a meeting with the Applicant to take place on 26 March 2024 and he included her UK Responsible Officer. The meeting did not take place as the Applicant was off on sick leave.

Without Prejudice Meeting between the Applicant and the Respondent with their legal advisers

76. On 5 April 2024, a without prejudice meeting took place between the Applicant and the Respondent with their respective legal advisers. At the meeting, the Applicant advised the Respondent that she had resigned her position in Sark practice effective in one month.

The Applicant's Evidence

77. In her first affidavit, the Applicant set out her concerns about the Respondent's decision-making. The Applicant alleged that the commencement and the carrying out of the investigation amounted to an abuse of process. She said that the Respondent was inconsistent as to who raised the concerns/complaints about her practice. Had the SMC had concerns regarding her, these should have been brought to the attention of the Respondent in the first instance without being brought to the attention of other persons or bodies until the Respondent had had an opportunity to consider them. Further, the Applicant alleged that the TORs concerned issues that she herself had raised with the SMC as early as 8 October 2020. The TORs and the report sought to hold her responsible for precisely the matters of concern regarding the failings of the SMC which she had raised more than 2 years prior to the investigation. She said that the report deviated from the TORs.

78. The Applicant expressed her concerns that Part C fell outside the scope of the TORs and made *"incredibly serious allegations"* against her. The allegations were published in the report and disseminated to the GMC and the NHS England without providing her with the opportunity to first address the allegations made. She said that in an attempt to remedy that, she provided the Respondent with a formal statement addressing two of the allegations which the Respondent had selected for her to explain. However that information was not included or further disseminated to those already in possession of the report or its contents. The Applicant further alleged that on several occasions, her requests to be accompanied by legal representation since the commencement of the investigation were refused.

79. The Applicant addressed her concerns regarding Dr Carter's investigation. She alleged that the report was flawed and incomplete. It failed to consider and include crucial and relevant evidence. She said she was interviewed during the course of the investigation by Dr Carter at his request on 21 October 2023 and on 6 November 2023 prior to him undertaking interviews with 14 witnesses. She said that she requested further meetings with Dr Carter which took place on 8 November 2023 and 13 November 2023 and a further witness was interviewed by Dr Carter thereafter. The Applicant stated that the chronology of interviews clearly indicate that she was not afforded the opportunity to respond to the information obtained by Dr Carter before it was published at face-value in the report. Her formal statement to Dr Carter, which she signed, was not included in the report. The Applicant expressed her concern that the report did not consider or contain crucial and relevant evidence pertaining to Dr Carter's findings. She was concerned that the dissemination of the report would cause irreparable harm to her professional reputation.

80. In her second affidavit, the Applicant said that whilst she was provided with a copy of the report on 15 December 2023, she had subsequently learned that the document which was provided to her was not the full Report as it omitted to include witness statements from witnesses which remained unknown to her, the formal statement she had sent to Dr Carter on 25 November 2023 and she complained that vital information had been redacted in the report such as the names of witnesses and the dates on which they made their statement. She said that she had not been provided with a full copy of the report and had therefore not been provided with the full opportunity to address the allegations made against her or be presented with the alleged evidence supporting such claims as contained in the report.

81. The Applicant also referred to and exhibited the audio recording of the meeting of SMC and Policy and Finance Committee of the Chief Pleas that took place on 31 July 2023 which was provided to her by Conseiller Makepeace on 8 November 2023 by WhatsApp. The Applicant highlighted a number of statements in the audio recording that in her view supported her claim:

> *"8.1 Concerns regarding my practice as a medical doctor*
>
> *8.1.1. Paragraphs 21 – 24 of the Cause set out how the Respondent has been inconsistent as to who or what entity raised any alleged concerns regarding my practice as a medical doctor.*
>
> *8.1.2. However, at time mark 00:05:32 of the Audio Recording Transcript, Speaker 3 (who I can confidently identity (sic) as Sandra Williams, Deputy Chair of the SMC ("Conseiller Williams")) states "There's been instigated an inquiry into her practice by NHS England … We haven't instigated it".*
>
> *8.1.3. The SMC were aware that the NHS did not have any concerns regarding my practice as a medical doctor which is confirmed by several comments in the Audio Recording Transcript:*
>
> *8.1.3.1 at time 00:17:58 Conseiller Williams sets out the concerns of the SMC and confirms that "all the issues we raised in her appraisal were written off by [the NHS] as being merely contractual rather than professional"; and*
>
> *8.1.3.2. at time mark 00:22:30 Conseiller Williams states that the NHS had come back to the SMC and hadn't acknowledged any concerns, in fact, the NHS said I had "passed with flying colours".*
>
> *8.1.4. There are several references to an alleged apology by the NHS over the phone to the SMC (See time mark 00:17:58 and 00:24:30) for dismissing the concerns raised by them regarding my practice, and which were discussed and considered between the NHS and me in early 2023. However, I have not received any such notification from NHS England in relation to an "apology" from the NHS or that they are changing the outcome of my appraisal.*
>
> *8.2 Failures of the investigation*

8.2.1. I believe that the SMC has/had an agenda to terminate my appointment as the Sark Doctor and has instigated and encouraged the investigation against me and that the investigation and subsequent Report failed to acknowledge this, despite me providing evidence supporting this to both Dr Carter and the Respondent. The following statements from the Audio Recording Transcript support this:

8.2.1.1. At time mark 00:05:32 Conseiller Williams states "Well we found, shall we just cut to the chase and say we found ourself in a situation where it's looking very likely that the doctor's contract is going to be untenable and we don't think we want to keep her";

8.2.1.2. At time mark 00:10:17 Conseiller Williams states "We are seriously working towards her resigning";

*8.2.1.3. At time mark 00:45:25 Speaker 6 who I can confidently identify as Conseiller John Guille (Chairman of the Policy and Finance Committee) ("**Conseiller Guille**") and Speaker 2 who I can confidently identify as Anthony Beaumont (co-opted member of the SMC) state the following "I'd be surprised if she didn't just straight walk because this has been going on for a while and I've thought she would've walker if she was going to walk in a fit. I thought she would've gone a while ago, but maybe if she's going to be investigated";*

8.2.1.4. At time marks 00:49:53 and 00:50:08 I believe the comments made by Conseiller Williams and Dianne Marshall (Assistant Chief Secretary) state "sack her" despite the typographical errors generated by the voice recognition software; and

8.2.1.5. At time mark 00:54:49 Conseiller Williams states "I think the minute that she finds out that there's been a review, she's going to walk … she's not going to stay here and take it".

*8.2.2. I believe that not only did the SMC have an agenda to terminate **my** appointment as the Sark Doctor, they sought to do so in a manner which would be most convenient and cost beneficial to them. At time mark 00:23:11 Conseiller Guille states "It strikes me another way that this could end badly would be for the committee to be sued by the doctor because obviously everyone's we're all patients of hers. It's all far too close. So the quicker, we, the committee can remove yourselves from the investigation, we then mitigate to getting sued from that direction"."*

82. The Applicant said that she gave the audio recording to Dr Carter to consider during the investigation by WhatsApp on 15 November 2023. She sent to him her concerns that the SMC had an agenda to terminate her appointment as the Sark doctor and that the collusion between Dr Anthony Beaumont (a co-opted member for the SMC), Dr Andrew Foulkes and the Respondent *"blatantly contravened the prescribed process for the investigation contained in the Ordinance"*. She complained that the Respondent should have considered the contents of the audio recording before accepting the report in its final form and disseminating it. Had he done so, he would or should have known that not only were the SMC using his position to achieve their agenda, but they also held little faith in him to do so. This she said was supported by the audio transcript of the meeting in which Conseiller Williams and Conseiller Guille stated at time marks 00:42:58 and 00:42:56 respectively "*we met with him [Rabey] on numerous*

occasions ... is a waste of space ... you need to go above him" and "he [Deputy Brouard] might talk a good game, but he isn't actually that keen on helping the other islands".

83. On her concern that the investigation was procedurally flawed and incomplete, the Applicant referred to an example at Section 1.5.3 of Part C which was about a prescription error: a patient received only one month's supply of the Apixaban medication when the patient's discharge letter from the hospital stated that she should be prescribed with three month's supply of Apixaban. She said that this error occurred as a result of mistakes by two separate locums when she was on leave. She said she alerted the Respondent to this in an email dated 14 August 2023 and subsequently the SMC on 9 November 2023. The Applicant complained that despite having taken that proactive action, Dr Carter investigated the incident and included the accounts of the two locums involved without referencing the content of her email or providing her with the opportunity to respond to the accounts of the two locums. Dr Carter concluded that he is "unable to reconcile" the incident and yet he included it in the report. The Applicant said that the Respondent was aware of the Apixaban case by virtue of her email to him dated 14 August 2023 which she resent to him on 9 November 2023 and nevertheless accepted the allegations and content on the Apixaban case and disclosed it notwithstanding.

84. The Applicant said that there had been no queries or concerns regarding her fitness to practice in the 24 years that she had practised in territories including the Bailiwick of Guernsey, England, Isle of Man, Scotland and the Shetlands, the Hebrides and Belgium. She exhibited eleven testimonials of medical professionals practising in the Bailiwick of Guernsey who attested to her fitness to practice and whose evidence and insight was not sought or considered during the investigation.

The Evidence of Conseiller Frank Makepeace and Mrs Sarah Vivienne Beaumont

85. In his affidavit, Conseiller Makepeace said that on or around 1 August 2023, he was provided with an audio recording via WhatsApp from a concerned attendee of a meeting that took place on 31 July 2023 at the Assembly Rooms of the Chief Pleas of Sark. He was advised that the audio file provided to him was a recording of the meeting which was attended by members of the SMC and members of the Policy and Finance Committee of the Chief Pleas. Conseiller Makepeace confirmed that save for a few typographical errors which were automatically generated by the software, the audio recording of the meeting on 31 July 2023 accurately reflects the matters discussed. He said that by virtue of his own dealings with the various persons recorded on the audio recording, he confirmed the identities of the speakers as follows:

> *"8.1. Speaker 1: Conseiller Fern Turner (Member of the Policy and Finance Committee);*
>
> *8.2 Speaker 2: Anthony Beaumont (co-opted member of the SMC);*
>
> *8.3 Speaker 3: Conseiller Sandra Williams (Deputy Chairman of the SMC);*
>
> *8.4 Speaker 4: Conseiller Helen Plummer (Chairman of the SMC);*
>
> *8.5 Speaker 5: Assistant Chief Secretary Dianne Marshall (Civil Servant);*
>
> *8.6 Speaker 6: Conseiller John Guille (Chairman of the Policy & Finance Committee);*
>
> *8.7 Speaker 7: Conseiller Scott Sullivan (Member of the SMC); and*
>
> *8.8 Speaker 8: Conseiller Jolie Booth (member of the SMC and the Policy and Finance Committee)"*

86. Conseiller Makepeace said this:

"10. It is my view that the SMC sought to remove the Applicant as the Sark Doctor by perpetuating false and misleading statements regarding her practice as a medical doctor. In addition, the SMC is well acquainted with the way of life in Sark as well as the nature of the complaints raised by Sark residents (if any) and I am disappointed that they did not relay this to Dr Carter in his investigation, as they prioritised their own self-preservation. At time mark 00:23:11 Speaker 3 (who I can confidently identify as Conseiller Sandra Williams) states "It strikes me another way that this could end badly would be for the committee to be sued by the doctor because obviously everyone's, we're all patients of hers. It's all far too close. So the quicker we, the committee can remove yourselves from the investigation, we then mitigate to getting sued from that direction".

11. I am concerned that the SMC have utilised Dr Rabey and the investigation as a 'weapon' against the Applicant as a way to remove her as the Sark Doctor. I believe the SMC were worried about the legal ramifications and pushback from the Applicant were they to give notice to her in the usual manner. Instead, they have sought to try and use the threat and stress of a professional investigation to achieve this aim, which I consider to be abusive, spineless and vexatious."

87. In her affidavit, Mrs Sarah Vivienne Beaumont, a resident of Sark and wife of Seigneur Christopher Beaumont said that she met with Dr Carter and Seigneur Christopher Beaumont on 6 November 2023 at La Seigneurie, Sark. Mrs Beaumont said that on that occasion:

"We discussed Dr Carter's inability to understand the antipathy towards the Applicant, in fact, Dr Carter said "it's like a witch-hunt" ...

I asked Dr Carter about the Terms of Reference for his review. He said they troubled him because they had been written in such a way that there could be no separation of the Applicant's clinical practice from the provision made by the Sark Medical Committee. He went on to say that he felt that the Applicant is highly competent and he had no doubts about her clinically. He cited the case of Patient X who had been handled to a text book standard at which he marvelled given the infrequency of occurrence in this tiny community. We asked who had written the terms of reference, he explained that it was the Respondent. He asked how well the Respondent knows Sark, we explained that as far as we were aware he had never visited the Sark Practice and that we felt it to be pretty astonishing given that he is supposedly the Responsible Officer. I asked if Anthony Beaumont had been involved in the writing the TORs, he said he didn't know."

<u>The Respondent's Evidence</u>

88. In his affidavit, the Respondent stated that he is the Responsible Officer for all medical practitioners practising in Guernsey or Alderney under the Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance, 2017. This includes practitioners in the "local practitioners" class and practitioners in the "UK-connected practitioners" class. He was appointed as Responsible Officer by the States of Guernsey on 8th March 2016 and his appointment was extended by the States of Guernsey on 14th July 2021. The Respondent is the Responsible Officer for about 320 doctors on the Guernsey and Alderney Register and with a licence to practice. By virtue of being the Responsible Officer for both classes of practitioners in Guernsey and Alderney, the Respondent is also the Responsible Officer for both classes of medical practitioners practising in Sark under the Regulation of Health Professions (Medical

Practitioners) (Sark) Ordinance, 2017. The Respondent stated that the Applicant performs some work in the United Kingdom and this means that she has a UK Responsible Officer in accordance with the Medical Profession (Responsible Officers) Regulations 2010 as amended. Her UK Responsible Officer oversees her annual medical appraisals and makes recommendations for medical revalidation – usually 5-yearly – to the General Medical Council. By virtue of having a designated body in the United Kingdom, the Applicant falls within the UK-connected practitioners class under Sark Ordinance.

89. The Respondent then set out his responsibilities for a UK-connected doctor working in Sark as set out in Schedule 6 of the Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance, 2017 which includes where appropriate taking all reasonably practicable steps to investigate concerns about the practitioner's fitness to practise raised by any person and "where appropriate, refer concerns about the practitioner to the practitioner's responsible officer in the United Kingdom or to any other relevant body or officer for a relevant purpose." In addition, he is responsible for dealing with concerns about any registered practitioner referred to him under Part III of the legislation including any referral by the SMC. He also has a duty to cooperate with the UK Responsible Officer of any practitioner working in Sark as well as the General Medical Council respect of their functions under the Medical Act 1983.

90. The Respondent set out the background to the raising of concerns with him about the Applicant. He said that under Section 18 of the Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance, 2017, he must assess whether any concern identified by or referred to him raises a substantive issue. He said:

> *"My preliminary assessment of the concerns that had been raised with me by Dr Foulkes was that they potentially raised a substantive issue in that they related to the doctor's performance against GMC standards and that they had not been properly investigated as they should have been."*

91. The Respondent said that he agreed the TORs with Dr Taylor on 1 September 2023 and they were shared with the Applicant on 5 September 2023. The Applicant objected to Dr Warshafsky as an investigator and he subsequently appointed Dr Carter as the Authorised Person to conduct the investigation on 26 September 2023. He said that he briefed Dr Carter on the background to the investigation and provided him with background information including the Island Health Report. He stated:

> *"The TORs required the Authorised Person to investigate a list of issues relating to the doctor's practice. The concerns clearly relate to the doctor's practice against relevant GMC standards. The TORs drew the attention of the Authorised Person to the unique circumstances of Sark…"*

92. The Respondent referred to Section 4 of Part A of the report which states that evidence in support of the investigation was obtained by undertaking interviews, reviewing medical records and reviewing correspondence. He said:

> *"A wide selection of persons was interviewed and section 4.8 outlines that each Term of Reference would be investigated by interviews (including an interview with Dr Borchardt, except in respect of concerns over working collaboratively with colleagues)"*

93. The Respondent said that after his report was completed, Dr Carter sent it to him and to the Applicant's UK Responsible Officer on 14 December 2023. He said:

"I decided that I needed Dr Borchardt to respond to the report and arranged a meeting for the next day to inform her of the report and introduce her to our initial thoughts."

94. The Respondent said that whilst the Applicant had requested to be accompanied by more than one representative at the 15 December 2023 meeting, he considered that that would have delayed what was simply a preliminary meeting to introduce her to the report before sending her a copy and he decided to proceed with her BMA representative who could make the meeting. He said that the Applicant was told that he would not be sending the appendices or the list of witnesses to her because it would be possible to identify individuals from them.

95. The Respondent set out in his affidavit an explanation for providing the Applicant with the redacted report:

"I redacted the report and withheld the Appendices in order to protect the identities of witnesses. The withheld Appendices (parts E and F of the report) included a statement recording Dr Borchardt's responses to the concerns raised in the TORs (this statement was verified by her). Protecting the identities of the witnesses was done partly to protect Dr Borchardt from allegations of discrimination if any issue arose in the future about her treatment of them as patients, and partly to protect witnesses, some of whom had expressed concern that they might face some sort of repercussion from Dr Borchardt for having provided evidence to the investigation and who had been told that their identity would be protected as much as possible."

96. The Respondent said that him sending a copy of the report to his GMC Employment Liaison Officer (GMC ELA) "is common practice" as Responsible Officers are expected to keep the GMC ELA informed about investigations and concerns and this was not the same as a referral to the GMC. He said that it was agreed that the concerns did not appear to reach the threshold for a formal referral to the GMC at that stage. The GMC ELA requested the Respondent to obtain further information about two of the concerns from Part C of the report. The Respondent said that he also met with Dr Cochrane Dyet on behalf of the Applicant's UK Responsible Officer and agreed that although on the face of it there were issues to address regarding the doctor's practice, they did not require urgent action such as suspension and that a remediation plan looked to be an appropriate level of response.

97. The Respondent said that at the meeting that took place with the Applicant and her representatives, he indicated that on the face of it "things looked to be remediable" and neither the Applicant nor her representatives raised any objection to the content of the meeting or any proposals made.

98. On the letter from the Applicant setting out her response to the two concerns on Part C of the report, the Respondent said:

"I concluded that the issue of the patient who claimed not to have [sic been] examined was now closed as the doctor's response was convincing, and I noted that she accepted that prescribing for herself and her family was not in line with GMC standards and her proposal to stop doing so."

99. On the Applicant's full response to the investigation sent through her Advocate on 9 February 2024 and on his subsequent consideration of the case, the Respondent stated:

"46. I considered the response from the doctor to the two concerns which had been sent to me on 10 January 2024 and her full response of 9/2/24 in light of the Report. I also had the benefit of considering the statement verified by Dr Borchardt in response to the TORs (which was included in part E of the Report that was redacted from the version that I provided to Dr Borchardt).....I reviewed all that information and the findings of the report against the relevant standards from the GMC contained in Good Medical Practice and associated guidance.

47. I considered that all parts of the Report, including Part C, were relevant to my determination that there were substantive issues about Dr Borchardt's practice. Strictly speaking Part C does not directly relate to a concern which was referred to the Authorised Person under his TOR. However, the facts uncovered in the course of the investigation by the Authorised Person raised issues which were brought to my attention (Dr Borchardt prescribing for herself and members of her family, and other issues). These issues raised possible breaches of GMC standards in GMP and were reported on in Part C of the Report. Part D of the Report maps the issues to the relevant GMC standards and makes recommendations for the doctor and the SMC. Part C raised several issues. I did not consider that there was sufficient information to draw any adverse conclusion about Dr Borchardt's practice in the matter of the Apixaban prescription. In a case where a patient had informed the investigator that Dr Borchardt had not examined them when her notes state that she had, I considered Dr Borchardt's response to be convincing and I did not draw any adverse conclusions regarding that matter. Regarding the concerns raised about her health, I had recommended that Dr Borchardt undergo an Occupational Health assessment, however she assured me that she was resilient and not depressed, and I did not make a recommendation about this in my conclusions. However Dr Borchardt had been found to be prescribing for herself and her family in breach of GMC standards, and although I noted her mitigation, she had admitted to this when I invited her to respond about it. I considered that to be relevant and important information which formed part of the substantive issues I wished the doctor to address.

48. Any shortcomings of the medical infrastructure in Sark were not, and indeed should not have been, the focus of the investigation or the Report. I have no functions under the Sark Ordinance in connection with overseeing, evaluating or investigating the designated body of the practitioner (the Sark Medical and Emergency Committee). The Authorised Person was not investigating contractual or employment issues, but I was satisfied that he did take into account the circumstances of working in Sark and matters where these issues impacted on the performance of the doctor. He focused on the performance of the doctor against the standards in Good Medical Practice. The Report makes frequent reference to deficiencies of infrastructure in Sark, and in fact included a list of recommendations to the SMC for addressing those issues, see e.g.

1) *Part A, Medical provision on Sark (section 1.4)*
2) *Part B, Recommendations specific to Sark Medical Committee (section 1.3) – Part D,*
3) *Recommendations specific to Sark Medical Committee (section 1.3)*

Overall, I was satisfied that the unique conditions of working in Sark had been fairly considered by the investigator.

I considered Dr Carter's investigation to have been properly carried out, that it appropriately took into account information provided by Dr Borchardt, and that Dr

Borchardt had been given a fair and reasonable opportunity to respond to his concerns. This view was supported by the doctor's UK RO.

49. I concluded that the concerns investigated and addressed in the Report raised substantive issues. This was because, after taking into account all the circumstances in which she was working, there was evidence that Dr Borchardt had not complied with GMC standards in areas of her practice as a doctor for which she alone was responsible. Not complying with GMC standards is relevant to a doctor's fitness to practice. It was my view that these matters needed addressing."

100. The Respondent said that he concluded that there was no case to answer or no need to require remediation regarding several of the TORs but he concluded that the Applicant's practice required improvement in the following areas: the management of patients with long-term conditions as demonstrated by the examples in the report; working collaboratively with colleagues; safe medicines management; and the prescribing of medication by the Applicant for herself and for her family.

101. The Respondent said that a Resolution Notice is not a sanction against the doctor but it provides a way for the doctor to demonstrate learning and to amend their practice to become compatible with the acceptable standards. There is no sanction prescribed for non-compliance with a resolution order under the Ordinance but the Responsible Officer would have to consider the next steps. He said that if a practitioner accepts a Resolution Notice and completes the actions, changes and other steps set out in the notice in the specified time frame, the concern is taken as resolved and that that is equivalent to a "remediation plan" which is a common response in the NHS to concerns about a doctor. The Respondent said that he decided that a remediation plan – by way of a Resolution Notice - was a reasonable and proportionate response to the level of concern raised by the investigation. The Applicant's UK Responsible Officer agreed with his conclusions that a remediation plan would be an appropriate level of response in the first instance and she agreed to assist the Respondent in the drafting of the plan.

102. In his affidavit, the Respondent set out, *inter alia*, his response to the evidence filed on behalf of the Applicant:

a. he said that he did not disseminate the report to the Professional Standards Medical Directorate NHS England. He considered it likely that the Applicant's UK Responsible Officer might have shared the report with them.

b. he took issue with the Applicant's evidence that she subsequently learned that the document provided to her was not the full report. He said that the Applicant was informed of this and the reasons for it at the meeting on 15 December 2023.

c. he said that the appraisal that the Applicant underwent with the NHS England was not an investigatory process. The appraiser was not acting as investigator and only has the evidence that the doctor provides. Any investigation would happen outside the appraisal setting.

d. with regard to the audio recording of the meeting on 31 July 2023, the Respondent said that there was no reason for him to listen to a recording of what should have been a confidential meeting when the investigator had done so and had concluded that it did not affect his investigation or findings.

e. the Respondent said that he had no interest in achieving any agenda of the SMC beyond investigating concerns raised with him about the doctor's practice.

f. he took issue with the Applicant's evidence that there had been no queries or complaints regarding her fitness to practice in the 24 years that she had practised. A previous concern which the Applicant and he were both aware of which involved advice from the GMC and intervention by her Clinical Director and he subsequently discussed it with the Applicant.

g. with regard to the Applicant's concern that the evidence of testimonials on her behalf was not sought or considered during the investigation, the Respondent said that she was invited to submit evidence to Dr Carter and presumably could have submitted them then or to him as part of her response to the report. She did not do so and they in any case did not appear to be relevant to the investigation.

h. in response to Mrs Beaumont's affidavit, the Respondent said that he could not comment on the accuracy of the conversation she reported with Dr Carter but he noted that Dr Carter had submitted in his report an account of the meeting at Appendix 9 to Part E and he said that that record was acknowledged to be an accurate account of the meeting by her husband, the Seigneur. The Respondent said that he had visited Sark on many occasions and had met the Applicant and her immediate predecessors there at meetings with the SMC.

i. in response to Conseiller Makepeace's affidavit, the Respondent denied having ever colluded with the SMC against the Applicant and said that he simply ensured that the concerns raised with him were investigated in line with the Ordinance.

103. The Respondent said this in conclusion:

> *"....I have again considered the matter in awareness of all of the information that I have been presented with. What has been presented has not changed my mind and would not have done so at the time I made by decisions. I believe that there are validated concerns relating to the practice of Dr Borchardt and that the response of a resolution notice was fair, reasonable and proportionate."*

The Legislative Framework

104. The key statutory instrument for this case is The Regulation of Health Professions (Medical Practitioners) (Sark) Ordinance, 2017 ("the Sark Ordinance"). Part III of the Ordinance sets out the relevant procedures where concerns are raised about a registered medical practitioner.

105. Pursuant to Section 17(1) and (2) of the Sark Ordinance, where a concern about a registered practitioner comes to the attention of any practitioner, any designated body, the Medical and Emergency Services Committee of the Chief Pleas of Sark ('the Sark Committee') or the States of Guernsey Committee for Health & Social Care ('the Guernsey Committee'), the person concerned must refer the concern to the responsible officer for the practitioner concerned as soon as practicable. "Concern" in relation to any practitioner is defined under Section 47(1) of the Ordinance as *"any concern, allegation or complaint regarding the practitioner that has been raised by any person (including a person specified in Section 17(1))"*.

106. Pursuant to Section 17(3), the responsible officer for the practitioner concerned may at any time by written notice to any of the persons to who the concern was raised require the person to report to the responsible officer within a time specified in the notice on any investigation into the concern conducted by or on behalf of that person, any findings made by that person or notified to that person in relation to the concern or any other actions taken by or on behalf of that person to address the concern. Section 47(1) provides that "responsible officer":

> *"(a) means the responsible officer for any class of practitioner under section 29(1) or (2),*
> *(b) in relation to a practitioner in any class, means the responsible officer for the class under section 29(1) or (2), and*
> *(c) in relation to any application for registration, means the responsible officer who, if the applicant were registered and classified under this Ordinance, would be responsible for the relevant class of practitioner under section 29(1) or (2)."*

107. Section 18 provides for the preliminary assessment of concerns. The responsible officer must assess whether any concern about the practitioner identified or referred to the responsible officer raises or may raise a substantive issue, being an issue –

> (a) regarding the practitioner's eligibility or suitability for registration
> (b) regarding the practitioner's compliance with the general conditions and any additional conditions,
> (c) that must be referred to the Sark Committee or the General Medical Council under section 23 or
> (d) regarding the practitioner's fitness to practise.

108. Section 19 provides that if the responsible officer decides that a concern does not raise a substantive issue, the responsible officer must inform the person who raised the concern of that decision and may inform the practitioner of that decision. Pursuant to Section 20, if the responsible officer decides that a concern does not raise a substantive issue, the responsible officer may seek to informally resolve the concern with the agreement of the person who raised the concern and the practitioner.

109. Sections 21 – 24 of Part III of the Sark Ordinance contain provisions that are relevant to this application. Section 21 provides:

> *"21. (1) If the responsible officer's assessment is that a concern raises or may raise a substantive issue in relation to a practitioner, the responsible officer must –*
>
> *(a) subject to section 23, refer the concern to an authorised person, and*
>
> *(b) give the practitioner written notice of the referral within 7 days of that referral.*
>
> *(2) The authorised person must –*
>
> *(a) investigate the facts to which the concern relates, and*
>
> *(b) report the authorised person's findings, and pass any information obtained under subsection (3), to the responsible officer.*

(3) An authorised person may, for the purposes of an investigation under this section, exercise any powers of a responsible officer under this Ordinance.

(4) In this section, "authorised person" means a person authorised by the responsible officer to investigate a concern."

110. Section 22 provides:

"22. (1) Upon receiving an authorised person's report of the findings of an investigation under section 21(2)(b), the responsible officer must decide whether or not the concern investigated has raised a substantive issue.

(2) If the responsible officer decides that the concern has not raised a substantive issue, the responsible officer –

(a) must inform the practitioner within 7 days of that decision, and

(b) must –

(i) take no further action in respect of the concern, or

(ii) seek to resolve it informally with the agreement of the person who raised the concern and the practitioner.

(3) If the responsible officer decides that the concern has raised a substantive issue, the responsible officer must decide whether to take any action under section 24 or Schedule 2."

111. Section 23(2) provides that if at any time, it appears to a responsible officer or the Panel that a concern raises an issue regarding a practitioner's fitness to practise that is appropriate to refer to the General Medical Council, the responsible officer or (as the case may be) the Panel must refer the issue to the General Medical Council.

112. Section 24 governs Resolution Notices:

"24. (1) This section applies where –

(a) a responsible officer has decided under section 22 that a concern has raised a substantive issue, and

(b) the responsible officer is of the opinion that –

(i) none of the mandatory grounds for removal applies, and
(ii) there is no or little risk that the practitioner's fitness to practise is impaired.

(2) Where this section applies, the responsible officer may serve a resolution notice on the practitioner setting out actions, changes and any other steps required to be undertaken by that practitioner, and the time or times by which they must be

undertaken, in order to address the issues raised by the concern and any other issues identified in the course of the investigation conducted under section 21.

(3) A resolution notice may include actions and steps initiated by the responsible officer, for example, arrangements by the responsible officer for the practitioner's clinical practice to be assessed by a person or body considered by the responsible officer to be competent to undertake such assessments.

(4) The practitioner must notify the responsible officer of the practitioner's acceptance or rejection of the resolution notice no later than 14 days after it is served.

(5) A practitioner who does not give notice in accordance with subsection (4) is to be taken as having rejected the resolution notice.

(6) If the practitioner accepts the resolution notice and completes the actions, changes and other steps set out in that notice within the time specified, the concern is to be taken as resolved.

(7) If –

(a) the practitioner accepts the resolution notice but does not complete the actions, changes and other steps required of the practitioner within the time specified, or

(b) the practitioner rejects the resolution notice,

the concern is not [sic] *be taken to have been resolved and the responsible officer must decide whether to take any action under Schedule 2. Schedules 2 and 3 to have effect. 25. Schedules 2 and 3 have effect."*

113. Part VI of the Sark Ordinance governs Responsible Officers. Section 30(2) provides that:

"The office of a responsible officer is a public office and a responsible officer is under a duty to carry out the functions of that office with complete fairness, impartiality and independence."

114. Section 34 relates to information sharing by a Responsible Officer:

"Duty to co-operate and share information

34(1) A responsible officer must co-operate with and provide any information reasonably required by a relevant body or officer for a relevant purpose.

(2) A responsible officer may also give any information relating to a concern that raises or may raise an issue regarding a registered practitioner's fitness to practise to a relevant body or officer for a relevant purpose.

(3) A responsible officer must inform a registered practitioner when the responsible officer gives information concerning the practitioner to any person under subsection (1) or (2).

(4) For the avoidance of doubt, subsections (1) and (2) apply whether the information has been obtained by a responsible officer carrying out the officer's functions under this Ordinance, or provided to a responsible officer voluntarily by a registered practitioner or any other person."

115. Schedule 6 of the Sark Ordinance is entitled *"Functions of Responsible Officers for UK Connected Practitioners"*. For the purpose of Schedule 6, "practitioner" means a registered practitioner in the UK Connected Practitioners class and "responsible officer" means the responsible officer appointed for the UK Connected Practitioners class. Paragraph 2(1) of Schedule 6 provides:

***"2. Duties of responsible officer – fitness to practise**.*

(1) In relation to the evaluation of the fitness to practise of every practitioner, the responsible officer must –
(a) where appropriate, take all reasonably practicable steps to investigate concerns about the practitioner's fitness to practise raised by any person,
(b) where appropriate, refer concerns about the practitioner to the practitioner's responsible officer in the United Kingdom or to any other relevant body or officer for a relevant purpose, and
(c) take any steps necessary to protect patients, including recommend to the designated body of the practitioner that that practitioner should be suspended from practising as a medical practitioner or should have conditions or restrictions placed upon his or her practice.

(2) In carrying out functions under subparagraph (1), the responsible officer must seek and take into account the practitioner's comments, where appropriate."

Summary of the Applicant's Arguments

Permission to apply for judicial review

116. Advocate Cowling submitted that the Applicant has sufficient interest in the subject matter complained of as required by paragraph 6 of Practice Direction No. 3 of 2004 on Judicial Review. The report was commissioned to investigate and report on the Applicant herself and the Resolution Notice was addressed by the Respondent to the Applicant as it related to her medical practice in Sark. Relying on *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 W.L.R. 763, Advocate Cowling contended that it was clear that the Applicant could not be further from a *"meddlesome busy body"*. She had a clear interest in this matter as the actions of the Respondent directly affected her.

117. It was submitted that the Applicant had also complied with paragraph 6 of the Practice Direction which requires that "proceedings must be instituted promptly". The relevant decision of the public body was dated 4 March 2024 (the Resolution Notice). The Applicant attempted to remedy her concerns by responding to the Notice setting out her concerns. She attended a without prejudice meeting with the Respondent on 5 April 2024 however this meeting did not remedy her concerns. She had attempted to resolve matters in open and closed correspondence with the Respondent in an attempt to avoid contentious proceedings but this was unsuccessful and as such, a judicial review was her only remedy. The application for permission to apply for

judicial review was commenced less than three weeks after the without prejudice meeting between the parties when the Respondent had confirmed his original decision to the Applicant.

118. On the test for permission to apply for judicial review, it was the Applicant's case that the grounds in judicial review relied on by the Applicant are arguable and they have a realistic prospect of success. The Court should treat the position of the Respondent – namely that it neither consented nor objected to the grant of permission and contends that the question of permission to apply for judicial review is a matter for the discretion of the Court - as meaning that there was no opposition to leave. The Court was urged to grant leave and to consider the substantive application.

Ground (i): Concerns raised about the Applicant's practice

119. The Applicant challenged the decision of the Respondent to commence an investigation under the Sark Ordinance in respect of her practice.

120. First, relying on Section 17 of the Sark Ordinance, Advocate Cowling submitted that whereas the Respondent had identified himself as the Responsible Officer in his letter to the Applicant dated 5 September 2023, it was not clear as to (i) who raised the concerns about the Applicant; (ii) the identity of the Person Concerned and (iii) the nature of the alleged concerns raised about her. The Respondent had been inconsistent as to who or what entity raised the alleged concerns. In his letter dated 28 February 2024, the Respondent stated that *"an NHS Senior Professional Standards Advisor" raised the alleged concerns but later in the same letter it was stated that "the NHS England assessment team"* recommended that concerns be investigated. Advocate Cowling submitted that this was directly contradicted by the email from NHS dated 13 April 2023 (from Ms Hayley Turner of NHS England) by which the Applicant had been advised that her appraisal had been successful and that her case had been closed with no further action.

121. It was further submitted that the transcript of the audio recording of the meeting (SMC and members of the Policy and Finance Committee of the Chief Pleas) which took place on 31 July 2023 contains statements by members of the SMC confirming that they had raised concerns regarding the Applicant to the NHS. However in an email dated 17 August 2023, Dr Cochrane-Dyet on behalf of NHS confirmed that *"the NHS have not been given any detail regarding the SMC's further concerns"*. As the Respondent had been unwilling and/or unable to clarify and/or confirm who raised the concerns about the Applicant and the identity of the Person Concerned and the nature of the alleged concerns raised about the Applicant, it was unclear on what basis the Respondent was legally entitled to pursue the investigation set out in Section 21 of the Ordinance.

122. Second, Advocate Cowling argued that the process of referring concerns to the Respondent was essentially a tool employed by the SMC to engineer the exit of the Applicant from her role and that the Respondent should have realised that those concerns were frivolous and vexatious. The Respondent's own inconsistencies as to who or what entity raised any alleged concerns and whether such concerns have come from the SMC or the United Kingdom support the Applicant's claim that those concerns are frivolous and vexatious. Consequently, in the Applicant's submission, the Respondent's decision to conduct an investigation into the concerns should be set aside.

123. In further support of the submission that the concerns raised were of a frivolous and vexatious nature, Advocate Cowling submitted that the Respondent had not disclosed the specific concerns despite several requests to do so and that the Applicant had successfully completed

her Appraisal and Revalidation with the NHS just months before the Respondent claimed that concerns were raised with him by the NHS. It was contended that it was unlikely that the NHS omitted to raise the specific concerns during the Appraisal and Revalidation process as the TORs for the investigation referred directly to the Applicant's practice as the Sark doctor. The TORs forming the basis of Dr Carter's investigation and his report were synonymous with the issues already raised, considered and dismissed by the NHS in the Appraisal and Revalidation process. Advocate Cowling submitted that the transcript of the meeting on 31 July confirmed the SMC's agenda to terminate the Applicant's appointment as the Sark doctor in a manner which would be most convenient and cost beneficial to them. There were references in the transcript which confirmed that the investigation into the Applicant's practice in Sark was encouraged by the SMC to achieve their agenda to terminate the Applicant's appointment as the Sark doctor without the threat of litigation against the SMC.

124. Third, Advocate Cowling submitted that the Applicant was concerned about the involvement of Dr Foulkes. The Respondent had requested that Dr Foulkes assist him in the investigation. Despite Dr Foulkes being the person who raised the concerns with the Respondent, Dr Foulkes was appointed as an initial investigator by the Respondent, as communicated to the Applicant on 1 August 2023 and Dr Foulkes confirmed that he would assist the Respondent in the drafting of the TORs.

Ground (ii) The failures of Dr Carter's investigation

125. Advocate Cowling contended that the Respondent's decision that the concerns referred to him gave rise to substantive issues and the decision to issue the Resolution Notice were flawed because they were based on Dr Carter's report which itself was both irrational and infected by procedural unfairness.

126. It was submitted that Section 21 of the Sark Ordinance makes it clear that the Responsible Officer and the Authorised Person (who acts at all times under the authority of the Responsible Officer) are masters of their own procedure but that when exercising their respective powers, they must do so fairly in accordance with the principles of natural justice. Relying on *Cotterill v The States of Guernsey*, Royal Court, Guernsey Judgment 58/2017, it was submitted that if there are any procedural irregularities that impact on the fairness of the investigation/process, this calls into question the integrity of the findings of Dr Carter's report and the decisions made by the Responsible Officer that were based on that report.

127. It was submitted that the investigation conducted by Dr Carter and the follow up action taken by the Respondent was much wider in scope than a preliminary inquiry. Advocate Cowling submitted that the preliminary stage of the process under the Ordinance is governed by Section 18 ("Preliminary Assessment of Concerns"). Any suspension of the rules of natural justice (which was not accepted by the Applicant) could only be confined to this part of the Ordinance. By the time the Respondent had appointed Dr Carter to conduct an investigation, he had moved on to Section 21 of the Ordinance and by that point, the process had moved from the preliminary stage into a substantive investigation. The rules of natural justice fell back into place. Section 21(1)(b) of the Ordinance in fact requires that notice is given to the Applicant of the referral. It was submitted that this should be read to include not only the original referral under the original TORs but also any further referrals such as the concerns investigated under Part C of the report. When the concerns under Part C were referred to the Respondent, he should have notified the Applicant of them to ensure that she had the opportunity to consider them and to respond.

128. It was submitted that contrary to the principle of *audi alteram partem*, a key principle of natural justice that provides that no one shall be condemned unheard and that embodies the essence of

fairness and due process in legal proceedings, was not afforded to the Applicant. Part C of the report was produced entirely without her knowledge. The Report records that Dr Carter raised the further matters with the Respondent and that he was authorised to continue with the investigation of those further matters.

129. The Applicant referred the Court to *R (on the application of Rudling) v General Medical Council* [2019] P.T.S.R. 843 which related to judicial review proceedings brought by a doctor against her medical regulatory in the United Kingdom. The claimant alleged that she had not been informed of new allegations brought by the General Medical Council or given the opportunity to make written representations in relation to those new allegations. She was unsuccessful as safeguards had been put in place by the General Medical Council (GMC). At paragraph 46, Farley J held:

> *"In relation to a matter as serious as probity, the practitioner has the right to know the full extent of the allegation made against him or her: Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council [2016] EWHC 1983 (Admin) at [19] and [30]. However, the claimant knows and has been provided with a detailed account of what is alleged…..She has been provided with the evidence on which the GMC relies. She has and will have at the resumed hearing, the right to attend and be represented by counsel.. she is entitled to submit any written representations or other documents that she wishes to provide….All these procedural safeguards are founded on the Rules and ensure adequate protections for practitioners."*

130. Applying the procedural safeguards identified in *Rudling*, Advocate Cowling contended that the Applicant had no knowledge of the matters contained in Part C until she was provided with a copy of the report in December 2023. She had only seen parts of the report and had not been provided with any of the witness statements relied on by Dr Carter. She did not know the identities of the witnesses. She was invited to attend a meeting with the Respondent in December 2023 but her request for Counsel to attend was refused. She was able to make some written representations but only after the conclusion of the investigation by Dr Carter. In any event, such written representations could only go so far as she had been denied the opportunity to review any of the witness statements forming the evidence for the investigation.

131. Advocate Cowling referred the Court to the judgment of the House of Lords in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560 (per Lord Mustill) and to *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 in which Lord Sumption said at paragraph 29:

> *"The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180 143 ER 414, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice."*

132. Advocate Cowling referred the Court to the judgment of Holgate J in *R v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at paragraph 99:

"In R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221 the Supreme Court endorsed the legal tests in Derbyshire Dales District Council [2010] 1 P & CR 19 and CREEDNZ Inc v Governor General [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

It was submitted that the Applicant's response and her evidence for the investigation was so "obviously material" (as she was the subject of the investigation) that it should have been considered by the report and ultimately by the Respondent when considering the report with a view to making a determination as to whether substantive issues have been raised.

133. The arguments relied on by the Applicant on the parts of the report that correspond to the Resolution Notice findings that there were substantive issues, namely Part C, TORs 1, 3 and 5 were these:

a. **PART C**. The Applicant's central argument on Part C of the report was this: she knew nothing about this part of the report and was unaware that the scope of the investigation had changed until she was provided with the report in December 2023. Part C did not form part of the TORs and the Respondent had not liaised with her before instructing Dr Carter to expand the scope of the report to include Part C. As such, it was submitted that Dr Carter had investigated matters that were entirely unknown to the Applicant and she had not had the opportunity to respond to those matters. Advocate Cowling referred the Court to several excerpts within Part C to support his submission. On Section 1.2 of Part C – which relates to the Applicant self-prescribing for herself and her husband – it was submitted that there was no consideration of the Applicant's position in response to this issue and she was not afforded the opportunity to respond to those matters during the investigation. It only provided "one side of the story".

b. **TOR 1**: Advocate Cowling argued that Dr Carter reached his conclusion that *"Patients often do not get managed in line with national guidance"* (paragraph 6.1.1) without setting out his analysis. It was suggested by Advocate Cowling that the reason for the lack of this analysis in his report on this point was because Dr Carter knew that Sark was neither part of the NHS nor the Guernsey medical system, that healthcare is private and that patients in Sark have to pay for their treatments. He would have been aware of the reference in the materials to patients refusing treatment because they could not afford it. It was submitted that there was no analysis under TOR 1 of why actions were not being carried out. Had the Applicant had an opportunity to provide her evidence, she could have responded to the failings and she would have been able to demonstrate that they were not due to her falling short of the relevant professional guidelines but rather to other reasons out of her control relating to the system in place, the contractual arrangements or simply due to patients refusing treatment.

Advocate Cowling referred the Court to Dr Carter's conclusion that "*There is difficulty in managing patients in line with national guidance in that it is not unusual for patients to decline paying for the relevant monitoring. It would be useful for Dr X to document that patients had been invited, understand the risks and that they had declined, but this does not routinely happen" (Section 6.1.5).* It was submitted that there is no reference to the evidential basis for this conclusion in the report.

It was submitted that in relation to Dr Carter's conclusion that "*The GP does not have the means to provide modern primary care to Sark's residents. In my opinion MidexPRO is not fit for purpose*" (Section 6.1.7), the Applicant was limited by the system within which she was working. He referred to the Island Health Report entitled 'Primary Care in Sark – An Overview' that was conducted in April 2023. This report addressed the IT-related matters in Sark. One of the recommendations in the report was *'Investigate a more fit-for-purpose IT system'*. This supported a point raised by the Applicant throughout. The system and context in which she worked was relevant and she was doing all she could to try to keep chronic disease registers but she was limited because she was working with a system that is out of date and is not fit for clinical practitioners. The Applicant was concerned about these issues because TOR 1 formed part of the Resolution Notice.

On Dr Carter's recommendations in relation to TOR 1 in Part B of the report, Advocate Cowling referred the Court to Section 1.2.1 where Dr Carter referred to the relevant GMC Guidance on *"Leadership and management for all doctors".* It was submitted that the Applicant had previously raised her concerns about the IT-system. She was aware the system was deficient. Dr Carter found the system to be deficient but yet the issue found itself in the Resolution Notice against the Applicant when this was quite clearly, in the Applicant's submission, an issue with the system within which the Applicant operated. Had Dr Carter - and the Respondent when he received Dr Carter's report - properly considered the Applicant's evidence, they would have found that it was not the Applicant who fell short of the GMC Guidelines but that she was placed in an almost impossible position by the system within which she was working. At paragraph 1.2.2. Dr Carter stated that *"he did not see any evidence of regular reviews and audits of standards nor did he see evidence of clinical governance and risk management structures."* The Applicant submitted that the reason for this was because he had not sought the proper evidence from the Applicant.

A further example of Dr Carter accepting evidence at face value in Advocate Cowling's submission, was found in the findings on TOR 1. At Section 5.1.7, Dr Carter stated "GP Locum Person H, who worked on the island in July 2023, did not see any registers pertaining to chronic disease. He stated that chronic disease management was *"not being done at all"*. Whilst Dr Carter had, at Section 5.1.6 set out that Applicant had attempted to form some registers and he cited an example for elderly/frail patients with 'do not resuscitate' orders, there was no real analysis, in Advocate Cowling's submission, on the evidence and on Dr Carter's finding.

It was submitted that TOR 1 refers to medical records and to comments from witnesses but there is no reference to any evidence from the Applicant even though she had raised various deficiencies regarding the computer system with Dr Carter on 6 November 2023. It was submitted that the report failed to explain why the Applicant's evidence had not been considered.

c. **TOR 3**. The Applicant was not interviewed by Dr Carter in relation to this particular TOR. Her evidence was expressly excluded. Advocate Cowling's central submission in relation to TOR 3 was that various allegations and unidentified witnesses were referenced in this Section but there is reference to the Applicant's evidence. TOR 3 should not have featured in the Resolution Notice because the Applicant's position on the allegation in question isn't referenced in the report and it was not clear as to what was said by witnesses to Dr Carter in relation to this particular subject matter. It was submitted that the conclusions reached by Dr Carter in relation to TOR 3 appear to have been based solely on what he was told by the witnesses without making reference to the position of the Applicant. Advocate Cowling referred the Court to some examples by way of illustration. At paragraph 1.2.10 of the report (TOR 3), Dr Carter stated that *"Dr X has complex issues with her contract (and therefore the Sark Medical Committee). These are intertwined with personal and professional issues. Dr X often confuses the issues. Acrimony between Dr X and SMC is adversely affecting the running of Sark Medical Centre. Therefore, the RO may wish to consider if Dr X has breached point 66. Dr X should consider arranging her own training in leadership and management."* Advocate Cowling submitted that there was no evidential basis for the assertion that the Applicant often confuses the issues. By way of further illustration, Advocate Cowling drew the Court's attention to paragraph 6.3.6 of the conclusions on TOR 3 where Dr Carter concluded that: *"Dr X describes feeling like a "modern day slave""* and that "*she has previously had annual leave declined".* It was submitted that there was no direct evidence from the Applicant in relation to the allegations made against her in relation to TOR 3 and that this particular TOR should not therefore have featured in the Resolution Notice.

d. **TOR 5**. The Applicant contended in relation to TOR 5 that it was wrong that the Applicant was held responsible for failures in the system in which she found herself. This was especially so given that the Island Health Report had stated that there are issues with the computer system on Sark. The computer system did not allow her to print prescriptions as would be expected in a normal functioning medical system. Advocate Cowling referred to the Applicant's first report to the SMC in 2020. In that report, she had suggested that there needs to be use of proper prescription and recording via EMIS software, especially for repeat prescriptions and controlled medication. In his findings on TOR 5, Dr Carter stated *"The Chief Pharmacist in the Bailiwick of Guernsey visited Sark Medical Centre in August 2023 and found the medical centre's processes wanting, in terms of safe medicines management. The Chief Pharmacist made a number of recommendations which are outlined in Appendix 2"*. It was submitted that Appendix 2 was not furnished to the Applicant and she was therefore unaware of the content of those recommendations. She did not have an opportunity to see it and so she was unable to respond to it.

   Advocate Cowling accepted that in his findings on TOR 5, Dr Carter had acknowledged that *"Dr Borchardt has implemented a safer medication pick-up service where patients can only collect medication at a particular time and they are kept in the lockable treatment room….The controlled drugs do have a register and are in a locked safe in a locked cupboard with a lockable room with CCTV covering it."* It was submitted that Dr Carter's conclusions were broadly similar to his findings. At paragraph 6.5.4 of his conclusions, Dr Carter stated *"Controlled drugs are stored safely but there is no-one, other than an untrained practice manager, to witness the signing in/out of controlled drugs*". It was submitted that the reference to the untrained practice manager was

appropriate as it illustrated other variables at play that were relevant to the complaints made against the Applicant.

It was submitted that Dr Carter should have enquired further into the concerns raised by the Applicant on the system in her 2020 report or in the alternative, the Respondent should have on receipt of Dr Carter's report, considered the extent that the system is relevant to the issues before him. There is no evidence that that this analysis took place.

Finally, Advocate Cowling submitted that TOR 5 should not have been part of the Resolution Notice because the failures referenced were not due to the Applicant's failings under GMC Guidelines but rather the system that she was working in. It was submitted that the reference to TOR 5 in the Resolution Notice is vague and should not have featured in the document. There was no evidence that either Dr Carter or the Respondent considered the Applicant's contractual arrangements.

134. Advocate Cowling submitted that TOR 2 and TOR 4 should have been removed from the report before it was disseminated because neither were relied on by the Respondent in the Resolution Notice.

135. Advocate Cowling acknowledged that TOR 6 does not form part of the Resolution Notice and was not taken any further by the Respondent but submitted that an issue dealt with under this particular TOR was related to the issues discussed under TOR 3 about the Applicant's communication skills and about her working collaboratively with colleagues. It was submitted that Dr Carter made reference to detailed printouts of the Applicant's notes in relation to her treatment plan of her patient who had a taken a suspected overdose. A document was included in the TOR 6 section which gave rise for concern to the Applicant, namely a partially redacted statement made under the Administration of Justice (Bailiwick of Guernsey) Law 1991 by Person N. Person N stated:

> *"On 1st December 2022 at 18.09 [redacted text] phoned me to say she had received a phone call from a patient saying she had taken lots of drugs. I asked if she had phoned the doctor but [redacted text] said that the doctor would not attend. At 18.20 I phoned the Sark doctor and had a heated discussion explaining that she should attend a potential overdose. She still refused to attend…"*

Advocate Cowling submitted that Person N had made an allegation that according to his version of events, a heated discussion took place and there was disagreement between him and the Applicant. It was submitted that whereas Dr Carter had concluded that the Applicant had not acted in a professional manner, she had not had the opportunity to respond to the allegation. Dr Carter only had the recollection of Person N. The allegations had been taken at face value by Dr Carter without further investigation.

136. It was also submitted that the report failed to properly consider relevant evidence concerning the systems and context in which the Applicant worked and her contractual obligations. The Respondent expressly instructed Dr Carter to do this "as far as possible". There is no evidence that the report or the Respondent have considered the Applicant's contractual arrangements and no reference to or evidence of the Applicant's contract with the SMC. The report states that the evidence to support the investigation was obtained by "undertaking interviews, reviewing medical records and reviewing correspondence" but there is no reference to consideration of any contractual documents by Dr Carter. On TOR 5, the failings with the computer system are frequently referenced in the report with Dr Carter finding that MidEx Pro is not fit for purpose

and does not enable the Applicant to have the "means to provide modern primary care to Sark's residents". This finding was not properly considered by the report. It did not consider what the Applicant's contractual arrangements or obligations are with the SMC in relation to the running of the pharmacy and dispensary. It was submitted that had it done so, the report would have properly concluded that the issue of safe medicines management is entirely down to the system within which the Applicant worked. Any response to the report by the Applicant would in any event be constrained by the fact that she was and is entirely unaware of the evidence against her, who it is from and what it says including the particulars of any allegation.

137. Advocate Cowling contended that the shortcomings of the Sark medical infrastructure and resources were not adequately factored into the investigation and subsequent Report. First, the Court was referred to Part 3 of the Resolution Notice which states that *"arrangements for the safe management of medicines has not been put in place"*. Advocate Cowling referred to the affidavit of Conseiller Frank Makepeace in which he averred that medication was originally stored in a conservatory which was accessible to the public to help themselves. Once appointed as the Sark doctor, the Applicant had imposed greater oversight and control over the dispensing of medication by only dispensing medication through the practice nurse at the reception of the medical practice. It was submitted that despite these measures that were taken at the initiative of the Applicant, the Resolution Notice imposed liability on her for the management of medicines. It was submitted that prior to the Covid-19 pandemic, the Chief Pharmacist made annual trips to Sark to establish how medicines were managed in Sark but no equivalent action was taken against the predecessors of the Applicant for having medicines freely available to the Sark public in an unsupervised conservatory.

    Second, it was submitted that on several occasions, the Applicant had raised her concerns regarding the poor resources available to her, including but not limited to the poor IT systems available to the Applicant. With regard to TOR 1, the report states that "*the SMC must provide the island's medical staff with an IT system which is fit for purpose and allows the provision of modern medical care"* yet the Resolution Notice attributes substantive issues regarding the management of patients with long terms conditions to the Applicant.

    Third, it was submitted that the only reference in the report to the lack of functional equipment is at TOR 2 in which Dr Carter stated that *"the SMC must ensure the GP has the equipment to provide high quality end of life care, specifically a functioning syringe driver [for the administration of continuous medication infusions]"*.

    It was submitted that the Applicant had repeatedly raised issues with the SMC and the Respondent in relation to the working conditions she was under in Sark, particularly concerning the amount of hours she was required to work by the SMC (only one day off a month and remaining "on-call" essentially twenty four hours a day). This was solely down to the SMC's inability to employ a sufficient number of support staff for the Applicant. The impact of these extreme pressures on the Applicant's time should have been properly considered by Dr Carter and by the Respondent and they had failed to do so.

Ground (iii) Dissemination of Dr Carter's report

138. In essence, Advocate Cowling submitted that the dissemination of the report was premature. It was disseminated before the Applicant was able to provide her response to it. Prior to disseminating the report, the Respondent should have reviewed the draft report, identified the various evidential gaps and he should have either sent it to the Applicant requesting her response on each of the allegations or requested Dr Carter to address the outstanding matters.

Ground (iv) The issuance of the Resolution Notice

139. Advocate Cowling submitted that the Resolution Notice was flawed in two respects. First it was based on Dr Carter's report which itself was flawed and incomplete. Second, the Resolution Notice failed to provide adequate reasons to explain the Respondent's conclusion that under Section 22 of the Sark Ordinance, the concerns investigated by Dr Carter have raised substantive issues. The Court was referred to *Roger v Roger* Guernsey Judgment 10/2003 at paragraph 17 (per Rokison JA) in which it was held that:

> *"..it is a necessary requirement of a successful appellate process for the appellate court to be able to understand from the judgment why the court below reached its decision".*

The Respondent, it was submitted, had failed to provide adequate reasons for reaching his conclusion as set out in the Resolution Notice as it does not enable the Court to understand from the decision why the Respondent reached his decision.

Summary of the Respondent's Arguments

140. Advocate Hill neither objected to nor conceded permission to apply for judicial review. It was submitted that the question on permission was a matter entirely within the discretion of the Court. However, it was robustly argued that at all times, the Respondent acts independently of all other organisations and further, that under Section 30(2) of the Sark Ordinance, the Respondent has a positive duty to carry out the functions of his office with "complete fairness, impartiality and independence". As such, any criticisms of other bodies or persons are irrelevant when determining whether the Respondent acted appropriately under the Ordinance.

141. Advocate Hill relied on three points of general application. First, the standards of fairness required in the Authorised Person's investigation of the concerns and the Respondent's determination as to whether or not those concerns raise substantive issues, which led to the decision to issue a Resolution Notice, are lower than those required in relation to judicial or tribunal decisions. The Respondent's decision is an administrative decision, not a judicial or quasi-judicial decision. Second, the purpose of the Sark Ordinance is to provide for a quick and expeditious way to carry out an investigation in order to determine whether any remedial or preventative actions may be needed. The report is the basis for further action by the Respondent and any further action that the Respondent proposes to take which carries significant consequences for the Applicant – for example the commencement of disciplinary proceedings by the General Medical Council – or suspension by the Respondent – is accompanied by further procedural safeguards (Schedule 2). A Resolution Notice is the lowest possible level outcome and the enhanced outcomes have additional procedural safeguards. Third, notwithstanding the lower standard of fairness applicable to administrative decisions, even if the Court decided to apply the higher standard applicable to judicial or quasi-judicial decisions, that higher standard has in fact been met in this case.

142. The Ordinance, in Advocate Hill's submission, must be considered both holistically and purposively. The relevant provisions set out a process by which the Respondent can appoint an Authorised Person to investigate one or more issues which may - after investigation – be substantive issues. Upon being appointed, it is for the Authorised Person to investigate those issues and compile a report. At that stage, which is a preliminary inquiry, the concerns were notified to the Responsible Officer, a person is appointed to investigate and the important consequence is that the investigation and the report are merely a potential prelude to a range of

other potential steps which may be taken by the Respondent if he considers them reasonable and proportionate. The only factual outcome of the report is a potential finding by the Respondent that one or possibly more of the concerns notified to him raised substantive issues. That is all that the Responsible Officer can do when he considers the report (Section 22(1)). There is no finding of guilt or misconduct or impaired fitness to practice, for example.

143. It was further submitted that the Sark Ordinance does not descend into procedural minutiae. It provides a purposive intent: investigation and outcome. It does not require the Authorised Person to be the exclusive investigator. As such, the legislation does not preclude or prevent the Authorised Person in his report from drawing the Respondent's attention to matters and it does not prevent the Respondent from then finding that he has concerns but will take the necessary steps to make sure that the conclusion drawn is fair. Advocate Hill submitted that the Ordinance provided a framework for the investigation of concerns about a practitioner and that it would be entirely contrary to the spirit of the legislation if patients had to wait for mere technical administrative machinery to fall into place rather than establishing quickly and fairly the factual basis of the matter. The purpose of the legislation is to enable quick, expeditious and fair investigation into concerns raised. Provided that the Respondent complies with the mandatory requirements of the Sark Ordinance, it was submitted that the procedure adopted by the Respondent was not defective.

144. It was not for the Responsible Officer to 'micro-manage' the Authorised Person. The legislation did not require either the Authorised Person or the Responsible Officer to consult with the practitioner before finalising the content of the report. However, the Respondent did – fairly and reasonably – offer the Applicant the opportunity to make a written submission on the report and she did so in her response dated 9 February 2024. It was clear from the report that there were matters on which Dr Carter could not reconcile the evidence before findings of fact could be drawn with any level of certainty and because of that it was submitted, the Respondent could resolve the matter by speaking to the Applicant. It was submitted that it is not the role of judicial review to criticise administrative decision makers for taking a practical and pragmatic approach especially where the legislation does not forbid or prevent that pragmatic approach.

145. Advocate Hill submitted that there was no concession on the part of the Respondent that this process did not comply with natural justice. It was clear from the report itself that Dr Carter investigated the TORs by and including conducting interviews or an interview with the Applicant. There are only two exceptions to that but they didn't lead to any prejudice or injustice for the Applicant. The first exception was in relation to TOR 3 – working collaboratively with colleagues. There was good reason for this in Advocate Hill's submission. Because of the nature of the Sark medical practice, interviewing the Applicant in relation to those specific allegations would inevitably have identified the witnesses irrespective of how if at all those statements could have been anonymised. The second exception was in relation to Part C of the report. The Applicant was invited by the Respondent to deal with two specific allegations referred to in Part C before he reached any conclusions about them. It might have been necessary to do further investigations into those two matters but as it turns out there was no need. The Respondent accepted the explanation provided by the Applicant in relation to one of the matters (allegation of not examining a patient) and the other matter (self and family prescribing) was admitted by the Applicant. In those circumstances, there was no prejudice or unfairness.

146. The nature of a Resolution Notice under Section 24 of the Ordinance was underlined by Advocate Hill. It was submitted that a Resolution Notice is not a penalty or a sanction against the Applicant and that there is no automatic adverse consequence against the Applicant for non-compliance. If the Applicant rejects or fails to comply with the Resolution Notice, the only

consequence is that the Respondent must decide whether to take any action under Schedule 2 of the Ordinance (Section 24(7)). Consequently, when the Respondent exercises his powers under Part III of the Ordinance, the process leading to the final decision to issue a Resolution Notice is properly to be regarded as an investigation and nothing more. With the exception of duties on the Respondent for example to provide notice of certain matters (Sections 21(1)(b) and 22(2)(a)), the strict rules of natural justice do not apply to an investigation of possible breaches of a professional code. Advocate Hill relied on *Christopher John Moran v Lloyds (A Statutory Body)* [1981] 1 Lloyd's Rep 423/1981 WL 186799 (1980) (Court of Appeal) and on *Herring v Templeman* [1973] 3 ALL ER 569 in support of his submission. In *Moran v Lloyds*, Lord Denning MR said:

> *"A preliminary inquiry of this kind is held out of a desire to be fair to the man affected. It is done because it is thought that he should not be put to the worry and expense involved in a charge – unless there is sufficient evidence to warrant it. On such an inquiry there is no need for the man to have notice of it; or to be invited to attend; or to call witnesses or the like. I know that it is sometimes done – sometimes he is given notice and is allowed to make representations – but it is not essential. Afterwards those who hold the inquiry make a report. Then on the basis of that report, a charge is formulated.*
>
> *[The preliminary inquiry] does not do anything which adversely affects the man concerned or prejudices him in any way….In all such cases all that is necessary is that those who are holding the preliminary inquiry should be honest men – acting in good faith – doing their best to come to the right decision."*

147. Referring to Lord Mustill's guidance in *Doody* that "fairness will very often require that [she] is informed of the gist of the case which [she] has to answer", it was submitted that that is precisely what the Respondent did in this case. Advocate Hill underlined that as set out in *Doody*, what fairness demands depends on the context of the decision and this shall be taken into account in all aspects. The facts in *Doody* were specific and the case was distinguished from the present case. The administrative decision of the Home Secretary in the United Kingdom in *Doody* was of huge consequence to the persons convicted of murder whereas in the present case, the Respondent shared the report with persons he was obliged to do so in any event and a Resolution Notice that the Applicant could (and did) ignore or repudiate without penalty or sanction. Further, in *Doody*, the Home Secretary had simply handed down his decision without discussing the matter with the prisoner or informing the prisoner of the judge's advice. In stark contrast, in the present case, the Respondent personally discussed the report with the Applicant, gave her a copy of the report and agreed to consider her written response and extended time for doing so by one week.

148. Relying on the *Doody* guidance that an *"essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken"*, it was submitted that the Sark Ordinance provides for a quick and expeditious way to carry out a preliminary investigation in order to determine whether any remedial or preventative actions may be needed to address concerns about a doctor's practice.

149. The Respondent accepted that if asked by a Responsible Officer from another jurisdiction if there had been an investigation in relation to the Applicant, he would provide information that there had been. The Respondent also accepted that the Applicant would be required to provide information about the investigation to another prospective employer. The Resolution Notice is effectively a record that a doctor has done something in a certain way in the past and is requested

to do it in another way in the future. The only consequence of failure to comply with the Resolution Notice is that it enables the Respondent, if he determines it appropriate, to consider what to do next. If enhanced options are pursued, then there are safeguards in Schedule 2 that would be directly applicable to the practitioner in question.

150. It was submitted that the Respondent's decision to redact the report was necessary in order to comply with his obligations under the Data Protection (Bailiwick of Guernsey) Law 2017. Given what was at stake in this case (a Resolution Notice carrying no penalty for non-compliance) it would have been disproportionate for the Respondent, when balancing the competing interests, to disclose patient identities and statements to the Applicant in circumstances where disclosing the gist of the complaints against the Applicant would suffice. On the redaction of the names of witnesses in Dr Carter's report, Advocate Hill submitted that had patient identities been disclosed, the safety and health of the witnesses could have been placed in jeopardy and the Applicant could have been exposed to an unnecessary risk of being wrongly accused of poor or bad treatment.

151. Advocate Hill submitted that the case of ***Rudling*** was significantly different on the facts to the present case in three respects. First, ***Rudling*** concerned the referral of a practitioner to entities described as "case examiners" of the General Medical Council. That referral was specifically for consideration of whether the practitioner's fitness to practise was impaired. It was submitted that that is more serious and potentially something that carries greater consequences than a mere finding that there are substantive issues. It was submitted that a substantive issue means an issue that has substance, in other words more than a trivial issue. Second, ***Rudling*** involved a substantive public hearing. That is very different to the present case in which the Applicant is interacting in private with the Authorised Person and the Responsible Officer. Third, ***Rudling*** turned on the interpretation of GMC fitness to practice rules applicable at the time and how those rules interacted with the particular facts of that case. The present case does not involved application of those rules or anything similar but rather it concerns a completely different legislative matrix designed to achieve very different things.

152. On the subject of the management of acute issues, Advocate Hill submitted that issue did not form part of any of the substantive issues identified by the Respondent and it did not feature in the Resolution Notice. This arose out of the investigation that took place in Part C. The Respondent investigated the issues on Part C and he sought representations from the Applicant on two issues. The Applicant admitted one matter (self and family prescribing) and the Respondent accepted her explanation on the other matter (allegation that a patient was not examined).

153. It was argued by Advocate Hill that it was not essential for Dr Carter to interview the Applicant rather than the Respondent doing part of the investigation because this was a preliminary investigation. The process as whole is to determine fairly and proportionately whether there are substantive issues and that is what happened at the end of the day. It would be too much to require that this be completed exclusively by the Authorised Person. The Respondent adopted an eminently fair, reasonable and proportionate step and he asked the Applicant about the issues in Part C himself. He could have written back to Dr Carter and asked him to ask the Applicant about the two matters but this would be a cumbersome and unnecessary process when the Respondent himself could do exactly the same himself. Even if it was a requirement for Dr Carter to undertake the task, Advocate Hill invited the Court to consider if the outcome would have been different.

154. It was submitted that the first written response from the Applicant dated 10 January 2024 was a statement, but primarily it was an explanation as to why it was inconvenient for the Applicant to comply with relevant standards. It did not contain unambiguous confirmation that the Applicant had put in place suitable arrangements to allow her to comply with GMC guidance or that she would do so and comply with those standards in future. It was reasonable for the Respondent, in Advocate Hill's submission, flowing from the Applicant's statement, and particularly in relation to self and family prescribing, to take the view that a written assurance was required by way of formal acknowledgement.

155. Advocate Hill submitted that when one considers the report and the Resolution Notice, the Applicant was not in fact held responsible for the failings of the IT system. The Respondent quite properly held her responsible for providing an appropriate level of care to patients with long terms conditions. The criticisms are not in relation to IT failings but rather they relate to poor management by the Applicant of a patient's long-term conditions and her performance in this was below the applicable standards. It was submitted that the report did not seek to consider and involve itself with information technology with the issues that the doctor had to work with but when considered in the context of the report, they are in fact examples of the Applicant's failings in relation to her professional performance in managing long term conditions. The Authorised Person took it into account as far as possible – as far as it was relevant – but the conclusion drawn was that there was a professional failing. There was another finding of a professional failing in relation to prescription of medication generally. The Chief Pharmacist found the process of issuing prescriptions to be illegal. No prescriptions were being issued; a sticker was placed on a box which was taken off the dispensary shelf. When that was pointed out, no immediate remedy was put in place by the Applicant and the intervention of a person referred to as "W" in the report was required. It was submitted that this was a direct area of responsibility in which the Applicant had failed.

156. On the Island Healthcare report, it was contended that this report was factored into the investigations and consequently into the Respondent's findings.

157. The Respondent's submissions in response to the grounds of judicial review may be summarised as follows:

Ground (i) Concerns raised about the Applicant's practice

a. relying on Sections 18 and/or Section 34(4) and Schedule 6, paragraph 2(1)(a) of the Sark Ordinance, Advocate Hill argued that it does not matter how the Respondent comes into possession of information relating to concerns about a registered practitioner or from where they come. It was submitted that matters touching on the alleged inconsistencies about the source of information relied on by the Respondent are immaterial and irrelevant. They do not affect the lawfulness, reasonableness or proportionality of the Respondent's actions.

b. in response to the alleged frivolous and vexatious nature of the allegations against the Applicant it was submitted that successful completion of an appraisal and revalidation is not an automatic gateway to reject the suggestion that any concerns raised are or might be substantive issues. If that were the case, there would be no requirement for the extensive regulatory and investigatory powers set out in the Ordinance.

c. it was further contended that the SMC's involvement and alleged motive do not affect the Respondent's complete independence. Any actions of the SMC are not relevant to

the decision of the Respondent. Even if the Respondent considered that there was malicious intention behind the raising of the concerns about the Applicant's practice, he would have had no option but to investigate. It would be utterly inappropriate not to investigate a concern because of possible doubts about the ulterior motives of the complainant. If a concern is brought to the attention of the Respondent, however it comes to his attention, it must be investigated. This it was submitted makes perfectly good sense in the regulation of the medical profession. The focus of the Ordinance is on the merits of the complaint.

d. it was submitted that the Applicant had misunderstood Dr Foulkes' involvement. The Respondent had not requested Dr Foulkes to assist with the investigation and he was not appointed as the investigator in this case and did not draft the TORs. In any event, these allegations would not have affected the Respondent's obligation to investigate concerns reported to him. It was submitted that the consultation by the Respondent with professionals and the seeking advice and assistance from other suitable personnel did not compromise the Respondent's functional independence in evaluating the content of the report in determining whether or what kind of resolution notice and its content should be issued. The decision to do so always remains the Respondent's decision. It was entirely open to him to take reasonable professional advice when appropriate. The manner in which the Respondent processed the information, identified potential gaps and sought to fill them in in an appropriate and time and cost-effective manner was the epitome of good decision-making in administrative law. The Applicant's UK Responsible Officer has and had an entirely legitimate interest in this matter insofar as it related to her responsibilities under the law of the United Kingdom. Dr Foulkes acted with the knowledge of the UK Responsible Officer and it was entirely reasonable to involve him as someone with expertise in ensuring that the TORs would meet the requirements of the investigation.

Ground (ii) The failures of the investigation

158. In response to the Applicant's submissions that Dr Carter's report deviated from the TORs by the inclusion of Part C, Advocate Hill submitted that to a large extent, the content of the TOR is a red herring. The Respondent has mandatory duties to investigate and consider any allegations brought to his attention by any person. The Applicant was fully aware of the allegations contained in Part C and had the ability to make representations upon them. The alleged prejudice does not arise. The Applicant's reliance on the alleged deficiencies of the Sark infrastructure and failures of the SMC are no defence to allegations of improper professional conduct or ethics.

159. In response to Applicant's submissions that she did not have the opportunity to make representations as to the findings of the report before it was completed on 12 December 2023, Advocate Hill submitted as follows:

a. Dr Carter's report was simply the conclusion of a preliminary inquiry. It does not carry any legal consequences for the Applicant. It is only when the Respondent considered the report and determined what action (if any) he needed to take, that there is any potential legal consequence. In this case, the Respondent acted fairly and reasonably by giving the report (apart from certain necessary redactions to protect witness/patients) to the Applicant so that she could provide a written response. She provided her response with legal assistance. The unredacted parts of the report clearly set out the "gist" of the case that she had to answer. Advocate Hill submitted that that is the epitome of fairness.

b. the content of the report cannot be faulted on any reasonable examination. Dr Carter had fully considered all the evidence given to him by the Applicant before making his findings on the TOR. The fact that Part E, Appendix 1 (which contained the Applicant's statement at her interview with Dr Carter set out in full) had been redacted before being given to the Applicant does not alter the fact that Dr Carter considered it when writing his report.

c. unless the Court is prepared to rule that the Respondent's evidence is wrong, it is clear that the Respondent did consider all of the evidence set out in the report (including the Applicant's written statement in Part E, Appendix 1) before making his determination that the reported concerns raised substantive issues.

d. before the Respondent made his determination, he met with the Applicant and he gave her a copy of the report containing the "gist" of the case for the Applicant to answer so that she had an opportunity to make written representations to the Respondent. The Applicant sent a written response with legal assistance which was fully considered by him before he made his determination and issued the Resolution Notice.

160. On the inclusion of Part C, Advocate Hill submitted that no adverse conclusion was drawn in relation to the Apixaban prescription, the Respondent accepted the Applicant's explanation about the allegation of not examining a patient and no adverse was drawn. The Respondent accepted the Applicant's assurances relating to her health and no adverse conclusion was drawn and the Applicant admitted prescribing for herself and her family in her response to that allegation. This demonstrates that the Respondent's reaction to these allegations was fair and reasonable. The Applicant had an opportunity to respond to the allegations and the Applicant's responses were taken into consideration.

161. With regard to the Applicant's contention that Dr Carter's report failed to properly consider relevant evidence concerning the systems and context in which the Applicant worked and her contractual obligations, the Respondent submitted that the requirement to consider factors "as far as possible" does not require Dr Carter or the Respondent to consider them either to the exclusion of other factors or to give them unnecessary or disproportionate weight. In this context, they are required to consider those factors as far as may be necessary for the purpose of their investigation and decision and they did so.

162. In relation to the submission that there is no evidence that the Dr Carter's report or the Respondent have considered the Applicant's contractual arrangements and no reference to or evidence of the Applicant's contract with the SMC, the Respondent submitted that there is no requirement that he expressly records what he took into consideration; it is only necessary that his decision reflects that all material and no immaterial facts or matters have been considered. The Respondent submitted that the report and the Respondent's decision are based on the failings of the Applicant's practice. Matters relating to the Applicant's contractual arrangements/obligations with the SMC in relation to the running of the pharmacy/dispensary and in relation to the computer system were taken into account by the Respondent but were not sufficient to displace the conclusions reached about her practice.

163. In response to the Applicant's submission that any response to Dr Carter's report which the Applicant could give would be constrained by the fact that she was and is entirely unaware of the evidence against her, who it is from and what it said including the particulars of any allegation, the Respondent relied on his submissions made above on *Doody*.

164. On the shortcomings of the medical infrastructure on Sark, it was submitted that the Authorised Person was instructed to consider "as far as possible" the system and context but this was not and as a matter of law could not be the focus of the investigation. The focus was on the Applicant's practice on Sark, not on systemic and contextual issues. The expression "as far as possible" means as far as may be relevant to the considerations in hand. It does not mean promoting it to the most important consideration.

Ground (iii) – Dissemination of Dr Carter's Report

165. The Respondent contended that the dissemination of Dr Carter's report was as required and permitted by the Sark Ordinance. There is no requirement under the Sark Ordinance for the Responsible Officer to consult with the Applicant before sharing information with the UK Responsible Officer. The only requirement is that a Responsible Officer must inform a registered practitioner when he gives information concerning the practitioner (Section 34(3)).

166. Advocate Hill submitted that the Ordinance is silent as to the timings for the dissemination of the report. He referred to Section 34 of the Ordinance which provides for a duty, certain mandatory situations and one discretionary one. It was submitted that if it is not prohibited it is permissible provided that it complies with the requirements of natural justice.

Ground (iv) – The Resolution Notice

167. It was submitted that the Respondent had relied on the full and detailed report of Dr Carter in support of his decision to issue a Resolution Notice. There is sufficient specificity and particularity contained in Dr Carter's report to justify the findings and conclusions. The reasons for the Respondent's findings that there are substantive issues are based upon the findings in the report and accordingly the Respondent's reasons are to be found in the report.

Discussion

168. I sought the positions of both parties on the question as to whether the case had been rendered academic because of a development in the factual matrix, namely that the Applicant had resigned from her position in Sark after the making of the impugned decisions. The parties were in agreement that the case had not been rendered academic.

169. Before turning to consider each of the grounds, I set out below some governing principles of application in judicial review that are relevant for the present application.

Governing Principles in Judicial Review

170. In ***Robert Varley and The Employment and Discrimination Tribunal and the States of Guernsey*** [2021] GCA 067, the Court of Appeal of Guernsey held at paragraph 14:

> *"There remains neither a Law nor Rules of Court governing judicial review in Guernsey, with the result that the applicable procedural guidance continues to be derived from Practice Direction No. 3 of 2004 ("the Practice Direction"), cited above, and from the decisions of the courts themselves. As Collas B noted in Litchfield at [36]:*
>
> *"When considering applications for judicial review, the Guernsey courts look to the well-established principles in English law for guidance while recognising that in the absence of any specific Rules of Court, we have more flexibility in procedural matters than might be the case in England"."*

171. In accordance with *Practice Direction No 3 of 2004 on Judicial Review* ("the Practice Direction") of 24 April 2004, in a claim for judicial review, the Cause must seek permission to proceed with the judicial review (paragraph 2). The Practice Direction also underlines the duty of candour on claimants in judicial review and the requirements of promptitude and sufficient interest of the claimant at paragraph 6:

> *"Claimants are reminded that they are under a duty to make full and frank disclosure of all material facts, that proceedings must be instituted promptly, and they must satisfy the Court that they have sufficient interest in the subject matter complained of."*

172. In ***Old Government House Hotel Limited v The President of the Island Development Committee and Mighty Mouse Limited*** [Judgment 58/2003], Lieutenant Bailiff Day held at paragraph 34:

> *"The first step which this Court should take, on receipt of an application for judicial review, apart from considering the question of the locus of the applicant (and other interested parties), is to determine whether it is right to allow an applicant to proceed to a full hearing for judicial review so as to remedy its complaints. This Court's jurisdiction to proceed in such a summary way is based not only on Rule 55, but also on its historic power to treat causes as privilégiées and its inherent jurisdiction to do justice, which requires inter alia that the Court's time is not wasted on unworthy matters. Thus this Court should adopt the permission (formerly leave) stage present in equivalent proceedings in England and Wales."*

173. In ***Litchfield v Director of Environmental Health & Pollution Regulation***, Court of Appeal Guernsey Judgment 37/2014, Sir Richard Collas, referring to the relevant English statute on judicial review (Section 31(3) of the Senior Courts Act 1981) said at paragraph 46:

> *"the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates".*

174. The Court of Appeal in England and Wales considered the issue of sufficient interest in ***R v Monopolies and Mergers Commission, ex parte Argyll Group plc*** [1986] 1 WLR 763 at 773. Sir John Donaldson MR held at 773:

> *"Rules of the Supreme Court Order 53 rule 3(7) provides that "The Court shall not grant leave, unless it considers that the applicant has sufficient interest in the matter to which the application relates." In terms this sub-rule applies only to the stage at which level is granted or refused. However, the House of Lords in The Queen v. Inland Revenue Commissions, ex parte National Federation of Self-Employed and Small Businesses Ltd. (1982) AC 617, has introduced a two stage test (see per Lord Wilberforce at page 63)C, Lord Diplock at page 642E and Lord Fraser at page 645E) .*
>
> *The first stage test, which is applied upon the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance."*

175. In ***Varley***, the Court of Appeal of Guernsey provided the following guidance on the test for permission to apply for judicial review at paragraph 15:

> *"The requirement in English law of permission to apply for judicial review (still referred to in Guernsey, following the former English terminology, as leave to apply for judicial review) is described in The Hon. Sir Michael Fordham's Judicial Review Handbook (7th edn., 2020 at 21.2) as follows:*
>
> *"The permission stage filters out judicial review claims (a) whose grounds are not properly arguable with a realistic prospect of success, (b) which lack materiality under the statutory HL:NSD (highly likely: not significantly different) test or (c) in respect of which it is appropriate to refuse permission on the basis of a 'discretionary bar' (such as delay, prematurity or an alternative remedy)."*
>
> *The statute referred to at (b) is of course a United Kingdom measure, but the remainder of that paragraph accurately characterises the purpose of the leave stage in Guernsey. As indicated in paragraph 7 of the Practice Direction, the leave stage can also be a useful case management opportunity, allowing the court to deal with ancillary issues and applications and to make directions for the ongoing conduct of the proceedings."*

176. The Court in ***Varley*** also provided helpful guidance on the role of rolled-up hearings in judicial review at paragraphs 19 and 20:

> *"Where the question of whether to grant permission is difficult or uncertain, a sensible middle way is often for the court seized of an application for permission to order a "rolled-up hearing" at which argument on leave and on the substantive application are listed for hearing at the same time. Once the issues have been argued out, the court can determine them as seems most appropriate. That was the course alluded to in Litchfield at [33] and taken by the Royal Court (McMahon DB) in Groucutt v Minister of the Environment Department of the States of Guernsey [2015] GLR 406, at [2]. As this Court said in Litchfield at [35]:*
>
> *"In order to ensure that a case is dealt with justly, the judge will have to consider all relevant factors and may conclude that a preliminary hearing at the leave stage might be unjust and hence inappropriate especially where a separate hearing at the leave stage may only add to the costs and expense for the applicant and delay in reaching a final conclusion, without achieving any reduction in court time or other appreciable benefit."*
>
> *More specifically, in cases where issues of prejudice or detriment to good administration are identified by a defendant in the context of delay, a rolled-up hearing has the advantage that "full consideration can be given to issues of extension of time, prejudice and detriment, on the basis of evidence filed by the parties": Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5 at [41].*
>
> *Accordingly, and though each case must be considered in the light of its own particular circumstances, it is useful to bear in mind that the function of the leave hearing is to filter out cases unworthy of occupying the time of the Court, and that in borderline cases the interests of justice (including the expeditious resolution of judicial review applications) will often be best served by ordering a rolled-up hearing where issues relating to permission and substance can be considered together and in the round.*

177. The role of the judicial review Court is supervisory in nature. The Court is solely concerned with the legality of the decision-making and not the merits of the decision under challenge.

178. On the subject of public law remedies, the Court of Appeal in ***Varley*** said this:

> *"Reference has been made before us, as it was below, to the so-called "Beloff grounds", as enumerated in the Jersey Law Review by Michael Beloff QC, the distinguished public lawyer and former Senior Ordinary Judge of this Court, and cited by Day LB in Old Government House Hotel Limited v President of the Island Development Committee and Mighty Mouse Limited, Judgment 58/2003 of 9 December 2003 at [39]:*
>
> *"The main common feature of public law remedies is that they are discretionary in nature: they can be refused on grounds of delay; lack of utility; interference with good administration or with the rights of third parties; improper conduct by the applicant; or the existence of an available alternative remedy."*
>
> *It remains the case that the remedies provided for in public law are discretionary and may be refused on any of those grounds".*

Ground (i)

179. In essence, the first ground relates to the decision-making of the Respondent at the commencement of the investigation.

180. The first point that I make on this ground is that bearing in mind the focus of the Sark Ordinance, namely the regulation of the medical profession and the merits of a relevant complaint and taking into consideration the fundamental importance of the protection of the health of patients and the public in Sark, I consider that when the concerns about the Applicant were referred to the Respondent, there was no duty on him to take into account the motivations or the ulterior motives that may have been behind the referral of those concerns. The question as to whether the concerns were frivolous and vexatious is not a matter for this Court and I make no finding on that. The Court is solely concerned in its supervisory role with the decisions made by the Respondent in his capacity as Responsible Officer under the Sark Ordinance. I am further satisfied that the Respondent acted independently of the SMC when he reached the decisions that are under challenge.

181. Second, I accept Advocate Hill's submission that the successful completion of the Applicant's NHS Appraisal and Validation was no basis for rejecting the suggestion that the concerns raised were or may have been substantive issues. I accept the fundamental distinction underlined by the Respondent in his evidence between the appraisal process and an investigation, namely that for the appraisal, the Applicant would submit her evidence to demonstrate how she has complied with GMC requirements for validation and reflect on her evidence with her appraiser but the appraiser does not act as an investigator. Any investigation would take place outside the appraisal setting.

182. Third, I am satisfied that the Applicant misunderstood the role of Dr Foulkes. It is abundantly clear that in his first email to the Respondent dated 20 July 2023, Dr Foulkes made it expressly clear that he was willing to discuss the case with the Respondent on behalf of Dr Alison Taylor, the Applicant's UK Responsible Officer. Whereas Dr Foulkes had initially been appointed as Authorised Person by the Respondent, it was in fact Dr Carter who was subsequently appointed for the purpose of the relevant investigation under the Sark Ordinance. I accept the evidence of

the Respondent that on 1 September 2024, he agreed the TORs with the UK Responsible Officer. The seeking of advice and assistance from appropriate personnel did not compromise the functional independence of the Respondent for the purpose of his decision-making under the Sark Ordinance. Similarly, I accept that the Respondent's case that the Applicant's UK Responsible Officer had a legitimate interest in the matter insofar as it related to her responsibilities under the law of the United Kingdom.

183. Fourth, I accept that that properly analysed and in particular, taking into account Sections 18 and/or Section 34(4) and paragraph 2(1)(a) of Schedule 6 of the Sark Ordinance, it did not matter how the Respondent came into possession of information relating to the concerns about the registered practitioner or the source of the referral of those concerns.

184. In light of the above conclusions, I find that there is no arguable case in respect of the first ground.

Ground (ii)

185. I turn to consider the second ground in judicial review which is the heart of this case. In short, the Applicant's case was that the Respondent's decision that the concerns referred to him in relation to the Applicant raised substantive issues and the decision issue the Resolution Notice were flawed because in reaching those decisions, the Respondent relied on the report which itself was flawed as it was infected by procedural impropriety and irrationality.

186. In broad terms, a central element of the rules of natural justice is that a person is to be given a fair hearing before a decision affecting him is taken. It is well-established that the question as to whether the rules of natural justice or procedural fairness apply to a particular decision-making process, and what the actual requirements of fairness require depend on the circumstances of the particular case. In the seminal judgment of the House of Lords in *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 A.C. 531, Lord Mustill said at 560:

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: -*
>
> 1. *Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
>
> 2. *The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*
>
> 3. *The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
>
> 4. *An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*

5. *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*

6. *Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

187. There are, in my consideration, a number of important features that are relevant to the context of the present case.

188. The first set of features relate to the Sark Ordinance, the relevant statutory framework in this case:

a. under Part III of the Sark Ordinance, the Responsible Officer has a mandatory duty to undertake a preliminary assessment of concerns and must decide if the concerns raise or may raise a substantive issue. It is only after that preliminary assessment that the investigation of the facts to which the concern relates is undertaken by the Authorised Person (if the Responsible Officer concludes that a concern raises or may raise a substantive issue).

b. the essential tasks for the Authorised Person are first, the investigation of the facts to which the concern relates and second, the reporting of his findings to the Responsible Officer.

c. it is upon receipt of the Authorised Person's report of the findings of the investigation that the Responsible Officer must decide whether or not the concern investigated has raised a substantive issue.

d. whereas Part III of the Sark Ordinance expressly provides that the Authorised Person may exercise the powers of a Responsible Officer, there is no provision empowering the Responsible Officer to exercise the powers of an Authorised Person. The role of the Responsible Officer in the context of Part III is therefore, in my consideration, separate and distinct to the role of the Authorised Person. The Authorised Person investigates and reports to the Responsible Officer. The Responsible Officer then makes a decision on foot of that report.

e. the Sark Ordinance expressly provides that the Responsible Officer is under a duty to carry out his functions with *"complete fairness, impartiality and independence"*.

f. a decision of a Responsible Officer that a concern raises a substantive issue following the investigation by the Responsible Officer may lead to a number of adverse outcomes for the practitioner under the Sark Ordinance which include immediate suspension from the Sark register of medical practitioners, a discretionary suspension from the Sark register, referral to the General Medical Council, referral to the Panel for removal from the Sark Register or the varying of conditions on the doctor's practice. Procedural safeguards are provided for in Schedule 2 of the Sark Ordinance. The decision that a concern raises a substantive issue may also lead to the issuance by the Responsible Officer of a Resolution Notice. If the Resolution Notice is rejected by the practitioner, the Responsible Officer has a mandatory duty to decide whether to take any action

under Schedule 2. Thus, the decision as to whether a concern raises a substantive issue is an important one and it may lead to an adverse outcome for the practitioner.

189. The second set of features relates to the context of the investigation in the present case:

a. this was a complex investigation which was expressly acknowledged by Dr Carter at Part C of his report in crystal clear terms.

b. in the introduction to the report, Dr Carter referred to this being an *"independent report"*.

c. a significant number of witnesses were interviewed during the investigation. The identities of the witnesses and the full content of their evidence was not disclosed to the Applicant.

d. the Applicant was not interviewed in relation to TOR 3 and prior to receipt of the report, she was unaware that Part C had been undertaken by the Authorised Person on the instruction of the Responsible Officer.

e. in his instructions to Dr Carter setting out the TORs, the Respondent expressly requested Dr Carter to *"obtain all relevant information from any person or entity which the investigator considers appropriate to evaluate the matters of concern"*.

f. prior to the investigation, the Applicant communicated to the Respondent her willingness to cooperate with both him and NHS England and to disclose all information required. Her BMA Representative advised the Respondent that she may wish to call her own witnesses.

g. prior to the investigation and by letter dated 5 February 2023, in the context of the investigation, the Respondent advised the Applicant that it *"it will be important that those involved feel heard"*.

190. In light of these features, I consider that fairness required that the Applicant be afforded the opportunity to respond to the allegations made against her and to be heard during this investigation to enable the Authorised Person to reach fair and balanced findings for the consideration of the Respondent before he made a decision on whether the concerns raised substantive issues. I turn to consider the arguments relied on by the Applicant below as against the Resolution Notice.

191. At paragraph 2 of the Resolution Notice, the Respondent concluded that the concerns raised a substantive issue, namely that the Applicant had not consistently complied with Good Medical Practice in working collaboratively with colleagues. This corresponds to TOR 3 of the report. In my consideration, the critical issue is this: Dr Carter examined the issues, reached findings and conclusions and made recommendations entirely in the absence of any evidence from the Applicant on TOR 3. I consider that in so doing, the Applicant was denied the right to respond to the concerns raised about her for the purpose of the investigation of the facts. I consider that the Respondent fell into error by not recognising this evidential gap and by not remitting it back to Dr Carter to complete this part of the investigation in his capacity as the Authorised Person.

192. At paragraph 4 of the Resolution Notice, the substantive issue identified was that the Applicant had not complied with Good Medical Practice in prescribing for herself and her family. This corresponds to Part C of the report. The Applicant had no knowledge that Part C had been undertaken until she was provided with the report. She was afforded an opportunity to respond to the issue of prescribing for self and family by the Respondent after the completion of Dr Carter's report and prior to the issuance of the Resolution Notice. In her representations to the Respondent, the Applicant admitted prescribing for herself and her family. Whilst I recognise that the Respondent afforded the Applicant the opportunity to respond following receipt of Dr Carter's report, I consider that he fell into error by not identifying the evidential gap at Part C and by not remitting the matter back to Dr Carter so that he could take evidence from the Applicant and complete the investigation of the facts and his report on Part C.

193. Having reached this finding in relation to Part C of the report, I turn next to consider the question as to whether – had the Applicant had the opportunity to provide her evidence on prescribing for self and family to Dr Carter - this would have made any material difference. I conclude that it would not have made a material difference. That is because the Applicant admitted responsibility on prescribing for self and family.

194. I turn to consider the final two paragraphs in the Resolution Notice. At paragraphs 1 and 3 of the Resolution Notice, the Respondent sets out substantive issues that correspond to TORs 1 and 5 respectively. Properly analysed, the arguments on these points were irrationality-based and they cross over with the Applicant's case that Dr Carter failed to take into account the shortcomings of the Sark system and context and I address that below.

195. On the criticism made on behalf of the Applicant regarding the shortcomings of the Sark system and context, having examined the report of Dr Carter, I accept as correct the submission on behalf of the Respondent that Dr Carter was instructed consider "as far as possible" the system and context but this was not and could not as a matter of law be the focus of the investigation. The focus of the report was on the Applicant's practice in Sark not on systemic and contextual issues. I also accept that the expression "as far as possible" must be read in context to mean as far as may be relevant to the consideration in hand but not promoting it to the most important consideration. As the Respondent highlighted in his affidavit, the report makes frequent reference to the deficiencies of the infrastructure in Sark and included a list of recommendations to the SMC for addressing those issues. At Section 1.3 of Part B of the report, and on each of the individual TORs, Dr Carter set out multiple recommendations to the SMC. I accept the Respondent's evidence that he was satisfied that the unique conditions of working in Sark had been fairly considered by Dr Carter.

196. I accept the Respondent's argument that ***Rudling*** is to be distinguished from the present case.

197. In light of my findings above, I grant permission to apply for judicial review in respect of ground (ii) and I allow the application on this ground. I am satisfied that the Applicant has sufficient interest as she is the subject of the decisions under challenge.

Ground (iii)

198. In light of my findings on ground (ii), I am satisfied that the Resolution Notice was flawed. It was based on a report which itself was vitiated by procedural unfairness. It is unnecessary to consider the question as to whether the reasons provided were adequate in light of that finding. Had I been required to do so, I would have concluded that the Resolution Notice did not provide adequate reasons as it failed to reference the further representations furnished to the Respondent

by the Applicant on prescribing for self and for family (Part C). Those representations were directly relevant as they informed his decision on paragraph 2 of the Resolution Notice.

199. I grant permission for judicial review on ground (iii) and I allow the application on that ground also.

Ground (iv)

200. This ground relates to the dissemination of Dr Carter's report. It is abundantly clear that under the Sark Ordinance, the Respondent had information-sharing powers (Section 34). The Respondent appropriately informed the Applicant of the disclosures made by him in his role as Responsible Officer. The core issue is about the timing of the release of the report. I consider that in the present case, the issuance of the report was premature because the report of Dr Carter was both evidentially and substantively incomplete for the reasons set out above.

201. I grant permission for judicial review on ground (iv) and I allow the application on that ground also.

Relief

202. The grant and form of relief in judicial review are discretionary.

203. I am satisfied that it is appropriate to grant quashing orders in respect of both of the impugned decisions. I reach this conclusion on relief solely on the basis of my findings on procedural unfairness on paragraph 2 of the Resolution Notice (on TOR 3). I would not have granted quashing orders on the basis of my findings on paragraph 4 of the Resolution Notice (Part C) in light of my conclusion that the admission of the Applicant in relation to prescribing for self and family would not have altered the outcome.

204. With regard to a mandatory order, I am minded at this stage that as the Applicant is no longer in practise in Sark that there may be little utility in granting this form of relief but I will hear from the parties on that discrete issue and on costs.

Conclusion

205. In conclusion, I refuse permission to apply for judicial review in respect of ground (i) and I grant permission and allow the judicial review on grounds (ii), (iii) and (iv). I grant quashing orders in respect of the impugned decisions and I shall hear from the parties on whether the case calls for a mandatory order and on costs.