Appeal to the Royal Court of a decision of the Office of the Data Protection Authority concerning a breach of the data protection principles under Section 6 (Integrity and Confidentiality) and Section 41 (Duty to take reasonable steps to ensure security) and reprimand by way of sanction; Special Category Data; ultra vires or some other error of law, unreasonable decision, lack of proportionality and material error as to the facts or as to the procedure; privacy application

[2025]GRC094

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
Civil No. 2483

MARK GERARD FERBRACHE, PAUL RICHARDSON AND ROBIN JOHN REEVES COWLING PRACTISING UNDER THE STYLE AND NAME OF AFR ADVOCATES

Appellants

And

THE OFFICE OF THE DATA PROTECTION AUTHORITY

Respondent

Judgment circulated under the Practice Direction: 12 December 2025

Final Judgment handed down on: 23 December 2025

Before: Fionnuala A Connolly, Judge of the Royal Court

Counsel for the Appellants: Advocate M. Ferbrache
Counsel for the Respondent: Advocate S. Brehaut

Cases, texts & legislation referred to:

Data Protection (Bailiwick of Guernsey) Law, 2017

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)

Weighbridge Trust Limited -and- The Guernsey Financial Services Commission [2024] GRC080

The Guernsey Financial Services Commission -and- Ian Charles Domaille, Ian Geoffrey Clarke and Margaret Helen Hannis [2024] GCA003

Y -and- The Chairman of the Guernsey Financial Services Commission -and- Her Majesty's Procureur 47/2018

The Medical Specialist Group LLP -and- Guernsey Competition and Regulatory Authority [2023] GRC006

Justyna Zeromska-Smith -and- United Lincolnshire Hampshire NHS Trust [2019] EWHC 552 (QB)

***UI v Őesterreichische Post AG* (Case C-300/21)**

***VB v Natsionalna agentsia za prihodite* (Case C-340/21)**

The EU General Data Protection Regulation (GDPR), A Commentary, Kuner C, Bygrave L and Docksey C.

JUDGMENT

Introduction

1. Advocate Mark Gerard Ferbrache, Advocate Paul Richardson and Advocate Robin John Reeves Cowling are Advocates of the Royal Court of Guernsey practising under the style and name of AFR Advocates ("the Appellants" or "AFR"), situated at Rue du Manoir, Guernsey, GY1 3XZ. This is an appeal against a decision of the Office of the Data Protection Authority in Guernsey ("the Respondent" or "the Authority"), the supervisory authority for the Data Protection (Bailiwick of Guernsey) Law, 2017, as amended and associated legislation. It was common case that this is the first appeal under the relevant data protection legislation.

2. By decision made on 27 February 2023, the Respondent concluded that the Appellants had contravened the data protection principles under Section 6 ("Integrity and Confidentiality") and Section 41 ("Duty to take reasonable steps to ensure security") of the Data Protection (Bailiwick of Guernsey) Law 2017 and imposed a reprimand by way of sanction. It is this decision that is under appeal.

3. The Court is grateful to Advocate Ferbrache and Advocate Brehaut for their helpful written and oral submissions. The Court has given careful consideration to all of the evidence and the submissions.

Procedural Background

4. On 20 March 2023, the Appellants served the Cause on the Respondent by which it sought an order that the determination of the Respondent as contained in its decision dated 27 February 2023 be set aside. By consent order dated 23 March 2023, the appeal was placed *Inscrite* on the *Rôle des Causes à Plaider* and on an interim basis, the sanction (reprimand) was suspended and the Respondent was ordered not to make a public statement pursuant to Section 64 of the Data Protection (Bailiwick of Guernsey) Law, 2017.

5. Defences were filed on 5 May 2023. On 23 October 2023, the Appellants served and filed Répliques to the Respondent's Defences. On 2 November 2023, the Respondent served and filed a Duplique to the Appellants' Répliques. On 1 December 2023, the Appellants and Respondent gave standard disclosure and on 8 December 2023, the parties allowed inspection of the relevant documents. The parties exchanged witness statements on 2 February 2024.

6. There were four witness statements before the Court. On behalf of the Appellant(s), there was a witness statement from Advocate Robin John Reeves Cowling and from Mr Brendan Paul Ferbrache ("Mr B. Ferbrache"), a paralegal employed by the Appellants, both dated 2 February 2024. The Respondent relied on a witness statement from Mr Martin Richard Harris, an

investigator employed by the Respondent and from Mr Peter Du Port, the individual who raised a complaint with the Respondent, both dated 2 February 2024. All of the witnesses gave oral evidence to the Court.

7. Some additional documents were furnished to the Court at hearing. A further bundle containing, *inter alia*, the *Billet d'Etat* in respect of the Data Protection (Bailiwick of Guernsey) Law, 2017 was helpfully furnished to the Court following the conclusion of the hearing. The Court also had the benefit of skeleton arguments from both of the parties.

8. The Respondent sought a privacy order. On 8 January 2025, the Court gave an *ex tempore* decision. In short compass, the application was refused. The reasons for that decision are set out in this judgment.

The Relief sought and Grounds of Appeal

9. The primary relief sought was the annulment of the Respondent's determination on the following grounds:

    a. it *was ultra vires* or there was some other error of law;
    b. it was unreasonable;
    c. there was a lack of proportionality; and
    d. there was a material error as to the facts or as to the procedure.

10. In the alternative, the Appellants requested the Court to make, in its place, any determination or order that the Respondent is authorised to make under the Law and make any order it considered just.

The Legal Framework

11. The parties were largely agreed on the applicable statutory framework.

12. The primary legislation for the purpose of this appeal is the ***Data Protection (Bailiwick of Guernsey) Law, 2017*** ("the DP Law"). By way of background, according to the *Billet d'Etat* dated 13 March 2017, it was intended that the DP Law reflected *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC* ("the EU General Data Protection Regulation"). This approach is reflected in Section 1 of Part 1 of the DP Law which provides that the object of the legislation is to:

> *"... (a) protect the rights of individuals in relation to their personal data, and provide for the free movement of personal data, in a manner equivalent to the GDPR and the Law Enforcement Directive, and*
>
> *(b) make other provisions considered appropriate in relation to the processing of personal data."*

13. Section 6 provides for the duty to comply with data protection principles. Section 6(2)(f) refers to the principle of Integrity and Confidentiality:

> *"(f)* ***Integrity and Confidentiality****:*
>
> *Personal data must be processed in a manner that ensures its security appropriately, including protecting it against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures…"*

14. Section 31 provides for the duties of controllers:

> *"Duty to take reasonable steps for compliance.*
>
> *31. (1) A controller must take reasonable steps (including technical and organisational measures) –*
> *(a) to ensure that processing of personal data is carried out in compliance with this Law, and*
> *(b) to be able to demonstrate such compliance upon request by the Authority.*
>
> *(2) In discharging the duty in subsection (1), the controller must take into account –*
> *(a) the nature, scope, context and purpose of the processing,*
> *(b) the likelihood and severity of risks posed to the significant interest of data subjects, if processing is not carried out in compliance with this Law,*
> *(c) best practices in technical measures, organisational measures and any other steps that may be taken for the purposes of subsection (1), and*
> *(d) the costs of implementing appropriate measures.*
>
> *(3) A controller's compliance or non-compliance with applicable provisions of an approved code or approved mechanism in respect of the processing may be taken into account in determining whether or not the controller is in breach of subsection (1)."*

15. Section 41 of Part VI of the DP Law ("Security of Personal Data") provides:

> *"Duty to take reasonable steps to ensure security.*
>
> *41. (1) A controller or processor must take reasonable steps to ensure a level of security appropriate to the personal data.*
>
> *(2) The steps required under subsection (1) may include technical and organisational measures such as –*
> *(a) pseudonymising and encrypting personal data,*
> *(b) ensuring that the controller or processor has and retains the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services,*

(c) ensuring that the controller or processor has and retains the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident, and
(d) establishing and implementing a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

(3) In discharging the duty in subsection (1), the controller or processor must take into account –
(a) the nature, scope, context and purpose of the processing,
(b) the likelihood and severity of risks posed to the significant interest of data subjects, if the personal data is not secure,
(c) best practices in technical measures, organisational measures and any other steps that may be taken for the purposes of subsection (1), and
(d) the costs of implementing appropriate measures.

(4) The risks mentioned in subsection (3)(b) include risks presented by processing, in particular from – (a) accidental or unlawful destruction, loss or alteration of personal data, or (b) unauthorised disclosure of, or access to, personal data.

(5) A controller's or processor's compliance or non-compliance with any applicable provisions of an approved code or mechanism in force in respect of the processing may be taken into account in determining whether or not the controller or processor is in breach of subsection (1).”

16. Part XI of the DP Law provides for establishment of the Authority. The General Functions of the Authority are provided for in Section 61. Those functions include the administration and enforcement of the Law (Section 61(1)(a) of the Law).

17. Section 64 provides for the Power of the Authority to issue public statements.

18. Part XII of the DP Law provides for Enforcement by the Authority. Section 68 provides for the process to be followed by the Authority for the investigation of complaints:

“68. (1) Upon receiving a complaint, the Authority must –

(a) promptly give the complainant a written acknowledgment of receipt of the complaint, and
(b) as soon as practicable and in any event within two months of receiving the complaint, determine whether or not to investigate it.

(2) The Authority must investigate the complaint unless –
(a) the complaint is manifestly unfounded,
(b) the complaint is frivolous, vexatious, unnecessarily repetitive or otherwise excessive, or

(c) the Authority determines that it is inappropriate to investigate the complaint, having regard to any other action that may be or is taken by the Authority under – (i) section 65, or (ii) any regulations made under section 66.

(3) Where a complaint is investigated, the Authority must give the complainant and the controller or processor concerned

(a) as soon as practicable, and in any event within two months of receiving the complaint, written notice that the complaint is being investigated, and

(b) at least once within three months of giving the notice under paragraph (a), written notice of the progress and, where applicable, the outcome of the investigation.

(4) If the Authority determines not to investigate a complaint, the Authority must give the complainant written notice of its determination and the reasons for it within two months of receiving the complaint.

(5) A notice under subsection (4) must include information as to the complainant's right of appeal under section 82.

(6) Despite subsections (3) and (4), where the Authority is of the opinion that giving a notice required by either of those subsections within the time specified for the notice to be given is likely to seriously prejudice an investigation, the Authority may delay giving the notice.

(7) If the Authority delays giving a notice under subsection (6), the Authority must give the notice, including an update as to the progress and, where applicable, the outcome of the investigation, as soon as it becomes possible to do so without seriously prejudicing the investigation."

19. Section 71 provides for determinations on completion of investigation:

"71. (1) On completing an investigation, the Authority must determine–

(a) whether or not the controller or processor concerned has breached or is likely to breach an operative provision, and

(b) if the Authority makes a breach determination against the controller or processor, which sanction to impose against that controller or processor.

(2) As soon as practicable after making a determination under subsection (1), the Authority must give the controller or processor concerned and the complainant written notice of –

(a) the determination and the reasons for it, and

(b) their respective rights of appeal under sections 83 and 84."

20. Section 73 provides for Sanctions following breach determination:

"73. (1) If the Authority makes a breach determination, the Authority may by written notice to the person concerned impose all or any of the following sanctions against that person –

(a) a reprimand,

(b) a warning that any proposed processing or other act or omission is likely to breach an operative provision, and
(c) an order under subsection (2).

(2) For the purposes of subsection (1)(c), the Authority may make an order against the person concerned requiring that person to do all or any of the following – ….

(g) in any case where the person concerned has breached an operative provision, pay a civil penalty by way of an administrative fine ordered by the Authority in accordance with section 74."

21. Section 76 of the DP Law provides for the Procedure to be followed before making a breach determination or order:

"76. (1) This section applies where the Authority, otherwise than with the agreement of the person concerned, proposes to make –
(a) a breach determination, or
(b) an enforcement order.

(2) Before making the determination or order, the Authority must give the person concerned notice in writing stating –
(a) that the Authority is proposing to make the determination or order,
(b) the terms of, and the reasons for, the proposed determination or order,
(c) that the person concerned may, within a period of 28 days beginning on the date of the notice or any longer period that may be specified in the notice, make written or oral representations to the Authority in respect of the proposed determination or order in a manner specified in the notice, and
(d) the right of appeal of the person concerned under section 84 if the Authority were to make the proposed determination or order.

(3) The Authority must consider any representations made in response to a notice under subsection (2) before giving further consideration to the proposed determination or order…."

22. Section 84 provides that a Sanctioned Person may appeal a breach determination or order:

"(1) The person concerned may appeal to the Court against

(a) a breach determination made by the Authority, or
(b) an enforcement order.

(2) The grounds of an appeal under this section are that –

(a) the determination or order was ultra vires or there was some other error of law,
(b) the determination or order was unreasonable,
(c) the determination or order was made in bad faith,
(d) there was a lack of proportionality, or

(e) there was a material error as to the facts or as to the procedure.

…….

(7) On the application of the appellant, the Court may, on such terms as the Court thinks just, suspend or modify the effect of the determination or order appealed pending the determination of the appeal."

Background

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

24. On 18 July 2022, Mr Peter Du Port ("the Complainant") lodged a complaint with the Respondent ("the Complaint"). The Complaint stated:

"That AFR delivered to the front door of my house a document bundle containing a great deal of confidential information about myself, my health records, my claim for negligence against Queens Road Medical Practice, and information about the Practice Doctors and Nurses who are named. This document bundle arrived totally unannounced in a ring folder with a front piece detailing the contents. It was not in an envelope or any other covering and was left face up in front of my front door in plain sight of the road. Anyone passing along the road or coming to my front door could have read it or stolen it or photographed parts of it."

25. The Complainant provided other information relevant to the Complaint, namely:

"I have photographs of the document on the doorstep and of its proximity to the road."

26. The bundle of documents delivered to the Complainant on 18 July 2022 referred to in the Complaint ("the Bundle") was a Court hearing bundle in respect of proceedings brought by the Complainant against Queen's Road Medical Practice ("QRMP"). Mr Du Port had lodged a Petty Debts Claim against QRMP alleging medical negligence in the provision of medical care during an ear wax removal treatment resulting in damage to his ear canals, loss of hearing and ongoing tinnitus. The proceedings were in open Court. At the hearings on 16 June 2022 and on 20 July 2022, Mr Du Port was unrepresented, and Advocate Cowling appeared on behalf of QRMP. On the first return date on 16 June 2022, Advocate Cowling applied to the Court for the case to be transferred to the Royal Court of Guernsey. The Court directed that it wished to hear further argument and ordered the parties to file written submissions. The matter was listed for hearing on 20 July 2022.

27. At 15:44 on 18 July 2022, Mr B. Ferbrache, a paralegal employed by AFR, sent an email to the Royal Court Greffe and to the Complainant attaching the bundle and he stated that the hard bundle would be delivered to the Complainant's address "shortly". On the same date, Mr B. Ferbrache attended the Complainant's home address and delivered the bundle. The Complainant was not at home when Mr Brendan Ferbrache attended. He waited a short period at the Complainant's home and then left the bundle on the Complainant's front doorstep. The bundle was left in an ordinary lever arch file. The cover of the folder contained the names of the parties to the Court proceedings. The folder was not enclosed in an envelope, box or any other form of container.

28. The Complainant received the bundle on 18 July 2022, a short period after it had been delivered by the Appellants.

29. Following receipt of the Complaint, on 29 July 2022, the Respondent allocated the case to Mr Martin Richard Harris ("Mr Harris").

30. On 22 July 2022, the Respondent received photographs from the Complainant of the Bundle and where it was left at the Complainant's premises, namely on the doorstep of his home.

31. By letter dated 2 August 2022, the Respondent informed the Appellants that it had received the Complaint and that it was investigating it pursuant to Section 68 of the DP Law.

32. The Appellants filed representations with the Respondent on 13 September 2022 and on 21 September 2022.

33. On 18 November 2022, the DPA issued a notice that it was proposing to make a breach determination pursuant to Section 76 of the DP Law.

34. By letter dated 13 December 2022, the Appellants submitted representations in response to the Notice. The Respondent responded to certain points raised in those representations and provided the Appellants with a further opportunity to provide further information which the Appellants provided to the Respondent on 6 January 2023.

35. On 27 February 2023, the Respondent issued a breach determination pursuant to Section 71 of the DP Law. It concluded that the Appellants breached operative provisions of the Law, namely Sections 6 and 41 of the DP Law ("the Breach Determination").

36. Following the Breach Determination, the Respondent issued a reprimand pursuant to Section 73 of the DP Law.

The Breach Determination and Notice of Sanction

37. By letter dated 27 February 2023, on behalf of the Respondent, Mr Harris gave notice under Section 71 of the DP Law to the Appellants as Controller ("the Controller") of the Respondent's decision following the investigation, namely:

> *"a) that the controller has contravened the data protection principles outlined in section 6 of the Law, specifically that part relating to "Integrity and Confidentiality" and*
>
> *b) that the controller has breached operative provisions of the Law, namely section 41 relating to "Duty to take reasonable steps to ensure security."*

38. The Breach Determination summarised the background including the investigation correspondence and representations received from the Appellants. The letter stated that based on the evidence submitted, the circumstances summarised in the letter and the various representations made/communications received from both the Complainant and the Controller,

the Respondent had determined that the Controller had acted in breach of Sections 6 and 41 of the DP Law. The letter said this:

> "*It is the view of the Authority that the Controller, whilst implementing some security measures by hand delivering the package, failed to apply additional, adequate measures considering Special Category Data was involved, such as ensuring that the Complainant was at home to receive the package or that the package was in a sealed envelope.*
>
> *The Authority asserts that the fact that the documents were lodged with the Court for a pending judicial matter, does not diminish the sensitivity, integrity or confidentiality attached to the personal data. Neither does it relieve the Controller of its obligations when collecting and processing personal data., and in particular Special Category Data. Moreover, the fact that the proceedings are 'public' does not allow ANY person to gain access to the documents. The Controller's responsibilities in respect of the 'integrity and confidentiality' and 'security' of personal data continues until such time as the Controller ceases to process such data.*
>
> *The Authority also consider that the absence of an allegation or indication that a third party had accessed the personal data following its delivery to the Complainant's home, does not constitute a justification for the matter of delivery or the potential risks to the security of the personal data."*

39. In its conclusion, the Breach Determination stated that the Controller had breached Sections 6 and 41 of the DP Law because:

> *"…inadequate security measures were applied to the delivery manner employed by the Controller, leaving clear and obvious risks to the integrity of the data by possible loss, destruction or damage or by unauthorised or unlawful access."*

40. The Breach Determination further stated that it was able, in accordance with Section 73 of the law, to impose a sanction and it referred to an enclosed Notice of Sanction letter. It continued:

> *"Public Statement*
>
> *The Authority is able to make, in accordance with section 64 of the Law, a public statement. In the event that the Authority decides to make such a statement, prior to its issuance, and in the event that the Controller is identified or identifiable from the statement, the Controller will be provided with written notice of its contents."*

41. The Notice of Sanction letter advised the Controller that:

> *"The Authority hereby notifies the Controller that it is issuing the following sanction:*
>
> - *A Reprimand".*

<u>Summary of the Evidence on behalf of the Appellants</u>

Advocate Cowling

42. Advocate Cowling said that throughout the proceedings, the Appellants, the Complainant and the Greffe communicated with each other by email.

43. In accordance with directions made by Judge Fooks, Advocate Cowling asked Mr B. Ferbrache to send QRMP's submissions and documents by email to the Greffe and to the Complainant and he did so on 30 June 2022 at 15.53. In his email, Mr B. Ferbrache informed the Greffe and the Complainant that "*we shall file a consolidated bundle with the Court and Mr Du Port upon receiving his submissions on the 14th July 2022 for the hearing on the 20th July*".

44. Having received the Complainant's submissions and supporting documents on 14 July 2022, and in order to assist the Court and the Complainant in preparation for hearing on 20 July 2022, Mr B. Ferbrache prepared a consolidated bundle ("the Bundle") containing the parties' submissions and documents.

45. On 18 July 2022, Advocate Cowling liaised with Mr B. Ferbrache to arrange for the delivery of the Bundle to the Greffe and to the Complainant both electronically and in hard copy. In email communications, the Greffe acknowledged receipt of the "hard copy of the Bundle and copied its reply to the Complainant. By email dated 18 July 2023, timed at 15.44, Mr B. Ferbrache notified the Complainant that a hard copy of the Bundle would "be delivered to his address shortly". Mr B. Ferbrache informed Advocate Cowling that he had hand delivered the Bundle at approximately 17.10 and had waited for the Complainant to return to until approximately 17.25.

46. On 19 July 2022, Mr B. Ferbrache provided Mr Cowling with a copy of the Complainant's email to him dated 18 July 2022 at 21.02 in which he indicated that he would be making a Complaint to the Respondent.

47. Advocate Cowling appeared before the Court on 20 July 2022 for the resumed hearing of the Referral Application. Judge Fooks indicated that she had read all of the material in the Bundle. Referral was made to the evidence filed by and relied on by the Complainant in his written and oral submissions. There was no application for the hearing to take place *in camera*. Judge Fooks ordered that the Complainant's claim be referred to the Royal Court. A hearing was listed before an Interlocutory Court sitting of the Royal Court on 12 August 2022.

48. Advocate Cowling said that AFR sought to engage with the Respondent both before and after the final determination was made on 27 February 2023. The Respondent refused to provide the Appellants with a copy of the Complaint when it was requested on 13 December 2022. A copy of the Complaint and Complaint assessment form was eventually provided to the Appellants by email dated 1 September 2023, following the making of the Breach Determination. Advocate Cowling complained that there was no reason why the Complaint could not and should not have been provided when first requested.

49. Advocate Cowling complained that there was no evidential basis upon which the Respondent could reasonably have reached the conclusion that it did after the Case Assessment Meeting and recorded in the Complaint assessment form. The recorded rationale for the assessment decision included that there were details on the contents of the Bundle on the front cover relating to Mr Du Port's health status and his ongoing legal matters was wrong. The front cover

of the Bundle contained no such information. The Respondent had been furnished with two photographs of the front cover apparently taken by the Complainant on 18 July 2022. The front cover set out that the matter was in the Magistrates Court, who the parties were and that it was a consolidated bundle for the hearing on 20 July 2022. Advocate Cowling expressed the concern that the Respondent had adopted an approach of "intending to prosecute the case come what may".

50. Further, Advocate Cowling complained that the Appellants' requests to meet with the Respondent had been refused yet it met with the Complainant and his wife.

51. Advocate Cowling said that the Respondent neither requested nor obtained a copy of the Bundle from the Appellants prior to making the decision of 27 February 2023. Mr Harris first requested a copy of the Bundle from the Complainant by email dated 11 April 2023 at 08:31. This request was made after the Respondent's determination was made and after the appeal proceedings were commenced. Advocate Cowling said this:

> *"It is clear from this correspondence that the DPA did not have any specific knowledge of the contents of the Bundle throughout their investigation and when making their various determinations/decisions. Mr Harris acknowledges this in his email of 11 April 2023 to Mr Du Port. Again, it is not clear why the DPA did not request and obtain the Bundle prior to its Determination. This again raises the concern that the DPA were determined to prosecute the complaint against us come what may."*

52. Advocate Cowling took issue with an email sent by the Complainant to the Respondent on 11 April 2023 in which he said that he could not supply the paperwork in the file and went on to state:

> *"Regarding my medical records, these were a fully detailed list of my full medical records from both my GP, the MSG and the Hospital covering all conditions from birth. It was necessary to go into this level of detail as AFR were looking for anything to frustrate my case…my medical records were very full and detailed, mine alone were some 40 A4 pages, with slightly more from AFR."*

53. Advocate Cowling's evidence was that this statement was untrue and that the Complainant knew that the Bundle did not contain his full medical records. He said that when filing his submissions in support of the Referral Application, QRMP did not file any medical records belonging to the Complainant and that any such material was filed by him with the intention that it would be relied upon by him in open court.

54. Advocate Cowling referred to an email sent by the Complainant to Mr Harris on 11 April 2023 at 00:00 attaching a document in pdf format. Mr Cowling believed that to be the "soft" copy of the Bundle attached to Mr B. Ferbrache's email to the Greffe and Mr Du Port on 18 July 2022 at 15:44.

55. Advocate Cowling said:

"Mr Du Port sent a further email to Mr Harris the next day, on 12 April 2022, timed at 08:53, exhibited at page 58 of RJRC1. I believe that Mr Du Port must have realised at this point that when Mr Harris examined the Bundle, albeit for the first time, he would realise that what Mr Du Port had told him in his email of 11 April 2022 timed at 13:51 was demonstrably untrue. It appears that in consequence he changed his position and now stated that:

> *"the medical notes contained in my case are only brief and limited only to the brief period when my ear damage occurred. The full medical history is not there, I am further reviewing my emails to see if I can find a copy of the full report."*

It is not understood why these and many other material investigations were not carried out and documents obtained by the DPA during the course of its investigation and before it made its final determination."

56. Advocate Cowling said that had the Bundle been served through His Majesty's Sergeant, a front and a backing sheet would have been attached to the front of the Bundle. The Sergeant would not have provided any notice of delivery prior to arriving at the Complainant's property. He would have knocked on the front door and if no-one was home to receive the Bundle he would have left it on the porch. He would not have waited for the Complainant to return.

57. In response to the suggestion by the Respondent that an additional, adequate security measure would have been to put the package in a sealed envelope, Advocate Cowling said that an envelope would have increased the risk of theft or investigation due to the allure of it being an unknown (and therefore potentially valuable) entity. He said that a court bundle does not have the same appeal. It was his belief that "*if the Bundle had been left in an envelope in my view it would have presented as a "target of value" rather than a rather "boring" court folder."*

58. In cross examination, Advocate Cowling accepted that at the relevant time, he along with Advocates Mark Ferbrache and Richardson were Controllers and that as such had to comply with the DP Law. He accepted the principles in the DP law and that he had to take reasonable steps to ensure a level of security appropriate to personal data protection. He accepted that the Bundle contained health data.

59. When it was put to Advocate Cowling that he hadn't given Mr B. Ferbrache any special instructions about the Bundle such as not to leave it unattended, to make sure the Complainant was at home and to call him by telephone, Advocate Cowling said that he told Mr B. Ferbrache to deliver the Bundle to the Complainant's property. Advocate Cowling accepted that this probably would have been different if the Bundle contained the Complainant's full medical history, but he could not say in what way it would be different, whether it would be delivered by armed guard or whether they would do the same because he did not know the extent of the Complainant's full medical history. He accepted that the content of a bundle is a variable to be considered when serving documents and that it all goes to what is reasonable and appropriate steps to take. Advocate Cowling said that the Appellants took reasonable steps in the present case by putting the papers into a lever arch folder and by hand delivering it. The Bundle was not placed into an envelope as that would increase the security risk. One of the considerations taken into account when serving the documents was that these were the Complainant's documents.

60. When it was put to Advocate Cowling that he hadn't addressed his mind to the fact that there was health data in the bundle, he said he knew these were medical negligence proceedings. He had exercised caution because the Bundle was hand delivered by Mr B. Ferbrache. When it was put to him that it had not triggered in his mind that he ought to be more cautious because of the presence of health data, Advocate Cowling said they had been cautious because the Bundle had been hand delivered.

61. Advocate Cowling said that sending the Bundle by post would have been an increased risk because of postal interception which would not occur if a member of AFR staff delivered the Bundle. He accepted that they had not asked the Complainant if he had a *safe place* for delivery.

62. He accepted that he knew which Bundle by post the Complaint referred to but he did not know what the Complainant had alleged about the Bundle. When pressed on what material factors he did not know about in relation to the Complaint, Advocate Cowling said that the provision of the Complaint to the Appellants was a key procedural issue to enable the Appellants to understand exactly the nature of the Complaint. In his opinion, they were entitled to know the nature of the Complaint made against them. Advocate Cowling accepted that the Respondent had the right to refuse to provide a copy of the Complaint.

63. Advocate Cowling accepted that conducting a litigation search at the Royal Court is quite different to a person seeing the Bundle on the floor and looking through it. Advocate Cowling did not accept that he had unfairly vilified the Complainant for having misrepresented the amount of health documents contained in the Bundle.

64. He did not accept the suggestion that he considered as a prevailing theme that this investigation was personal against AFR. He said that it seemed that an investigation had not been properly carried out and that a decision had been made before a proper investigation had been done. The Respondent "jumped to the end" without doing a proper investigation or knowing the full facts or events, the details of what was in the Bundle and other surrounding circumstances and context surrounding the delivery of the Bundle.

65. It was put to Advocate Cowling that his complaint in relation to the Respondent's refusal to meet with the Appellants was baseless because what they really wanted to do was to meet with the Respondent to try and convince them to consent to the appeal. The Respondent had indicated that it would not consent to the appeal. He said that they talked to the Authority but they saw that they met with the Complainant and his wife and they thought it would also be appropriate to meet AFR. He did not accept that there was no purpose to the meeting as it was after the Breach Determination. Conditions were sought by the Respondent that AFR could not agree to.

66. When asked whether, in a particular case in which he was instructed he would leave papers on the doorstep of an opposing unrepresented party if that individual was not home, Advocate Cowling said that if those were his client's instructions, he would do so. The question as to whether special steps would be taken was a very hypothetical question and it would depend on his client's instructions because his client is the data subject. Advocate Cowling said that the reasonable steps consideration would include taking into account what his client's instructions were and he would do what his client wanted.

Mr B. Ferbrache

67. Mr B. Ferbrache was employed by the Respondent as a paralegal at the relevant time. In June 2022, he was assisting Advocate Cowling with the clinical negligence claim brought by the Complainant against their client, QRMP. He was asked by Advocate Cowling to prepare and file the Bundle with the Court and to serve a copy on the Complainant. On 30 June 2022, he sent an email to the Greffe and the Complainant. He attached the skeleton argument on behalf of QRMP and he advised that AFR would file a consolidated bundle with the Court and the Complainant upon receiving the Complainant's submissions for the hearing on 20 July 2022.

68. A hard copy of the Complainant's submissions and supporting documents was received by the Appellants on Thursday 14 July 2022. On Monday 18 July 2022, having received the Complainant's submissions and supporting documents, Mr B. Ferbrache filed a hard copy of the Bundle at the Greffe and served a soft copy on all parties attached to his email at 15:44. He used the email address for the Complainant and the *election de domicile* which he had provided in his Petty Debts Claim Form dated 21 April 2022. This email informed the Greffe and the Complainant that a hard copy of the Bundle would "*be delivered to his (Mr Du Port's) address shortly*". By email at 16:15, the Greffe confirmed that the hard copy of the Bundle had been received by the Greffe and this email was copied to Advocate Cowling and the Complainant.

69. Mr B. Ferbrache said that he then drove to the Complainant's house. He arrived on or about 17:10 and parked his car in the driveway. He walked to the door of the house with the Bundle and knocked on the door, but it was not answered. He waited in his car until approximately 17:25 to see if the Complainant would return. As the Complainant had not returned by this point, Mr B. Ferbrache placed the Bundle in the porch at the front of the property and left. He said that he estimated the distance between where the Bundle was placed in the porch and the road was at least 10, possibly 12 metres.

70. Later that day, the Complainant sent an email to Mr B. Ferbrache at 21:02 attaching a photograph of the Bundle on his doorstep which stated:

> *"Dear Brendan*
> *I have today received a copy of the document bundle you supplied to the Greffe.*
> *I found this bundle on my front doorstep, face up with the contents clearly listed for all to see an in plain view of the road.*
> *I did not find this bundle until my return home at 17.29, photos appended.*
> *I do not know how long they had been there but they could easily have been stolen or read by anyone passing by.*
> *I am extremely upset and annoyed you have delivered these highly sensitive documents in this manner!*
> *They contain my medical records and other sensitive information, which I had every right to suppose you would protect.*
> *In view of this, I intend to report your actions to the Office of Data Protection."*

71. Mr B. Ferbrache saw this email on 19 July 2022 and he brought it to the attention of Advocate Cowling.

72. In cross examination, Mr B. Ferbrache said that he had not received any specific instructions in relation to the Bundle from Advocate Cowling, the partner responsible for this matter. He accepted that he had not been alerted by Advocate Cowling to the presence of health data in the Bundle or any special measures to be taken. He was requested by Advocate Cowling to make a bundle of the sets of documents. He accepted that in his email to the Greffe on 30 June 2022 with copy to the Complainant, he did not say that he would file a hard copy with the Complainant. He accepted that by the time he arrived at the Complainant's address at around 17:10, he had not received a response from the Complainant to his email to the Greffe indicating that he would file a hard copy on the Complainant. He said that he did not know when the Complainant would return and did not call him.

Summary of the Evidence on behalf of the Respondent

The Complainant

73. The Complainant is retired and was formerly employed by the Grammar School as a Technician in the Design and Technology Department. He said that the Bundle contained his personal data, including his sensitive medical information.

74. The Complainant's recollection of the clinical negligence proceedings was that no-one was present in the Court at the time save for the Judge, the parties and the court officials. This he said was because Judge Fooks requested that the application be heard at the end of Petty Debt Court as it required more time than the other matters listed on that day.

75. He said that prior to the delivery of the Bundle, he was not contacted by the Appellants to arrange a delivery time with him or to confirm whether or not he might be at home at any particular time. After delivery of the Bundle, the Appellants did not confirm with him that it been delivered or whether he had actually received it. On a separate occasion and in relation to a separate bundle of documents relevant to a hearing listed for 12 August 2022 which concerned his original claim against QRMP, the Appellants had sought to agree delivery arrangements with him and he expected the same courtesy in relation to the Bundle, particularly as it contained his sensitive personal data.

76. The Complainant said that he was not at home when the Bundle was delivered to his home on 18 July 2022 and nor was anyone else. He and his wife were at one of the local beaches since at least midday and they arrived home at 17:29. He said that upon their return, he immediately noticed the Bundle which was in a red binder and was on the porch of his property. The Complainant sent photographs of where the Bundle was left to the Respondent. His wife took the photographs which were taken the moment they arrived home.

77. He said:

> *"The Bundle was not left in a sealed envelope, nor was it marked "private and confidential" or with any words to that effect. It was clear from the front cover however that the Bundle related to Court proceedings relating to me. I think it would have been apparent to anyone walking past my house that it contained important and likely sensitive information. The porch of my property is a short distance away from Les Baissieres which is a busy footpath (located near the Grammar School and the Sixth Form centre) and the Bundle would have been seen clearly by any passers-by. In my opinion there was a very*

real risk of the Bundle being looked at, or even being taken, by anyone who happened to be passing; whether they were members of the public or postal or delivery workers or anyone else who either came to my door or walked past it. Furthermore, the Bundle was also left entirely exposed to the elements. Although I cannot confirm whether the Bundle was accessed and/or viewed by a third party, the fact that the Bundle, which contained my sensitive medical records, was left out in the open to the general public caused me great concern and led me to lodging the Complaint with the Authority."

78. The Complainant said that had he been contacted by AFR prior to delivery of the Bundle, he would have directed them to his safe place namely a shed erected 60 – 70 feet away from the porch and accessible to persons who wished to deliver parcels. The Complainant said that he is a very private person and would have been distraught had my sensitive medical information been viewed by unauthorised third parties. He was informed of the outcome of the Respondent's investigation on 6 March 2025 and that the Appellants had exercised their right of appeal.

79. In cross-examination, the Complainant said that he had not discussed with the Respondent whether or not the hearing before Judge Fooks on 16 June 2022 was a public hearing. He accepted that AFR had put together QRMP's documents and his documents together in one bundle and that at the hearing on 20 July, Judge Fooks had said that this was very helpful and she confirmed that she had read them all. The Complainant said that he had not discussed with the Respondent as to whether the hearing before Judge Fooks was in private and it was his understanding that it had been in private.

80. The Complainant accepted that all his communications with Mr B. Ferbrache had been by email and this was his preferred means of communication. He accepted that he had filed his Complaint online, that there was an exchange of emails with the Respondent about photographs, there was a letter advising that the Respondent was going to investigate it and then the Respondent advised him of its decision.

81. The Complainant said that he thought it was fair to say that the delivery of the Bundle was totally unannounced because in his email about delivery of the hard copy of the Bundle, Mr B. Ferbrache had expressed an intention to do so but the question as when that intention was to be realised was left open. There was no timeline attached. When it was put to the Complainant that Mr Ferbrache had stated that it would be delivered "shortly", he responded "*how long is a piece of string*".

82. He accepted that on the cover of the Bundle there were no details relating to his health status or his legal matters. He accepted that there was no medical information on the cover and nothing regarding his health but he said that it alerted anyone who looked at it that there is a matter between himself and QRMP. He accepted that in order to work out what his health status was, a person would have to look at the contents of the folder. He accepted that it was solely his decision to put in his medical notes and records, he had not been requested to do so by AFR.

83. It was put to the Complainant that AFR had notified him of the fact that they were going to deliver a consolidated Bundle. He said that they notified him of that with his preferred method but they did not state the time or place. Had they enquired, he could have informed them of where his *safe place* for delivery is. When asked if on reflection he regretted not saying to AFR

that he had a *safe place*, he said not really, they had a perfectly satisfactory means of communication which they could have explored and they chose not to.

84. When asked about his Complaint that the Bundle was left "*entirely exposed to the elements*", and when it was put to him that he had been to the beach and the weather had not been particularly inclement, he said that Guernsey was quite a windy place and the file could have opened up because it wasn't contained in an envelope or sealed.

85. The Complainant accepted that he had stated incorrectly that the Bundle on the doorstep simply contained his medical records from the audiologists and his medical records with his medical practice and the nurses relating to his medical negligence claim (not his full records and conditions from birth). He said that he was not trying to mislead the Respondent but he did realise that his wording was incorrect and that his medical notes and records in the Bundle did not contain everything from birth as he had stated. Those records were provided in a later document supplied to Judge Fooks for presentation at the Royal Court but they were not in the Bundle. Although it did not contain his full records, the Complainant said that there was a substantial amount of medical records relating to his doctors and nurses who were named, the way they treated him, a medical specialist person and to audiologists from *Specsavers*.

86. When re-examined, the Complainant said that at the two hearings before Judge Fooks, he said that it was his belief that his medical records and audiology reports were not read out by anyone in Court. He said he always communicated with AFR by email and that seemed to work very well. He considered the interval between 15:44 (email from Mr. B. Ferbrache notifying that the Bundle would be delivered) and 17:10 when the Bundle was delivered to his home was a little bit unreasonable.

Mr Martin Harris

87. As an investigator employed by the Respondent, Mr Harris said he is primarily concerned with ensuring that complaints addressed to the Respondent are investigated within the parameters of the DP Law. the Complainant's Complaint was allocated to him on 29 July 2022. Upon request, on 22 July 2022, the Complainant provided the Respondent with a copy of the photographs of the Bundle on his doorstep.

88. Mr Harris said that prior to the matter being referred to him, a complaint assessment was undertaken to determine whether or not the investigation threshold was met. During the complaint assessment, the Respondent considered whether the Complaint was manifestly unfounded, frivolous, vexatious, unnecessarily repetitive or otherwise excessive. The Respondent was of the view that that there were "*sufficient grounds to initiate an investigation into the Complaint*". On 2 and 3 August 2022, Mr Harris advised the Complainant and the Appellants in writing of the commencement of a formal investigation under the DP Law.

89. By letter dated 9 August 2022, Mr Harris requested information from the Appellants to commence and advance the Respondent's investigation into the Complaint ("the First Information Request"). At that point, the Respondent identified Sections 6(2)(f) ("Integrity and Confidentiality" of personal data) and 41 of the DP Law (the Appellants' "Duty to take reasonable steps to ensure security") were the provisions likely to have been breached by the Appellants.

90. In its response to the First Information Request by letter dated 13 September 2022, the Appellants confirmed that the file that had been delivered was a consolidated trial bundle and asserted that "*to the extent that there was any personal data, the exception under schedule 8 of the Law is engaged*." Mr Harris said that the Appellants did not identify which of the 19 exceptions and exemptions under Schedule 8 applied to the Complaint and it failed to respond to the specific requests listed in the First Information Request.

91. On 14 September 2022, the Respondent addressed the First Information Request again to the Appellants seeking responses to the points raised. By letter dated 21 September 2022, the Appellants reserved their position in relation to, *inter alia,* whether they were a Controller or processor as defined within the DP Law and whether the processing of personal data concerned was lawful with reference to Schedule 2 of the DP Law. Mr Harris said that the Appellants provided some responses to the points raised in the First Information Request.

92. The Respondent investigated the Complaint between 21 September 2022 to 18 November 2022. The investigation included "*the careful consideration of the Appellant(s) responses, the details of the Complaint and the relevant provisions of the DP Law*." A Case Review Panel ("CRP") was convened on 25 October 2022 and the key objective of this CRP was to agree on a determination of the Complaint. Mr Harris was present at the CRP along with the Respondent's then Commissioner and the current Deputy Commissioner. It was decided to impose a breach of Sections 6(2)(f) and 41 of the DP Law and thereafter to consider the potential imposition of an administrative fine.

93. Mr Harris said that as a result of the investigation, the Authority addressed two letters to the Appellants on 18 November 2022 as follows:

    a. the first letter responded to various points raised by the Appellants in relation to Section 102 of the DP Law, Schedule 8 of the DP Law and various "reserved matters". The letter also invited the Appellants to clarify various assertions it made in relation to certain legal provisions.

    b. the second letter was a Notice of Intention to Make a Breach Determination issued under Section 76 of the DP Law. This provided background to the proposed determination, reasons for the proposed determination and confirmed that the Respondent, having taken into account its findings, proposed to make a determination that the Appellants had breached Section 6(2)(f) and 41 of the DP Law. The Notice advised the Appellants that they were entitled to make written or oral representations to the Respondent in relation to the proposed determination.

94. The Complainant was advised of the proposed determination on 23 November 2022.

95. Mr Harris said that the Appellants responded to the Breach Determination Notice on 13 December 2022. Summarising their representations, he said that the Appellants asserted that:

    - the Breach Determination did not deal with Section 2 of the DP Law and whether or not the Appellants were controllers /processors as defined within the DP Law and asserted, in

relation to Section 6 and 41 of the DP Law, that the Respondent "*failed to properly address the issue of appropriateness or reasonable steps*" and that the Appellants "*processing of the data was appropriate and was within the range of reasonable steps as suggested by section 6 and 41 ….*".

- the conclusions of the Respondent were at "*odds with the provisions in the 2017 Law*" taking issue with the terminology used by the Respondent and they took issue with the fact that the Appellants had not been provided with an actual copy of the Complaint and that it had not been given the opportunity to see or interrogate the Complainant.

96. By letter dated 6 January 2023, the Respondent advised the Appellants of the investigation procedure and the limitations on the rights of controllers under the DP Law. The Respondent, *inter alia*, asserted that whilst the DP Law does not require the Authority to disclose a copy of the Complaint, it had on more than one occasion provided the Appellants with the necessary particulars to understand and respond to the Complaint. It further explained that the Appellants are not entitled to interrogate the Complainant (either by correspondence or otherwise).

97. Mr Harris said the matter was then reviewed internally. It was formally discussed at CRP meetings on 9 February and 25 February 2023 respectively. It was concluded that the Complaint should be upheld and that the Appellants had breached Sections 6 and 41 of the Law respectively. All of the Appellants' representations had been carefully considered. The Breach Determination was issued to the Appellants on 27 February 2023.

98. Mr Harris said that the Notice of Breach Determination and Notice of Sanction was issued to the Appellants on 27 February 2023. The sanction imposed, a reprimand, was the lowest level sanction that can be issued by the Respondent on a scale of options available under the DP Law. Mr Harris said:

> *"Having considered the Complaint carefully, together with the Appellants' representations, a reprimand was considered appropriate in this case, as we believed it would achieve the desired outcome, namely highlighting the issues with the processing of personal data (which included Special Category Data)."*

99. In cross examination, Mr Harris said that although the Respondent had not obtained the Bundle before reaching the Breach Determination, the Appellants had at no time in correspondence taken issue with the Bundle containing Special Category Data. Mr Harris said that there was no requirement under the DP Law for the Respondent to provide the Appellants with a copy of the Complaint. He accepted, on reflection, that it would have been sensible to provide a copy of the Complaint to the Appellants and said that it had been provided with more than enough information on more than one occasion about the nature of the Complaint.

100. On the reference in the CRP minutes dated 25 February 2023 to a fine as a suggested sanction, Mr Harris said that a briefing note was not prepared for the Board because it did not progress to that stage. He was advised by the Commissioner that the sanction would be a reprimand and that a fine was not to be progressed. He was not aware of minutes on this decision. Mr Harris said that he could not say with certainty if he had advised the CRP that he had not obtained the Bundle but he suspected they probably knew this. He was satisfied that a determination could

be reached on the information before him. Mr Harris said that a public statement had not been issued by the Respondent.

101. He said that a determination was reached that there were 201 documents in the Bundle because that is what it said in the Index but following a challenge to this by the Appellants, it was accepted that this number in fact represented the number of pages in the folder.

102. Mr Harris accepted that the use of the word "*inadequate*" in the Breach Determination was an error. It was not a deliberate error, it was clearly inadvertent and it was a mistake. Mr Harris said that notwithstanding this error, the Respondent had applied the correct legal test.

103. In relation to the advice by the Complainant following the Breach Determination that the Bundle had not contained his full medical records and all conditions from birth, the Complainant said that a difference in the volume of medical data would not make a difference. It mattered not if there was one item of data or fifty items of data. The Respondent's decision was proportionate.

104. It was put to Mr Harris that in his witness statement, in quoting the Complaint he had added the following wording "*I have photographs of the document on the doorstep and of its proximity to the road."* Mr Harris denied having done so. On this point, prior to re-examination, Advocate Brehaut applied to the Court to admit a further document, namely the full text of the Complaint. It was explained that the Complaint provided in the appeal bundle was incomplete. The Court granted the application and the document was admitted. Mr Harris was referred to that new document in re-examination and he said that the wording at the end of the document was used in his witness statement and that it must have come from that document because it is an exact quote from it.

105. In re-examination, Mr Harris said that the Respondent's officers usually summarise a complaint and that had been done two or three times in correspondence with the Appellants. When asked if he considered any excluded information that should in retrospect have been included in the first letter sent by the data protection authority, Mr Harris said absolutely not, all of the pertinent and relevant points were there.

106. Mr Harris said that from Mr Du Port's Complaint and the first letter sent from the Respondent, he absolutely did not consider that it was in dispute that the Bundle contained sensitive medical information. He said that as far as he was concerned, that was an agreed fact and at no time did AFR challenge the term "Special Category Data" or what the content of the bundle was.

Summary of the Submissions on behalf of the Appellants

107. On behalf of the Appellants, Advocate Ferbrache submitted that the burden of proving the facts which justify the decisions which were made, at the time those decisions were made, lies on the Respondent. The standard of proof is the usual civil standard of on the balance of probability. Relying on ***Y v Chairman of the Guernsey Financial Services Commission -and- Her Majesty's Procureur*** (Guernsey Judgment 47/2018) and ***The Medical Specialist Group LLP -and- Guernsey Competition and Regulatory Authority*** [2023] GRC006 (approved by the Court of Appeal of Guernsey in ***The Guernsey Financial Services Commission v Domaille & Ors*** [2024] GCA003), Advocate Ferbrache submitted that the grounds of appeal in a

statutory appeal confer on the Court the ability to look at anything which an appellant wishes to raise about the decision-making process and the decision reached.

108. It was further submitted that in order to ensure that the DP Law, including the enforcement process thereunder is compliant with the European Convention on Human Rights ("ECHR"), it must provide for a proper and effective means of appeal pursuant to which the decision making process of the Respondent can be dispassionately and effectively scrutinised by an independent body, in this case by the Royal Court (***Domaille*** at para 69).
109. Advocate Ferbrache further referred the Court to ***Weighbridge Trust Limited -and- Guernsey Financial Services Commission*** [2024] GRC080 in which Lieutenant Bailiff Marshall summarises the relevant principles of application for a statutory appeal.

Ultra Vires or Error of Law

110. It was submitted that in reaching the Breach Determination and in concluding that the Appellants had acted in breach of Sections 6 and 41 of the DP Law, the Respondent applied the wrong legal test and erred in law. Specifically, the Breach Determination stated that the Controller had breached Sections 6 and 41 because:

> *"…**inadequate** security measures were applied to the delivery manner employed by the Controller, leaving clear and obvious risks to the integrity of the data by possible loss, destruction or damage or by unauthorised or unlawful access" [emphasis added]*

111. In Advocate Ferbrache's submission, in employing the word "inadequate", the Respondent applied the wrong legal test. Advocate Ferbrache drew the Court's attention to the evidence of Mr Harris in cross-examination. He accepted that the reference in the Breach Determination to the word "*inadequate*" was an inadvertent error. It was submitted that notwithstanding that in correspondence the Appellants had drawn attention to the error, the Respondent again repeated reference to "inadequate" in the final Breach Determination.

112. It was submitted that the method of service adopted by the Appellants was consistent with the method of service used in both the Magistrates Court and the Royal Court and with the applicable rules. Further, it was entirely consistent with the method of service specified under Section 102 of the DP Law. In determining that the Appellants should have ensured that the Complainant was at home to receive the Bundle, the Respondent acted unlawfully. Once an *élection de domicile* is made in proceedings, H.M. Sergeant leaves the documents at that address and does not wait. The Appellants took the additional steps of providing notice of delivery by email, it hand delivered the Bundle and the person delivering the Bundle waited at the address for service for some time.

113. It was submitted that in reaching the Breach Determination, the Respondent had acted *ultra vires*. In essence, there were three aspects to this argument:

    (a) *Public Statement*. It was submitted that the issuance of a public statement by the Respondent is a reserved function under Section 64 of the DP Law (pursuant to paragraph 20 of Schedule 6 of the DP Law) and as such, can only be made by the Respondent's Board. At a CRP that took place on 21 February 2023, the Panel decided to issue a public statement and it gave consideration to the contents of it. In so doing, in Advocate Ferbrache's

submission, the Respondent acted *ultra vires* because that was a decision that only the Board could reach.

(b) *Fine*. Advocate Ferbrache referred the Court to extracts from the minutes of a CRP that took place on 9 February 2023 which stated:

> *"2.4 Discussion then ensued with regards to the potential of issuing a sanction in this case and the potential for a fine to be brought before the Board for approval.*
> *2.5 Discussion ensued regarding the similarities of the case to a previous case …where a fine was issued and it was suggested that a fine would be an appropriate course of action, in the interests of consistency."*

Advocate Ferbrache referred the Court to the recorded decision of the Case Review Panel dated 9 February 2023 which, referring to Mr Jarrad Knoetze of Walkers, stated:

> *"…Ask Jarrad for thoughts on issuing a fine."*

In Advocate Ferbrache's submission, these minutes indicated that the Panel's understanding was that the issuance of a fine as a sanction was a matter for the *approval* of the Board. That understanding was wrong because it was not a matter for the Board to approve a decision of the CRP but rather for the Board to reach a decision on the matter itself.

(c) *Conflict of Board members on referral*. Advocate Ferbrache contended that as the name of the Complainant had been redacted by the Respondent in the CRP Minutes of 9 and 25 February 2023 respectively. It was submitted that if the matter was referred to the Board, the members of the Board would not be able to reach a decision on any conflict that may arise because the name of the Complainant was redacted.

114. It was submitted that whilst the Respondent had ultimately decided to issue a reprimand only, the guidance set out in ***Y*** and ***MSG*** was such that the Appellants could raise any point in relation to the decision-making of the Respondent and that included the decision-making of the CRP on 9 February 2023 and 21 February 2023 respectively.

115. The Respondent strongly opposed the *ultra vires* line of argument on the basis that it had not been pleaded. The Respondent had not examined witnesses on the *ultra vires* contentions and the Appellants had not sought to amend the Cause. Advocate Ferbrache contended that the *ultra vires* ground was pleaded. It was further submitted that it would have been clear to the Respondent from the inter-parties correspondence that this was a live issue. Advocate Ferbrache further submitted that the Respondent had not sought further particulars.

Unreasonable Decision

116. Relying on ***Weighbridge*** and ***Domaille***, Advocate Ferbrache submitted that the Breach Determination was unreasonable.

117. The Respondent failed to attach weight or sufficient weight to the context and circumstances of the preparation and service of the Bundle. The Bundle was filed with the Court in the context

of a clinical negligence claim brought by the Complainant. Those proceedings were held in open court. Public hearings in the clinical negligence proceedings took place on 16 June 2022 and on 20 July 2022 respectively. Judge Fooks handed down her determination in open court and that decision forms part of the Court record of the case. In her decision, Judge Fooks referred to the medical details and evidence relied on by the Complainant.

118. Further, it was submitted that the Complainant chose the documents on which he sought to rely in the clinical negligence proceedings and they were in the Bundle.

119. Advocate Ferbrache referred the Court to the transcripts of the hearings before Judge Fooks in which there was reference to the documents in the Bundle. The relevant documents were already in the public domain having been referred to at a public open court hearing. The issue of an *in camera* hearing was not raised in the clinical negligence proceedings. In support of his submissions, Advocate Ferbrache relied on the judgment of the High Court in England and Wales in ***Zeromska-Smith v United Lincolnshire Hospitals NHS Trust*** [2019] EWHC 552 (QB) where Spencer J refused to grant an application for anonymity brought by a Claimant who sought damages for psychiatric injury arising out of the stillbirth of her daughter.

120. Advocate Ferbrache criticised the Respondent for having either disregarded or attached insufficient weight to the nature of the open court clinical negligence proceedings in which the Complainant was the Plaintiff and submitted that instead the Respondent had chosen to focus on the Complaint itself. Reliance was placed on Section 2C of Schedule 8 of the DP Law ("Disclosure required by law, etc") which provides that disclosure of personal data to any person is exempt from a provision of Part III that prohibits or restricts such a disclosure to the extent that disclosure is necessary *inter alia* for the purpose of or in connection with any legal proceedings (including prospective legal proceedings).

121. It was further submitted that prior to reaching the Breach Determination, the Respondent failed to obtain a copy of the Bundle. It was only following the lodgement of the appeal that the Respondent sought the Bundle from the Complainant. In cross-examination, the Complainant agreed that the Bundle should have first been obtained. In Advocate Ferbrache's submission, a Jurat would agree.

122. Finally, it was submitted that the Respondent's refusal to furnish a copy of the Complaint to the Appellants was unreasonable and it meant that the Appellants were unable to understand the nature of the allegations made against it. Contrary to the principle of *audi alterem partem (*no one shall be unheard without prior notice of allegations against him), the Appellants were not fully and properly informed of the allegations made against it, the underlying facts as determined by the Respondent and the evidence and the materials it relied on in the decision-making process. The Respondent provided the Appellants with a summary of the Complaint but did not provide a copy of the Complaint to the Appellants until after the appeal had commenced.

Lack of Proportionality

123. In Advocate Ferbrache's submission, the decision of the Respondent lacked proportionality. It was submitted that the decisions of the Royal Court have long recognised the importance of proportionality in this area of the law and that the Court often looks to the jurisprudence of the

Court of Justice of the European Union to inform its decisions. Advocate Ferbrache referred the Court to ***Domaille*** in which LB Marshall referred to the Royal Court acting as an (para 29):

> *"…external and dispassionate check on the proportionality of the outcome…."*

124. In Advocate Ferbrache's submission, there was no evidence that the Bundle or its contents were seen by anyone other than the Complainant. He urged on the Court to take into account the Opinion of Advocate General Campos Sánchez-Bordona of the Court of Justice of the European Union in Case C-300/21, ***UI v Őesterreichische Post AG*** dated 6 October 2022. This was a preliminary reference from the Austrian Supreme Court. The national court requested a preliminary ruling, on whether a violation of the GDPR in itself constitutes damage and whether the application of "materiality threshold", according to which mere feelings of displeasure would not qualify as compensable damage complies with the GDPR. In his Opinion, Advocate General concluded that GDPR infringements are not "per se" compensable damage, GDPR punitive damages was rejected and compensation was not available for "*de minimis*" breaches.

125. It was submitted that running through the Advocate General's Opinion and other judgments was the requirement for proportionality. In Advocate Ferbrache's contention, the conduct of the Respondent towards the Appellants had been oppressive and was disproportionate. It was submitted that from the very outset, the Respondent was determined to prosecute the case. Where it lacked evidence, it not only failed to obtain it but it was prepared also to supply it itself and/or disregard evidence which ran contrary to its position.

126. By way of example, Advocate Ferbrache submitted that following disclosure, the Appellants became aware that at the very outset of the Case Assessment Meeting on or about 29 July 2023, Ms Eleanor O'Donnell and Mr Lawrence West, described on the relevant form as "Officer making assessment" decided that there were sufficient grounds to initiate an investigation into the Complainant's Complaint. This decision was assessed and authorised on 29 July 2023 by Ms Rachel Masterton, the Deputy Data Protection Commissioner. Under the heading "Rationale/justification for assessment decision made" the Respondent set out its reasons for the decision which included that there:

> *"..were details on the contents of the folder on the front cover relating to the Complainant's health status and his ongoing health matters."*

It was submitted that at the time of making the decision the Respondent had photographs of the front cover of the bundle and knew that this was not true.

Material Error as to the Facts or as to the Procedure

127. There was some overlap in relation to this ground. The Appellants' core Complaint related to the Respondent's refusal to furnish it with a copy of the Complaint. This, in the Appellants' submission, meant that it was deprived of the opportunity to understand the allegations made against it beyond a summary of the Complaint and by consequence, it was unable to properly consider and respond to the Respondent's investigation and the case made out against it. It was submitted that this was an unfair process.

128. In conclusion, Advocate Ferbrache submitted that the Respondent had erred in applying the wrong test, was unreasonable in its approach to the case having regard to the context and the circumstances in which the Bundle was prepared and served; its decisions lacked an evidential foundation and the decisions lacked proportionality. There was no suggestion that the Bundle had been seen or accessed by anyone other than the Complainant and there were material errors as to the facts and the procedure adopted by the Respondent. The Respondent had repeatedly failed to engage with the Appellants in a fair and open manner and it was oppressive in its behaviour towards it.

129. On the relief sought, Advocate Ferbrache submitted that the Court should annul the Breach Determination. In deciding whether or not to remit the matter back to the decision-maker, the Court should consider whether the Respondent had properly reached decisions on the sanction. The Court was urged to look at all of the decision-making process.

Summary of the Submissions on behalf of the Respondent

130. On behalf of the Respondent, Advocate Brehaut contended that this was a very straightforward case. Contrary to Sections 6(f) and 41 of the DP Law, the Appellants caused a bundle of documents which included Special Category Data, namely the health data of Mr Du Port, to be delivered to the doorstep of his home address, unprotected, in a lever arch file.

131. It was submitted that the Court must be satisfied beyond a reasonable doubt that the Bundle contained the Special Category Data of Mr Du Port. Whereas the Appellants accepted that the bundle contained health data, it did not accept that it contained Special Category Data. In the correspondence between the parties, Advocate Richardson referred to a *de minimis* breach but he did not deny the presence of Special Category Data in the Bundle.

132. Relying on Section 111 of the DP Law, Advocate Brehaut submitted that it should be uncontroversial that the Complainant can be identified from the health data documents in the bundle. Under the DP Law, the individual's name does not have to be identifiable. The Complainant's name appeared on the front cover and in certain documents and he was the Complainant. The bundle could only relate to either the Complainant or to the Appellants' client in medical negligence proceedings. The audiological evaluation report from *Specsavers Opticians and Hearing Centre* contained information on the Complainant's health status and his medical records.

133. The Court was referred to the Respondent's published guidance note entitled *Special Category Data* which states that Special Category Data is personal data which the DP Law recognises as more sensitive and is therefore given higher levels of protection. Similarly, the Court's attention was drawn to *EU General Protection Regulation (GDPR), a Commentary*. Advocate Brehaut submitted that the Appellants had neither acknowledged nor taken into account that where Controllers are dealing with Special Category Data, heightened security is required.

134. It was submitted that Schedule 8 of the DP Law was not applicable to the present case. Section 2C of Part I of Schedule 8 – the specific clause relied on by the Appellants - was an exemption from Part III of the DP Law. Neither Section 6 nor Section 41 of the DP Law, which fell under Parts II and VI respectively, were affected by Schedule 8.

135. Before addressing the Court on the individual grounds of appeal, Advocate Brehaut submitted that, in the absence of relevant Guernsey authority, whilst it is not binding on the Court, the Court should, where appropriate, consider and apply the principles set out by the CJEU in ***VB v Natsionalna agentsia za prihodite*** (Case C-340/21). The judgment provides helpful guidance on assessing what is reasonable and appropriate as required by Sections 6(2)(f) and 41 of the DP Law and is at the very least of persuasive value. In summary, the CJEU held:

(a) the burden of proof lies with the data Controller to demonstrate the adequacy of the measures implemented.

(b) the appropriateness of the measures implemented must be assessed in two stages. First, it is necessary to identify the risks of a personal data breach and their possible consequences for the rights and freedoms of natural persons. Second, it is necessary to ascertain whether the measures implemented by the Controller are appropriate to those risks, taking into account the *"state of the art, the costs of implementation and the nature, scope, context and purposes of that processing."*

(c) a court must carry out its own evaluation to make sure that the measures adopted by the Controller are appropriate for the purposes of ensuring such level of security necessary.

(d) in order to review the appropriateness of the technical and organisational measures implemented under Article 32 of the GDPR (sections 6(2)(f) and 41 of the DP Law), *"a national court must not confine itself to finding how the controller concerned intended to fulfil its obligations under that article, but must carry out an examination of the substance of those measures , in the light of the criteria referred to in that article, the particular circumstances of the case and the evidence available to that court in that regard."*

(e) the examination in paragraph (d) above *"....requires a concrete analysis of both the nature and the content of the measures implemented by the controller, the manner in which those measures were applied and their practical effects on the level of security that the controller was required to guarantee, having regard to the risks inherent in that processing."*

(f) Controllers *"must be encouraged to do everything in their power to prevent the occurrence of processing operations that do not comply with that regulation, given that they bear the burden of demonstrating the appropriateness of those measures."*

136. On the first of the two-stage test, Advocate Brehaut submitted that there were multiple risks including that once the Bundle was left unattended on the Complainant's porch, there was a risk of it being looked at by anyone who happened to be passing. Guernsey is a small jurisdiction. The unlawful access to personal data (especially sensitive medical information) has the potential to cause significant prejudice and risk the interests of the Complainant; and the risks associated with leaving the Bundle exposed entirely to the elements, and the possibility that the Bundle could be lost either in part or in full.

137. On the second stage of the two-stage test, the following facts appeared to be uncontested: the Bundle consisted of a single lever arch file, it related to ongoing legal proceedings, the index to the Bundle recorded that it contained the skeleton argument bundle for the Complainant and finally, the Bundle contained the Complainant's personal data which included his sensitive medical information.

138. The Bundle was left on the porch by the Appellants. No further protective or security measures were implemented. The Bundle was not placed in the Complainant's "s*afe place*". It was not secured within a box or envelope. It was not marked "Private and Confidential". The Appellants did not telephone the Complainant prior to delivery to ensure that he would be at home at the time to take receipt. The Complainant was not at home when the Bundle was delivered. In Advocate Brehaut's submission, any of the measures could have been implemented to attempt to ensure the security of the personal data, including protecting it against unauthorised or unlawful processing and accidental loss, destruction or damage.

139. It was submitted that the risks referred to at paragraph 136 above should have been obvious to the Appellants. The Appellants should have implemented measures to ensure the security of the Complainant's personal data including, but not limited, to leaving the Bundle in the Complainant's safe place and/or telephoning the Complainant prior to delivery. The Appellants failed to do so. The costs associated with implementing the reasonable and appropriate measures would have been minimal and would not have been disproportionate.

Error of Law/Ultra Vires

140. The Respondent's primary position on the *ultra vires* arguments relating to the CRP minutes was that they cannot be pursued because they had not been pleaded and should not be permitted. There was no reference to those arguments in the Appellants' Skeleton argument and no application had been advanced for leave to amend the Cause. Witnesses had not been examined or cross-examined on these grounds. The assertions in relation to a conflict by an anonymised referral had not been developed by the Appellants and no further submission in reply was pursued. The Court should not permit the *ultra vires* arguments. Relying on ***Providence Investments Funds PCC Limited (managed by administration managers) -and- Pricewaterhousecoopers CI LLP [2020] GRC021***, Advocate Brehaut submitted that when invited to identify within the Cause the relevant arguments, Advocate Ferbrache had referred the Court to the inter-parties correspondence and not the pleadings. None of the references in the correspondence referred to the public statement argument.

141. If the Court was minded to allow the arguments, Advocate Brehaut's contention was that they were plainly wrong. The Court was referred to the wording of the Breach Determination on a public statement. It was clear that a decision on a public statement had not been reached by the Respondent. Neither had the CRP made such a decision as it was a Section 64 type decision and required to be referred to the Board. What the minutes indicated was that the Panel clearly thought that it *ought* to happen but the Board had to make such a decision and that is why the Breach Determination states *"In the event that the Authority decides to make such a (public) statement".* In Advocate Brehaut's submission, a complaint cannot be raised, that this was *ultra vires* because there was no public statement decision. Similarly, no decision had been reached on a fine.

142. Advocate Brehaut accepted that the Breach Determination contained an inadvertent error because it used the words "adequate" and "inadequate" instead of "appropriate". Advocate Brehaut referred the Court to the *Oxford English Dictionary* of "adequate" namely, *"fully satisfying what is required; quite sufficient, suitable, or acceptable in quality or quantity"*. Similarly, the Court was referred to the *Cambridge Dictionary* definition of "adequate" which is *"enough or satisfactory for a particular purpose"*. Whilst the use of "adequate" or "inadequate" was referred to in error, in Advocate Brehaut's submission, its usage in the context of the Breach Determination is wholly consistent with the word "appropriate" and indicates at the minimum that the Respondent took into account necessary and correct elements and considerations when making the Breach Determination. There was no error of law.

143. It was further submitted that the Respondent had taken into account the substance of Sections 41 and 6(f) of the DP Law along with the technical and organisational measures listed at Section 4(1)(2) of the DP Law.

Unreasonableness

144. Relying on ***Weighbridge***, Advocate Brehaut accepted that the threshold for unreasonableness is lower than *Wednesbury* unreasonableness in a judicial review. The Court must review the Breach Determination against the background of submissions made and evidence produced, but at the same time it must not stray into any usurpation of the Respondent's own "*primary fact-finding function*" or expert, evaluative, regulatory decision-making function. As set out in ***Weighbridge***, the personification of the hypothetical, ordinary, intelligent, right-minded and properly educated/informed member of the public as the arbiter of the situation in the Guernsey jurisdiction would be Jurats of the Royal Court.

145. The question for the Court, in Advocate Brehaut's submission, was whether in all of the circumstances, the ordinary intelligent and like-minded person, the Jurat, would be likely to consider reasonable the response to the decision that AFR breached Section 41 by delivering the Bundle in a lever arch file which was not marked private and confidential, at a time when the Complainant was not at home, not in a safe place and not ensuring he was at home or telephoning him. The circumstances included that the bundle contained Special Category Data. The Jurats would have to consider the powers of the Respondent under the DP Law and the evidence in the appeal including the evidence of the Complainant and the investigation process followed by the Respondent.

146. It was submitted that the Respondent followed the correct process in reaching the Breach Determination and it took the relevant factors into account. The ordinary intelligent right minded person member of the public or Jurat would have reached the same Breach Determination. They would not have tolerated the delivery of an unprotected bundle containing Special Category Data on a doorstep, unprotected from the elements. It was submitted that in no way can that decision be seen as unreasonable.

147. Advocate Brehaut submitted that it was irrelevant that the Respondent did not have the Bundle before it reached the Breach Determination. The Appellants' submission that the failure to obtain the Bundle was fatal and renders the Breach Determination unreasonable is without foundation. The Bundle contained Special Category Data and this was not disputed by the Appellants in correspondence with the Respondent. As such, the existence of Special Category

Data in the Bundle was not a contested issue during the investigation and in correspondence with the Appellants. Further, as set out by Mr Harris in cross-examination, the volume of health data was not relevant because all Special Category Data is protected under the DP Law.

148. Advocate Brehaut submitted that the ***Zeromska-Smith*** case and the present case were not on an even plane. The fact that the clinical negligence proceedings brought by the Complainant were held in open court did not permit the Appellants to ignore the principles of processing under the DP Law.

Proportionality

149. In Advocate Brehaut's submission, following the investigation, the Respondent was of the view that the Appellants had implemented some security measures but had failed to apply additional appropriate measures as the Bundle contained Special Category Data. The Respondent had the power to reach that decision under the DP Law. The sanction imposed was a reprimand, the lowest level sanction available to the Respondent under the Law.

150. Advocate Brehaut drew the Court's attention to examples of reprimands imposed as a sanction for data protection breaches by the United Kingdom Information Commissioner. Taking into account the powers of the Respondent, the investigation process followed and the proportionality factors contained in the DP Law, in Advocate Brehaut's submission, it could not properly be argued that the breach of determination was disproportionate and this ground must fail.

Material Error as to the Facts or Procedure

151. It was submitted that it cannot be properly argued that the Breach Determination was made on a material error as to the facts or procedure and that this ground must fail for the following reasons:

    a. it was not disputed that the Bundle contained the health data of the Complainant. Therefore, the Appellants were required to ensure the security of that data and implement measures which were reasonable and appropriate to ensure the security.

    b. it was not disputed that the Bundle was delivered to the Complainant's property on 18 July 2022, that he was not at home at the time and nor was anyone else. Upon his return he immediately noticed the Bundle in a red binder on the porch of his property. The Appellants accepted that they left the bundle on the porch of the Complainant's property unattended. This was confirmed in Mr B. Ferbrache's and in his evidence in cross- examination. As such, the Appellants should have been aware of the personal risk to the data, in particular the Special Category Data when leaving the bundle unattended in the porch.

    c. once the Bundle had been left unattended, there was a risk that it would be looked at by anyone passing. There was a risk of it being taken by anyone passing. Guernsey is a small jurisdiction. Unlawful access to personal data, especially medical information, has the potential to cause significant prejudice and risk to the interests of the

Complainant. The Appellants should also have been alive to the risks associated with leaving the bundle exposed to the elements and the possibility it could have been lost in part or in full. In short, it was submitted that the Appellants should have implemented reasonable and appropriate measures to protect against the risks and they did not do so. The Respondent therefore correctly concluded the Appellants had not done so and in turn made the Breach Determination.

d. it was not disputed that at the time the Bundle was left, the Complainant was not there to receive it and it was left on the porch. Regardless of how long it was on the porch or when the Complainant took possession, it was left unattended for a period of time. At the time it was left, AFR had no indication of when the Complainant might return home to claim it. The risks as set out at paragraph (c) above would have been apparent. It could have been looked at or removed by members of the public or postal or delivery workers, or any individual who came to the door or walked past it. It could have been lost or damaged by the elements. AFR did not properly identify the likelihood and severity of these risks which put the personal data, in particular Special Category Data at an increased risk of accidental or unlawful destruction, loss or alteration or at increased risk of unlawful disclosure of or access to the Complainant's personal data.

e. Advocate Brehaut submitted that the Appellants' position on the matter was concerning as they suggested they would take a not dissimilar approach with other deliveries even now thus resulting in systemic risk to any such delivery of Special Category Data to a member of the public having inadequate security safeguards. The fact that no external author or party accessed the data or that it wasn't lost or wasn't altered or wasn't unlawfully disclosed did not relieve AFR from its obligations under the DP Law. AFR was required to take reasonable steps as to ensure a level of security appropriate to the personal data taking into account the likelihood and severity of the risks posed to the significant interests of data subjects in particular from accidental or unlawful destruction loss or alteration or unauthorised disclosure of or access to personal data. They did not do so.

152. Advocate Brehaut referred to the Appellants' suggestion that the failure of the Respondent to provide it with the Complaint despite their repeated requests in some way affected the making of the Breach Determination either as a matter of fact or procedure. It was submitted that there was no merit or logical basis in the Appellants' position in relation to the Respondent's refusal to furnish it with a copy of the Complaint for the following reasons:

a. the Appellants' position ignored the investigation process prescribed by the DP Law and the rights of Controllers during the investigation process. It ignored the fact that the Appellants were aware of the substance of the Complaint and had sufficient information to understand the Complaint against it.

b. the Appellants knew exactly which Bundle of documents was at the centre of the Complaint. At the relevant time, there was only one bundle of documents in the forthcoming hearing before Judge Fooks.

c. the Appellants were also made aware of the relevant Bundle from the email from the Complainant dated 18 July 2022. In cross-examination, Advocate Cowling confirmed

that he had seen this email. When it was put to Advocate Cowling that the Appellants received the letter from the Respondent saying the Complainant was unhappy about the manner in which the bundle was delivered, there should have been no uncertainty as to what the bundle was, Advocate Cowling confirmed that AFR knew what the bundle was but not the Complaint.

d. the DP Law does not require the Respondent to disclose a copy of the Complaint. Rather, the DP Law states that the Respondent must notify if a complaint is being investigated and subsequently notify whether there is a breach determination. The Appellants were informed of the Complaint and the decision to investigate by letter dated 2 August 2022 from the Respondent.

e. the Respondent had on more than one occasion provided the Appellants with the necessary particulars to understand and respond to the Complaint. The Appellants were informed of the substance of the Complaint in the notification letter dated 2 August 2022 and by letter dated 9 August 2022. The provision of the Complaint to the Appellants would not have taken things any further.

f. The Appellants were not entitled to interrogate the Complainant either by correspondence or otherwise. The investigation process is clear and is prescribed by the DP Law. It does not involve the Appellants interrogating a Complainant to determine whether his Complaint is correct or whether it should have been made. Further the Respondent's investigation process is inquisitorial, not adversarial.

153. In conclusion, it was submitted that the Appellants' case was based on irrelevant, if not wrong-minded factors, and the Appellants' reaction to the Breach Determination is "bewildering" to the Respondent. In the Respondent's submission, the Appellants had stridently objected to affording the Complainant and any Guernsey resident who may receive a package the most basic of security assurances that is not only a legal obligation but a common-sense courtesy.

Discussion

The Privacy Application

154. By application dated 16 August 2024, supported by an affidavit of Mr Jarrad Noel Knoetze, Senior Associate at Walkers (Guernsey) LLP sworn on 16 August 2024, the Respondent applied for the following orders pursuant to Rule 50 of the Royal Court Civil Rules 2007 and/or the inherent jurisdiction of the Court:

(i) that the documents and/or information identified as the Complainant's Special Category Data and contained within the Bundle shall be sealed, and that the Court shall sit in private when evidence or submissions are heard relating to the documents and/or information and that any correspondence between the parties which refers to the documents and/or information should also be treated as private;

(ii) that any written judgment or act of the Court referring to documents and/or information identified as the Complainant's Special Category Data should be redacted.

155. In short compass, the privacy application concerned the Bundle that was delivered by the Appellants to the Complainant in relation to the proceedings brought by him against QRMP. Advocate Brehaut submitted that the privacy application was limited to the Special Category Data contained within the Bundle.

156. On behalf of the Respondent, Advocate Brehaut submitted that in matters where sensitive medical information (or Special Category Data) is involved and there are competing views as to the privacy of this information, the Court must balance the competing interests of, on the one hand the interests of those on whose relief it is sought to keep aspects of the hearing private. It was submitted that the purpose of the privacy application was to keep the sensitive medical information private and protect the Complainant's interests and further it was an attempt to protect the sensitive medical information against the risk(s) of "unauthorised" disclosure, "unlawful processing", "accidental loss, destruction or damage", which is what is expected under the DP Law when dealing with Special Category Data. It was submitted that the DP Law expects parties to take all such measures which are reasonable and appropriate to ensure the protection of Special Category Data. If the Bundle was made freely accessible by the public and/or referred to in open Court, it would be unlikely that the Special Category Data would be afforded the protection required by the DP Law, resulting in significant prejudice to the Complainant. On the other hand, the Appellants would not be significantly prejudiced.

157. It was further submitted that in the absence of a matter of public interest, the protection of the Complainant's sensitive medical information ought to prevail and the hearing and judgment (or those parts which concern the Complainant's sensitive medical information) should be confidential, private and not available to the public.

158. On behalf of the Appellants, Advocate Ferbrache robustly opposed the privacy application. It was submitted that the documents that formed the subject of the privacy application were read to or by the Court and/or referred to at the clinical negligence hearings. Advocate Ferbrache referred to the hearing that took place on 20 July 2022 at which Judge Fooks stated:

> *"Thank you very much Advocate Cowling and Mr Du Port, for your submissions and thank you for preparing a consolidated bundle, that is very helpful. I have read everything…"*

159. In Advocate Ferbrache's submission, the privacy application had to be judged in this evidential context. It did not come close to meeting the strict necessity test.

160. In ***Robin Fuller v Adam Ian Hayden Tattersall & Others*** [2024] GCA083, the Court of Appeal of Guernsey set out the relevant principles of application on privacy (paras 14 – 16):

> *"14. Accordingly, we start from the assumption that all matters before the courts of Guernsey should normally take place in open court, see the much cited judgment of Lieutenant Bailiff Day in IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-04] GLR 77, in which it was emphasised (at para 21) that "the principle of open justice … is and always has been a fundamental principle of our administration of justice". That statement is as applicable in 2024 as it was 20 years ago.*

15. The parties have found common ground in their citation of Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited, unreported Royal Court 4 March 2015, at para 22:

"(a) There is a general presumption that all aspects of a case are to be held in public;
(b) In exceptional circumstances, that presumption can be rebutted where it can be demonstrated that justice would be frustrated otherwise;
(c) The test to apply is one of strict necessity;
(d) The burden of establishing that the test applies lies on the applicant;
(e) The Court expects the applicant to adduce clear and cogent evidence in support of such an application;
(f) If that test applies, derogating from the general presumption follows as a matter of principle. Equally, if the test does not apply, the application must be refused. There is no question of exercising a discretion;
(g) Any limitations on the ordinary rule of open justice granted by the Court will, therefore, be the minimum required to preserve the confidentiality of the information involved so as to secure the proper administration of justice."

16. Thus, the agreed test for determining whether this appeal hearing should take place in private is one of strict necessity in the interests of justice, see In the Matter of the L Trusts [2020] GCA 061. There is no question of balance. This is a binary question. Either a hearing in private is necessary, or it is not."

161. On application of these principles, I was not satisfied that the test of strict necessity in the interests of justice was met. The documents that formed the subject of the privacy application had been lodged with the Court by way of a consolidated Bundle in the context of separate clinical negligence proceedings. Those proceedings were held in open Court. As such, those documents already formed part of a separate Court file and could be accessed by a member of the public. It is on that basis that I refused the privacy application. However, I gave an indication that either party would be at liberty during the trial to make a further privacy application should there be reference either during the evidence of the witnesses or submissions or at any other point during the hearing to any matter not expressly referenced in those documents but arising from the content of them. In the event, no further privacy application was brought.

Appellate Jurisdiction of the Royal Court

162. This appeal is brought pursuant to Section 84 of the DP Law. Section 84(8) provides for the powers of the Court on appeal:

"(8) Upon determining an appeal under this section, the Court may –

(a) confirm the determination or order, with or without modification, or
(b) annul the determination or order and –
(i) remit the matter back to the Authority for reconsideration, or
(ii) make, in its place, any determination or order that the Authority is authorised to make under this Law and make any other order it considers just."

163. I remind myself at the outset of the applicable guiding principles on the appellate jurisdiction of the Court that may be derived from the case law of the Court of Appeal of Guernsey and the Royal Court.

164. The first point relates to the remit of appeal grounds in a statutory appeal. In ***Y v Chairman of GFSC*** (Guernsey Judgment 47/2018), a statutory appeal against decisions of the Guernsey Financial Services Commission, Deputy Bailiff McMahon (as he then was) said (para 121):

> *"I am satisfied that the breadth of the potential grounds of appeal for example in s. 19(4) of the Fiduciaries Law …extend further that (sic) what might be considered as classic judicial review….*
>
> *I regard the grounds of appeal as effectively conferring on the Court the ability to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached."*

165. The Bailiff later affirmed this principle in ***Medical Specialist Group LLP*** and there was no criticism of this approach by the Court of Appeal of Guernsey ***Domaille.***

166. Second, in ***Domaille***, in the context of a statutory appeal against a decision of the Guernsey Financial Services Commission, the Court of Appeal of Guernsey observed that the Royal Court's function in an appeal needs to be understood against the background of a regulatory regime but also in light of the requirements of natural justice and the rights conferred under the European Convention on Human Rights and continued as follows (paras 69 – 70):

> *"69. As to the requirements of natural justice, it is axiomatic that a person must be tried by a process that is fair. As to the ECHR, Article 6 requires that a person's civil rights and obligations can only be determined by an 'independent' tribunal. That requirement is given force in domestic law by s. 6 of the Human Rights (Bailiwick of Guernsey) Law 2000 (the "Human Rights Law"), which makes it unlawful for a public authority to act in a way that is incompatible with a Convention right.*
>
> *70. The making of a Prohibition Order and the imposition of a financial penalty are both capable of engaging a person's rights under Article 6, ECHR. The GFSC is not an 'independent' tribunal within the meaning of Article 6, because it functions as investigator, 'prosecutor' and decision-maker. As a result, a question also arises as to whether its enforcement decisions violate the rules of natural justice."*

167. Third, in ***Domaille,*** the Court of Appeal set out the following principles:

> *"77. Against that framework, and having considered the case-law in light of the relevant legislation, we consider that the following considerations must be kept clearly in mind:*
>
> *(i) Under the express statutory wording of s. 106(1), the Royal Court is exercising an appellate function. It is hearing an "appeal". It is not conducting a trial de novo.*

(ii) The Royal Court is hearing an appeal "against the decision" of the GFSC. It is not conducting an inquiry into the performance by the GFSC of its investigative function.

(iii) The true scope and limits of the Royal Court's role under s. 106 must be identified in light of the other procedural safeguards which are laid down by the EP Law and in the Enforcement Explanatory Note.

(iv) It is important to recognise the significance of the limited remedies available to the Royal Court pursuant to s. 106(6). The Royal Court has a finite range of options: it can set aside the GFSC's decision, or remit the matter to the GFSC with such directions as it thinks fit, or it can confirm the decision in whole or in part.

78. Taking these considerations into account, it is important not to be misled by the apparent breadth of the issues by reference to which an appeal can be brought under s. 106(3). Whilst the question whether a decision by the GFSC was ultra vires or was made in bad faith admits of only one correct answer, the question whether a decision was reasonable, or proportionate, or involved an error of fact is a matter of judgment on which different, but equally rational opinions could be formed by different decisionmakers on the basis of exactly the same material.

79. The function of an appellate court on these issues begins and ends with a determination of whether the GFSC's decision was reasonable or proportionate: if it was, then the GFSC's decision stands; if it was not, the Royal Court can only exercise the limited functions conferred on it under s. 106(6); but it cannot usurp the primary decision making function of the GFSC. Similarly, the fact that a successful appeal can be brought on the basis that there was a material error as to the facts does not mean that the Royal Court is to undertake its own primary, evidential decision-making function. Rather, its appellate mandate is to consider the evidence and to determine whether the GFSC's decision on the facts is materially 'wrong' in the usual appellate sense – i.e. that it is unsupported by any evidence or is perverse in the face of the overall weight of the evidence. If the GFSC's decision was not wrong, in this sense, then it stands; if it was wrong, then the GFSC's decision cannot stand; but in that situation, the Royal Court is again limited to the exercise of the powers under s. 106(6), and it cannot arrogate to itself a primary fact-finding function.

80. The conclusion is that the Royal Court's function under s. 106(1) is to hear an appeal by reference to all or any of the grounds listed in s. 106(3), and to exercise the powers conferred by s. 106(6) – no more, no less. It is not the Royal Court's function to conduct a full, merits-based trial de novo, or to assume the primary fact-finding function or the expert, evaluative, regulatory decision-making function of the GFSC."

168. Fourth, in ***Weighbridge***, having reviewed the authorities including the judgment in ***Domaille***, LB Marshall helpfully summarised the following guiding principles, including on the correct approach to unreasonableness in a statutory appeal:

"86. First, as regards the ambit of any appeal authorised under grounds (b) of s. 106 (3), ie "that the decision was unreasonable", I note that the Court of Appeal made no comment

or criticism of the holding which I made in Domaille that the ground of appeal on the basis of "unreasonableness" in s. 106 (3)(b) connotes a threshold of "unreasonableness" which is lower than the threshold for "unreasonableness" required for success on judicial review - the latter being "unreasonableness" as a matter of law, commonly known in legal shorthand as "Wednesbury unreasonableness" - and denoting a decision which is judged to be illogical, irrational or perverse.....

88. Both Advocates agreed, at this hearing, that my approach to simple "unreasonableness" as a ground of appeal, as above, was left untouched by the Court of Appeal's decision in Domaille, and they also agreed that the test for this "factual" unreasonableness was lower, and consequently more readily met, than the test for "legal" (or "Wednesbury") unreasonableness.

89. The legislature's distinct ground of appeal for simple, unvarnished "unreasonableness" is not only apparently deliberate, but would also seem to be rather important. "Wednesbury" unreasonableness describes unreasonableness which is the product of illogicality, irrationality or perverseness. It puts such a decision outside even the possibility of being a decision made in accordance with the legal power intended to be conferred. A decision-maker is just not authorised to make such a decision. Factual unreasonableness would no doubt include the above, but it is wider. It is perfectly possible to make an "unreasonable" decision or judgment without being illogical, irrational or perverse in terms of its ratiocination, because this can depend on the culture from which one starts. In prescribing a statutory right of appeal against a "decision" on the specific ground of its simple "unreasonableness" the Law appears to have intended that a decision which is internally logical and rational, and obviously not perverse in the eyes of the actual decision-maker, can nonetheless be successfully appealed for being an "unreasonable" decision, or outcome, by some objective general standard of reasonableness which the legislature is envisaging.

90. The Court of Appeal said in Domaille at [78] that "whether a decision was reasonable, or proportionate, or involved an error of fact is a matter of judgment on which different, but equally rational opinions could be formed by different decision-makers on the basis of exactly the same material", However, this was not a finding laying down the content of reasonableness or proportionality, but was being stated as background introductory fact for drawing attention to the limited powers of practical intervention which were conferred on the Royal Court, and that these did not include holding a fresh trial of the facts: see the continuation at [79]. I therefore do not read this passage as affecting, the relevant test for mere factual "unreasonableness" in a decision of the Commission, in the Walters/Matheson sense discussed above, except possibly as a matter of flavour or influence.

91. As counsel agreed, therefore, the threshold test for "unreasonableness" within ground 106(3)(b) is still correctly viewed as not being as stringent as the test for unreasonableness in judicial review – illogicality, irrationality or perversity - which would be the equivalent test under ground (a) invoking error of law. However, identifying and applying such threshold (which is what I believed I was doing in Domaille, by considering the underlying

facts to test my factual impression of the unreasonableness of the outcome) may be more problematic.

92. Seeking to define such a test more closely in the light of all the above, I note that it connotes the difference between an illegitimate, purely subjective, test ("I would have made a different decision") and a properly objective test of factual (un)reasonableness ("I consider that the general view would be that this was an unreasonable decision"). In my judgment this latter is fairly equated to an assessment of whether an ordinary, intelligent, right-minded, properly educated and fully informed member of the public would be likely to consider the decision to be unreasonable in its outcome in all the circumstances. "Properly educated and informed" would include awareness of the Commission's duties and function as financial services regulator, and of their importance, and "right-minded" would include having appropriate respect for these. I do not consider that such qualifying unreasonableness is necessarily synonymous with "oppressive" although that would certainly qualify. To take a simple paraphrase of the then Deputy Bailiff's comment in Merrien v Chairman of GFSC Royal Court Judgment 23/2016 at [78], there considering "disproportionality" as to which similar principles must apply, the appropriate test would be "would right thinking members of the public consider that something appears to have gone wrong with the administration of justice" substituting the "administration of the regulatory regime" for the last three words. Quite how to assess and apply the above test I will have to look at more carefully, later.

93. I note that the Court of Appeal in Domaille was referred to, and itself cited passages from, the seminal case of Bordeaux Services (Guernsey) Limited v GFSC (Guernsey Judgment 18/2016), again, a decision of the then Deputy Bailiff. Whilst the Court of Appeal did not quote the following oft-cited and generally accepted passage at [30] in that judgment, it did not disapprove it: "Ultimately what matters is whether the GFSC has achieved a fair balance. This can involve consideration of whether the Senior Decision Maker has given disproportionate weight to one or more of the considerations relevant to his Decision, and, if so, whether it is of such significance that the aspect of the Decision affected falls outside the range of reasonable responses that could follow in the circumstances of the case…".

94. This "fair balance" test is frequently cited and has the obvious ring of being fair and reasonable taking one thing with another. I therefore regard this citation as applicable, and thus to permit, and even emphasise, such a "fair balance" test in considering the question of what is within or outside any range of "reasonable responses" of ordinary people on the factual basis, as just discussed. That balance must, as a matter of principle, be objectively justifiable, and it can therefore be subject to review. However great the degree of proper respect which may rightly be accorded to the Commission's own subjective decision as the authorised decision-maker under the relevant statutory powers, that cannot dictate that any such "fair balance" is achieved simply by the Commission's own self-certificated assertion, and I do not understand the Domaille appeal judgment to be contrary to this.

95. Crucially though (and emphatically in all the circumstances, having regard to the Court of Appeal's judgment in Domaille) I remind myself that the correct method for

***testing the matter and arriving at any such conclusion of factual unreasonableness, if appropriate, must be by reviewing the ultimate Decision in question (being that which is appealed against) against the background of submissions made and evidence produced, but, at the same time, it must not stray into any usurpation of the Commission's own "primary fact-finding function or expert, evaluative, regulatory decision-making function" (see: Domaille at [80]). Where the dividing line is actually to be drawn in any instance, between illegitimately doing that, and legitimately exercising the Court's power, deliberately conferred by the legislature, to set aside a Decision or any part of it on the grounds of simple "unreasonableness", giving that power meaningful content, will hopefully turn out to be sufficiently clear in practice**." [emphasis added]

169. In ***Weighbridge***, on the test for unreasonableness, Lieutenant Bailiff Marshall further elaborated (para 181):

> *"I have postulated the hypothetical ordinary, intelligent, right-minded and properly educated/informed member of the public as the arbiter of the situation. In the context of the Guernsey jurisdiction, I find that the personification of these qualities would be the Jurats of the Royal Court. Would such persons think that something seemed to have gone very much awry with the administration of the regulatory system?..."*

170. Taking into account the above principles, the Court must determine whether any of the grounds relied on by the Appellants under Section 84 of the DP Law are made out. The Court must then decide whether to confirm the Breach Determination (with or without modification) or annul the Breach Determination and either remit it back to the Respondent for reconsideration or make any other orders it considers just.

The Grounds of Appeal

Ground One: Ultra Vires or some other Error of Law

171. As I set out earlier, the *ultra vires* ground arising from the CRP minutes dated 9 and 25 February 2025 was robustly opposed by the Respondent on the basis that it had not been pleaded and no application was made to amend the Cause. The Appellants contended that *ultra vires* was pleaded, that no application for further particulars was brought by the Respondent and there could be no surprise because the issues were raised in correspondence between the parties.

172. In ***Providence***, an application to strike out a Cause, the Bailiff relied on the following extract from ***Tranquility Holdings Limited v Invista Real Estate Investment Management (CI) Limited*** (unreported, 13 August 2015) in relation to the requirements of particulars of claim in a pleading (para 17f):

> *"(f) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4: "Particulars of claim are intended to define the claim bring made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the*

defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."

173. Properly analysed, I consider that the ground of *ultra vires* or other error law was pleaded but the material facts pertaining to that specific argument have not such that the pleadings are deficient on this point. Self-evidently, reliance on correspondence is wholly insufficient. I accept the Respondent's position that it should not be allowed. Had I been persuaded to allow this argument; I would have concluded that there is clearly no basis for it for the following reasons:

    a. whilst it is readily apparent from examination of the CRP minutes that consideration, was given to the sanction of a fine and the issuance of a public statement as confirmed by Mr Harris in evidence, the sanction of a fine was not in fact imposed in the Breach Determination. In my consideration, in the Breach Determination, the Respondent asserted the existence of its power to make a public statement but the use of the wording "*in the event that the Authority decides to make a statement*" discloses that no such decision had in fact been reached by the Respondent. The Notice of Sanction, which followed the Breach Determination, solely imposed a reprimand and contained singularly no reference to either a public statement or to a fine.

    b. the Respondent cannot be criticised for having acted *ultra vires* or for having erred in law if in the final outcome, no decision was reached in relation to imposing a fine or the issuance of a public statement. Similarly, a conflict issue did not crystallise because there was in the event no referral to the Board.

174. I turn to consider the Appellants' contention that the wrong legal test was applied by the Respondent in the Breach Determination. It is, in my opinion, highly unfortunate that the Respondent repeated the erroneous reference to "inadequate measures" in the Breach Determination, having previously been alerted to the error by the Appellants in correspondence. I accept Mr Harris' evidence that the usage of this term was an inadvertent error. In my consideration, in resolving the question as to whether the ground of error of law is made out, regard must be had to the wider content of the Breach Determination.

175. Having examined the Breach Determination in its entirety, I am satisfied that the Respondent properly referred to and applied the salient applicable provisions of the DP Law. In the Breach Determination, under the Sections entitled "Background to the determination" and "Reasons for its determination", the Respondent expressly referred to and cited relevant extracts from Sections 6 and 41 of the DP Law. It had both of those provisions at the centre of its consideration. Further, I accept Advocate Brehaut's submission that the reference to "*inadequate*" or "*adequate*", their usage in the context of the Breach Determination is wholly consistent with the word "*appropriate*" as defined in the Oxford and Cambridge Dictionaries respectively and indicates that at the minimum, the Respondent took into account the necessary and correct considerations when reaching the Breach Determination. I do not accept that the inadvertent error on the part of the Respondent was fatal to the final outcome.

176. I accept that in the absence of Guernsey authority, the judgment of the CJEU in ***VB*** is helpful. The Court in the present proceedings must ensure that it does not stray into any usurpation of

the Respondent's own "*primary fact-finding or expert, evaluative, regulatory decision-making function*" (***Domaille*** at para 80). The Court is therefore not concerned with the guidance of the CJEU in relation to how the *national court* should assess the actions or inactions of the Controller. ***VB*** is helpful to the extent that it provides guidance on the assessment of what is reasonable and appropriate as required by Section 6(2)(f) and 41 of the DP Law and I am satisfied that the Respondent's assessment in the Breach Determination was consistent with those principles.

177. I am equally satisfied that the Respondent did not err in law in concluding that there was Special Category Data in the Bundle on the basis of the evidence before it. Careful examination of the correspondence between the parties prior to the making of the Breach Determination demonstrates that no challenge to the presence of Special Category Data was raised by the Appellants.

178. I consider that the Appellants' argument on service by H.M. Sergeant and that the Respondent should have taken into account and applied section 102 of the DP Law to be misconceived. The Respondent's consideration was solely about the Controller's responsibilities under the DP Law.

179. I conclude that there is no basis for the first ground of appeal.

Ground Two: Unreasonableness

180. I turn to consider the unreasonableness ground. It was common case that the threshold test for unreasonableness in a statutory appeal is lower than that required for unreasonableness in judicial review. I accept this approach which is entirely consistent with case-law authority.

181. The Appellants' core argument was that the Respondent either failed to have regard to or failed to attach sufficient weight to the context of the case and specifically to the fact that the Bundle contained documents that were the Complainant's chosen papers for a clinical negligence case before the Royal Court which was held in open court.

182. In my consideration, a Jurat would not consider the decision under appeal to be unreasonable for the following reasons:

    a. properly informed of the context and findings in ***Zeromska-Smith***, a Jurat would, in my opinion, conclude that it was not relevant to the Respondent's consideration under the DP Law. In ***Zeromska-Smith*** the High Court in England and Wales (Spencer J) refused to grant an application for anonymity brought by a Claimant who sought damages for psychiatric injury arising out of the stillbirth of her daughter. The Court refused the anonymity application and held:

        "In the present case, the revelation of matters personal to this claimant and her family are inherent and intrinsic to a claim of this nature, relating as it is to psychiatric injury suffered by the Claimant from the stillbirth of her daughter. Having chosen to bring these proceedings in order to secure damages arising out of that tragedy, the Claimant cannot avoid the consequences of having made that

decision in terms of the principle of open justice and the consequent publicity potentially associated with such proceedings being heard in open court."

Zeromska-Smith is relevant to the question of whether clinical negligence proceedings should be held in open Court but it is not relevant to the consideration of a Data Protection Authority on the question of whether there has been a data protection breach under the DP Law.

b. equally, I consider that a Jurat would be satisfied that the fact that the Complainant's clinical negligence application was heard in open court is not relevant to the Respondent's consideration which related to the duties of the Appellants in its capacity as Controller under the DP Law. Further, an informed Jurat would be satisfied in my view that the Respondent was correct to conclude:

"The Authority asserts that the fact the documents were lodged with the Court for a pending judicial matter, does not diminish the sensitivity, integrity or confidentiality attached to the personal data. Neither does it relieve the Controller of its obligations when collecting and processing personal data, and in particular Special Category Data. Moreover, the fact that the proceedings are "public" does not allow ANY person to gain access to the documents. The Controller's responsibilities in respect of the "Integrity and confidentiality" and "security" of personal data continues until such time as the Controller ceases to process such data."

c. a Jurat would be satisfied, in my view, that the Respondent had given consideration to the relevance of the clinical negligence proceedings held in open court and as set out above, had set out sound reasons for rejecting it.

183. I consider that a Jurat, properly informed of the remit and application of Schedule 8 of the DP Law would be satisfied that there was no basis for arguing that the Respondent failed to take it into account. The exemptions relied on by the Appellants in Schedule 8 of the DP Law are not relevant to the Respondent's consideration under the DP Law because neither Section 6 nor 41 of the DP Law are affected by that Schedule.

184. I am equally unpersuaded that a Jurat would conclude that the Breach Determination was rendered unreasonable because the Respondent failed to obtain a copy of the Bundle before reaching its determination. A properly informed Jurat would take into account that a fair summary of the Complaint had been provided to the Appellants on more than one occasion and it had obtained and considered the Appellants' representations on the allegations. Further, no challenge was raised about the presence of Special Category Data within the Bundle. As such, in my consideration, a Jurat would accept that the Respondent had sufficient information before it to enable it to reach a determination.

185. Further, I consider that an informed Jurat would not consider the decision was unreasonable because the Appellants were deprived of the original Complaint. Bearing in mind that there is no requirement in the DP Law for the Respondent to furnish the original Complaint to the Controller and taking into account the limited rights of Controllers under the DP Law, I consider that a Jurat would be satisfied that the Respondent was entitled to exercise its discretion to

refuse the request. I further consider that a Jurat would be satisfied that the Respondent provided to the Appellants on more than one occasion a fair summary of the Complaint and that no unfairness arose as a result of not having sight of the original Complaint. I consider that a Jurat would be satisfied on the evidence that the Appellants' knowledge of the allegation in the original Complaint to the Bundle having been delivered unannounced would not have made a material difference to the outcome.

186. I conclude that there is no basis for the unreasonableness ground.

Lack of Proportionality

187. The DP Law expressly provides for factors which must be considered when considering proportionality. Those factors are set out at paragraph 4 of Schedule 9 to the Law and include the following:

    (i) the nature of the personal data, including whether it is Special Category Data;
    (ii) the context in which the personal data has been collected or otherwise processed, an in particular the relationship between the data subject and the Controller;
    (iii) the reasonable expectations of the data subject in relation to the processing of that personal data;
    (iv) the interests at stake and in particular any significant interests of the data subject or any other individual who is a third party; and
    (v) the existence of appropriate safeguards for the protection of the personal data or the protection of significant interests of data subjects.

188. Further, paragraph 4(2) of Schedule 9 to the DP Law provides that:

    "A person weighing the proportionality factors in any case involving Special Category Data must have particular regard to the importance of protecting Special Category Data from processing where the data subject has not given explicit consent to the processing of the Special Category Data."

189. In addition to considering the content of the Breach Determination under appeal, I have also given careful consideration to the multiple examples relied on by the Respondent of reprimand sanctions imposed by the United Kingdom Information Commissioner ("UK ICO") under the UK General Data Protection Regulation ("UK GDPR") which include:

    (a) a reprimand to South Tees Hospital NHS Foundation Trust in respect of certain infringements of the UK GDPR. In this instance, a Trust administrator sent a standard letter to inform the father of a child patient of an appointment made for the child to attend hospital for a medical examination. The appointment letter was sent to the wrong address.

    (b) a reprimand to the Central YMCA, an education and wellbeing charity that provides a number of community programmes. A co-ordinator for one of the community programmes sent an email to a mailing list of 270 recipients inviting them to a talk about nutrition. This included the recipients' email addresses in the "CC" function thus revealing all of the email addresses to the 270 recipients. The following day,

the co-ordinator used the recall function which led to another email to all 270 recipients.

(c) a reprimand to Birmingham Children's Trust Community Interest Company ("BCTCIC"). The breach involved the inappropriate inclusion of information about another person in a Child Protection Plan by BCTCIC sent to a family. The Child Protection Plan included sensitive criminal data and personal identifiers of a minor under the age of 18.

190. Having examined the dedicated provisions on proportionality in the DP Law and the opinion of the Advocate General in ***UI v Őesterreichische Post AG*** **(Case C-300/21)** and the UK ICO reprimand examples, and having examined the evidence in its totality, including the evidence of Mr Harris on behalf of the Respondent, I am satisfied that in this case, the decision under appeal involved no lack of proportionality. The Respondent properly notified the Appellants of the Complaint and afforded it the opportunity to make multiple representations in writing which were duly taken into account as confirmed by Mr Harris in his evidence. The Respondent set out the reasons for the Breach Determination and it can be seen that the presence of Special Category Data in the Bundle was a feature of particular relevance to its consideration. The decision was reached at CRP level and whereas consideration was given to the making of a public statement and fine, the Respondent decided to impose the lowest level sanction, a reprimand, with the ability to issue a public statement if approved pursuant to section 64 of the DP Law. As set out in Mr Harris' evidence, the Respondent considered that a reprimand was appropriate as it would achieve the desired outcome of highlighting the issues with the processing of the personal data which included the Special Category Data.

191. I have given consideration to the specific argument raised that the complaint assessment form contained factual errors as to what was disclosed on the front cover of the Bundle. I do not consider that this supports any lack of proportionality on the part of the Respondent. It must be seen in the context of an initial complaint assessment stage which was later subject to further investigation.

192. I am compelled to accept Advocate Brehaut's submission that taking into account the powers of the Respondent, the investigation process followed, and the proportionality factors contained in the Law, it cannot properly be argued that the Breach Determination was disproportionate. Similarly, having considered the evidence, and in particular having heard from Mr Harris, I am unpersuaded that the Respondent acted in a manner which was oppressive towards the Appellants.

Material Error as to Facts or Procedure

193. There is some overlap on this ground.

194. I do not accept the argument raised by the Appellants in relation to the refusal of the Respondent to furnish it with the Complaint. First, there is no requirement under the DP Law to provide the original Complaint to the Controller and further, the rights of a Controller under the DP Law are limited. The Appellants were not entitled to interrogate the Complainant to determine whether the Complaint was correct. I am also satisfied that the investigation process is inquisitorial as opposed to adversarial.

195. Second, I am satisfied that on more than one occasion, the Appellants were furnished with a fair summary of the Complaint and that it had sufficient information to understand the substance of the Complaint. Specifically, the Appellants were informed of the substance of the Complaint in the notification letter dated 2 August 2022 and by letter dated 9 August 2022. Advocate Cowling accepted in evidence that the Appellants knew which bundle of documents was at the centre of the Complaint. Indeed, Advocate Cowling was notified of the Complaint to be made by Mr Du Port in his email to Mr B. Ferbrache sent on the date of the delivery of the Bundle.

196. Third, having given the matter careful consideration, I do not consider that any unfairness arose by the Appellants not having sight of the Complaint. On the basis of the evidence I consider that knowledge of the allegation by the Complainant that the Bundle arrived unannounced would not have made a material difference to the outcome and as such there was no prejudice to the Appellants.

Final Points

197. I am satisfied, having heard from Mr Harris and having examined the full text of the original Complaint, that in his witness statement Mr Harris did not falsify the original Complaint filed by the Complainant by supplementing it with further wording.

198. I am equally satisfied that the Complainant did not intentionally mislead the Respondent in initially asserting that the Bundle contained his medical notes and conditions since birth. I accept that this assertion was made as a result of an error on the part the Complainant and that he properly corrected the position with the Respondent.

Conclusion

199. In conclusion, for the reasons set out above, I find that none of the grounds of appeal are made out. Accordingly, pursuant to Section 84 of the DP Law, I confirm the determination without modification. I will order the Appellants to pay the Respondent's costs of this appeal on a recoverable basis.