



Case No: HC03C00538

Neutral Citation Number: [2006] EWHC 321 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd March 2006

Before :

THE HONOURABLE MR JUSTICE RIMER

Between :

DAVID PAUL JOHNSON

Claimant

- and -

THE MEDICAL DEFENCE UNION LIMITED

Defendant

Mr Martin Howe QC and Mr Ashley Roughton (instructed by Withers LLP) for the
Claimant
Mr Richard Spearman QC and Miss Jacqueline Reid (instructed by Fladgate Fielder) for
the Defendant

Hearing dates: 19, 20, 21, 24, 25, 26, 28, 31 October, 2 and 3 November 2005

Judgment

MR JUSTICE RIMER :

Introduction

1. The claimant is David Paul Johnson. He is a consultant orthopaedic surgeon. The defendant is The Medical Defence Union Limited (“the MDU”). The MDU is a mutual society which provides its members (who are principally in the United Kingdom and Ireland) with a range of discretionary benefits in the nature of advice and assistance. Until July 2000, it also provided them with discretionary professional indemnity cover, although since then such cover has been provided by an insurance policy underwritten by an insurance company for which the MDU’s subsidiary company has acted as agent.
2. Mr Johnson was a member of the MDU from 1980 to 1985 and again from 1 October 1986 to 31 March 2002. He has never been the subject of a claim for alleged professional negligence. Over the years he has, however, sought advice and assistance from the MDU in relation to professional questions and problems that concerned him, including complaints made against him. His contact with the MDU, and that from others about him, gave rise to the opening (at least since 1991) of 17 MDU files.
3. On 17 January 2002, the MDU wrote to Mr Johnson advising him that it had exercised its discretion under article 11(a) of its Memorandum of Association to resolve not to renew his membership after 31 March 2002, when his then current annual subscription would expire. The letter gave no reasons. Mr Johnson sought the reasons, but none was provided.
4. Mr Johnson was shocked. He had been given no forewarning of the possible termination of his membership. The immediate consequence of what he regarded as his “expulsion” from the MDU was the automatic termination of his professional indemnity cover, a serious thing for a professional person. He was able to obtain prompt alternative cover from the Medical Protection Society (“the MPS”), being cover of the like discretionary nature as the MDU had provided until July 2000 (the MPS does not provide its members with indemnity cover under an insurance policy). But he claims that his expulsion has caused him significant damage of a wider nature. He says he has had to disclose it to hospitals where he has, or has since sought, admitting rights or employment; and he asserts that it reflects that he was regarded by the MDU as a serious risk to its funds, which he says is likely to have had a chilling effect on hospitals who became aware of it. He claims it has damaged his professional reputation. He now asks to be compensated. His claim for compensation is brought under section 13 of the Data Protection Act 1998 (“the DPA”) and is founded on the assertion that his expulsion was the consequence of the MDU’s unfair processing of his personal data.
5. The MDU disagrees with every step in his case. But perhaps its main point is this. It says that over the years Mr Johnson was involved in, or was the subject of, a number of incidents and allegations in the course of his professional life, of which he and others made the MDU aware. By May 2001, his track record had caused the MDU’s risk management department to carry out a risk assessment review in relation to him. That involved an assessment of the various incidents and allegations, with particular features of his case history also being scored by reference to a standard form system that the MDU applies to its members under its risk assessment policy. Mr Johnson’s

score was at a level which, in accordance with that policy, justified consideration of his future membership of the MDU by a committee of senior clinicians. The outcome of that consideration was the termination of his membership. The MDU's position is that the termination was properly in line with the operation of its risk assessment policy.

6. More particularly, the MDU's position is that its risk management policy, of which the scoring system is part, is not dependent on any allegation against the member being well founded, a question which the MDU does not attempt to answer. It depends simply on the fact that the allegation was made: the MDU does not endeavour to investigate its merits. It applies the same policy to all its members. If (which it disputes) it processed any of Mr Johnson's personal data whilst carrying out its risk assessment in relation to him, it asserts that he consented to it, that he knew that his data was liable to be processed for the MDU's risk management purposes and that the processing was in line with its established policy and was fair. It emphasises that it is a non profit-making body, with a duty to protect its funds in the interests of all members, and it asserts that the termination of Mr Johnson's membership was a decision responsibly made by it in the performance of that duty. It emphasises that, under its contractual relationship with Mr Johnson, it had an absolute discretion to terminate his membership.
7. Mr Johnson's riposte to that is that a risk management policy geared to an assessment of risk by reference to a catalogue of allegations and what he says is an irrational and arbitrary scoring system is inherently unfair. He says that the MDU should have brought his side of the allegations and incidents into consideration and taken account of it when engaging in the risk review. The MDU's unfair failure to do so is said to have been reflected in the manner in which it processed his personal data whilst performing its risk review and entitles him to statutory compensation for the damage to him to which he says it ultimately led. He accepts that the MDU had an absolute discretion to terminate his membership, but his case is that, but for the unfair processing, the decision to terminate it would not have been made.
8. The central questions which I have to decide are, therefore: (i) did the risk review involve any processing of Mr Johnson's personal data; (ii) if it did, was the processing unfair; (iii) if it was, has it been shown that, if the processing had been fair, the termination decision would probably not have been made; (iv) if Mr Johnson succeeds thus far, to what (if any) compensation is he entitled? The answer to each question is in issue.
9. It is fair to note that Mr Johnson's case is an apparently exceptional one. I was told that the MDU currently has about 160,000 members. The evidence was that in 2002 there were 26 risk review references (including Mr Johnson's) to the MDU committee which considers such matters. The committee recommended that 16 of the referred members (including Mr Johnson) should not have their membership renewed, and that was the decision that the MDU's Board of Management made in each case.

Mr Johnson – background

10. Mr Johnson was inspired into a medical career from his youthful experience playing what he called semi-professional basketball, in which he gained an England Junior Cap and later played for English and British Universities. He became exposed at an

early stage to the world of sports injuries and knee surgery. He attended medical school at Manchester University, spending part of his fourth year undertaking sports injuries experience at the University of California. He graduated from Manchester in 1980 with MB and ChB degrees. He trained for six months in general and orthopaedic surgery at Park Hospital, Manchester and did six months accident and emergency work at Wythenshawe Hospital, Manchester. He passed Part I of the MRCP examination in July 1981, Part I of the FRCS examination in January 1982 (which he said only about 7%, including him, pass first time), the US Visa Qualification Examination in July 1982 and Part II of the FRCS examination in 1984, saying that in his year the pass rate was four (including him) out of 67.

11. He is now a consultant orthopaedic surgeon practising out of St Mary's Nuffield Hospital, a private hospital in Bristol owned and run by the Nuffield Hospital Group. All surgeons have to practise from a licensed institution. In the private sector, where Mr Johnson practises exclusively, this is usually a private hospital which provides admitting and practising privileges to the surgeon. These privileges have to be regularly analysed and reviewed. Mr Johnson has been working with Nuffield for 12 years and exclusively out of St Mary's for seven years. On average, each week he works on about four operations, has about ten out-patient appointments and provides one medico-legal report. His cases are all concerned with orthopaedics, especially joint replacement, knees and sports injuries. His practice now relates to very specialised areas, where he says his research is world recognised, such as surgery for patellar tendonitis and anterior knee pain. It derives from what he calls a trickle of referrals from GPs; from other orthopaedic surgeons; and some patients come to him directly on recommendations. He currently does little research work, but has done a considerable amount in the past: his CV is testimony to that. It has not been questioned in these proceedings that Mr Johnson is a competent and successful surgeon. He says, however, that since 2003 the number of patients referred to him has fallen, although he has not presented any supporting proof of that or produced any material showing a downturn in income since then.
12. Mr Johnson became a member of the MDU on 9 July 1980, when he was a fourth year medical student undertaking locum house officer's positions. He said it was his then understanding that MDU membership provided insurance cover that was maintained throughout a doctor's professional career and into his retirement. If that was his understanding, it was imprecise, as I shall explain. His membership lapsed on 31 July 1985 when, following his move to Oxford, he delayed paying his renewal subscription. It was, however, restored on 1 October 1986, after which it continued until it was terminated on 31 March 2002. When he rejoined in 1986, he did so expressly "in accordance with the Memorandum and Articles of Association" of the MDU.

The MDU – background

13. The MDU is a company limited by guarantee which was incorporated in 1885 and whose members are mainly medical practitioners. It is a mutual organisation run for their benefit. In May 2000, its records and systems were transferred to MDU Services Limited ("MDUSL"), in which the MDU holds 75% of the ordinary shares and 50.1% of the voting shares. Since then MDUSL has, as agent for the MDU, provided various services to MDU members, including advice and assistance of a medico-legal nature. It is a nominated representative of the MDU for the purposes of the DPA.

14. The constitution of the MDU is contained in its Memorandum and Articles of Association, which bind its members to the same extent as if they had respectively been signed and sealed by each member (section 14 of the Companies Act 1985). The latest version relevant to these proceedings was adopted by a special resolution of 14 September 2000. The main objects of the MDU in its Memorandum include (by reference to the numbered paragraphs of the Memorandum, although this is a major paraphrase): (i) the promotion, support and protection of such categories of medical practitioners involved in the practice of medicine as are eligible for membership; (ii) the promotion of high standards of professional practice; (iii) the giving of advice or legal assistance to members who may seek advice or who are or are likely to become involved in litigation or disputes in relation to their professional activities; (iv) the indemnification in whole or in part, on such terms as may seem expedient, of members from liabilities and losses arising from claims made against them in relation to such activities; and (x) the provision to members of advice, assistance or services on any matters relating to their professional or business affairs. The Memorandum provides that the MDU's income and property are to be applied solely to the promotion of its objects.
15. The provisions of the MDU's Articles of Association of primary relevance are in the section headed "Members" in articles 4 to 15. Article 4 empowers the Board of Management ("the Board") to specify the categories of persons eligible for membership of the MDU. Article 11 provides:

"11. The Board of Management shall be entitled in its absolute discretion

(a) and subject only to giving 42 days' prior notice to the member of its intention to do so to refuse to renew the membership of any member with effect from the date on which that member's current subscription expires ('the expiry date') and in such event at the end of the expiry date such member shall cease to be a member of the MDU

(b) to terminate the membership of any member by not less than 14 days' notice given at any time and, in such circumstances, a due proportion of that member's subscription (if any), reflecting the period from the date of such termination until the expiry date, shall forthwith be refunded to that member by the MDU."

Mr Johnson's membership of the MDU was terminated under article 11(a).

16. I should refer to article 14, although it is of only minor relevance:

"14. If any member or applicant for election to membership or any group to which the member belongs makes default in any payment of whatsoever nature due to the MDU then if such default shall continue for 30 days after such payment shall become due the member shall, unless the Board of Management at any time otherwise determines, cease to be a member."

It was under that provision that Mr Johnson's membership of the MDU lapsed in 1985, although it was renewed in 1986.

17. Finally, I should refer to article 46, dealing with the power of the Board to delegate its powers. The decision to terminate Mr Johnson's membership was made by Dr

Christine Tomkins, a Board member, acting under a delegated power. Dr Tomkins is the MDU's Professional Services Director. She had joined its Medical Secretariat in 1985, became Head of Claims Handling in 1993 and was appointed to her present post in 1995. Article 46 provides:

“46. The Board of Management may delegate any of its powers to any committee or sub-committee. It may also delegate to any member of the Board of Management or employee or agent such of its powers as it considers desirable to be exercised by such person. Any such delegation may be made subject to any conditions the Board of Management may impose and either collaterally with or to the exclusion of its own powers and may be revoked or altered.”

Benefits of MDU membership

18. I should first say something about professional indemnity insurance for doctors. Doctors working within the NHS hospital service are covered by a state indemnity scheme for claims arising out of their NHS practice. The risk of claims arising out of any private practice they may conduct has to be covered by professional indemnity insurance. Down to July 2000, professional indemnity cover was provided by the MDU to its members, although only on a discretionary basis. That is, whilst in practice the MDU would indemnify its members against claims, it assumed no contractual obligation to do so: the MDU is not an insurance company
19. In July 2000, that position changed when one of the benefits of membership enjoyed by MDU members included a policy of professional indemnity cover. Cover for UK members was provided by Zurich Insurance (Irish members had the benefit of an Eagle Star policy). MDUSL, also part-owned by Zurich, acted as the members' agent for this purpose. The change was an important one: indemnity cover was no longer provided at the discretion of the MDU, it became a matter of contractual right. This brought doctors into line with most doctors practising in mainland Europe and the USA, the majority of whom were covered by insurance. The premium the member pays for such cover comes out of his MDU subscription. The cover is written on a “claims made” basis: that is, it covers claims made during the policy year regardless of the date of the occurrence occasioning the claim. The cover is in respect of medical negligence claims, but not matters such as General Medical Council (“the GMC”) inquiries or other non-claim matters.
20. The institution of the new indemnity arrangement in July 2000 obviously reduced the potential for calls on MDU funds in respect of medical negligence claims, including for occurrences pre-dating July 2000 and giving rise to claims made later. It did not, however, extinguish it. Cessation of MDU membership automatically also terminates the separate insurance cover (as in Mr Johnson's case). In such cases, the MDU remains answerable (but only on a discretionary basis) for claims subsequently made against a doctor who was an MDU member at the time of the occurrence occasioning the claim. Thus, in Mr Johnson's case, if a claim were now to be made against him for alleged professional negligence in respect of occurrences during his MDU membership, it would be to the MDU that he would look for an indemnity; and the fact that he ceased to be a member of the MDU at the end of March 2002 would not prevent him from claiming it. It is a fact of medical life that a claim is often made long after the occurrence said to have given rise to it. In short, the discretionary indemnity benefits, as well as all other benefits, of membership of the MDU are and

have always been provided on an “occurrence” basis rather than a “claims made” basis.

21. As regards the indemnity cover that the MDU still so provides to former members, it is, therefore, important to note that it remains strictly discretionary. Dr Tomkins acknowledged that the expectation of former members is that the discretion to indemnify them would be exercised in their favour, but there have been cases in which it has not. Mr Johnson’s evidence in cross-examination was that, for all practical purposes, he regarded the MDU as having no discretion in the matter and that he had never heard of an instance in which the MDU had decided not to indemnify a doctor in a medical negligence claim. In fact, the MDU had written to him on 1 December 1997 explaining that it was not an insurance company and that its assistance to members was discretionary.
22. Dr Tomkins was asked during her oral evidence about the incidence of claims arising in Ireland out of the birth of children with cerebral palsy. The claims have been against obstetricians and have resulted in the recovery of substantial damages. They have caused great concern over recent years. Dr Tomkins accepted that in 2004 the MDU had declined to provide assistance and indemnity to some 11 consultants in relation to such claims (presumably they were not entitled to insurance cover). The situation had arisen because it had become apparent that the MDU had raised insufficient subscription money in the past to fund the cost of such claims: and by 2003 the statistics showed that perhaps 150 children with cerebral palsy would be born each year in Ireland. The MDU’s experience by then was that some 20 to 30 cases could be expected to be litigated each year, of which about eight would attract damages then running at between 3 million and 4 million euros: the MDU had not predicted in the distant past how claims in such cases would escalate. An example given was that a claim that settled in 2001 for 1.5m euros would, by 2004, settle for twice that. The situation in Ireland had for some time been regarded by the MDU as a crisis, which it hoped the Irish government would take steps to meet. Dr Tomkins agreed that the MDU’s refusal to provide its discretionary indemnity in respect of certain Irish claims had given rise to a legitimate apprehension on the part of consultants but also said that she did not regard the MDU’s stance with regard to meeting claims for indemnity by Irish obstetricians as comparable to the way in which it would exercise its discretion to meet an indemnity claim by an individual English consultant practising in a different area, such as an orthopaedic surgeon. I add that I was shown a copy letter dated 22 February 2005 from the Secretary General to the Irish Government and addressed to the Secretary General of The Irish Hospital Consultants Association recording in welcome terms that the Government “... has today endorsed the Tanaiste’s position on the issue of cover for past liabilities of consultants arising from decisions by the [MDU] to withdraw cover, namely, that no person who has suffered from a medical mishap in Ireland would be left without compensation and no consultant would be left without cover in all reasonable circumstances and in accordance with law.”
23. The provision of discretionary indemnity cover is not the only benefit that the MDU provided until July 2000 and which it continues to provide in the circumstances I have mentioned. It is, and always has been, also a key part of its functions to provide advice and assistance to members in relation to problems that may concern them in connection with their professional life, and this may also entail the incurring of

expense on the member's behalf. The MDU classes its work as "advisory" when it relates to a matter not directly affecting a patient (for example, advice on a general question of principle), being a matter which is not likely to require any legal advice and where there is little prospect of any indemnity or expenditure; and as "assistance" when the help sought relates to a patient-related problem and may involve a requirement for legal advice or assistance. The legal advice or assistance the MDU provides may include advice from outside lawyers or the provision of legal representation in relation to a complaint made to the GMC.

24. As regards complaints to the GMC, the first stage is a screening stage. The complaint is considered in order to see whether it raises a serious matter. The doctor is notified of the complaint and may, if he chooses, respond by letter. The outcome of that stage is that the complaint may or may not proceed further. Dr Tomkins's evidence was that in 2002, for example, only about 13% of some 4,500 complaints to the GMC went beyond the initial screening stage to the Preliminary Proceedings Committee. Her evidence, again in reference to 2002, was that it was unusual for a doctor to be the subject of a complaint to the GMC, and even more unusual for any such complaint to filter beyond the initial screening stage. It is only if it passes that stage that it has been adjudged to have at least something to it. If it does proceed to the Preliminary Proceedings Committee, the MDU will then usually instruct solicitors on behalf of the doctor. The Preliminary Proceedings Committee may itself screen out the complaint; or, if there appears to be something serious in it, may refer it to the Professional Conduct Committee, the Health Committee or the Interim Orders Committee.
25. I was referred to some of the MDU's publicity material. It describes the MDU as "the market leader" whose "sole purpose is to serve our members and that is why we pride ourselves on providing the best and most personal service to you." It says that "We may not be the cheapest, but we aim to be the best." It includes extracts from letters from grateful doctors for its help, attention and advice. Its brochure includes smiling, understanding faces. It conveys that it is there to provide help to doctors on a 24-hour basis and is a mere telephone call away. What it does not convey is that if the doctor picks up the telephone as often as Mr Johnson did, he may – without any warning - one day find a letter on his doormat terminating his membership. In cross-examination, Dr Tomkins said that whilst the MDU's annual report would encourage doctors to contact the MDU if they were concerned about any circumstances or adverse incident, there was no obligation on them to do so; and if, for example, a doctor failed to report any circumstances which might give rise to a claim or complaint, and one did later arise, the MDU would not close its doors on him merely because he had not earlier made a report.
26. It is worth quoting from this material. It is said to be a 2005 document, and the MDU did not admit that like material was published during the prior period with which this claim is concerned. I will, however, set out some extracts so as to give a flavour of what the MDU offers (the emphasised parts are as in the original):

“Today, more than ever, you need MDU membership

Today's doctor works in a litigious and increasingly regulated environment. In the last 10 years the number of complaints to the [GMC] has risen significantly, as have performance reviews by hospital trusts. While many doctors, particularly at the beginning of their career, do not believe they will ever face these threats,

statistics show that every doctor is likely to have at least one claim or complaint made against them during their career.

By joining the MDU, the world's first and longest standing medical defence organisation, you can gain access to the finest personal support available to defend you when need it most.

You can **rest assured** that should you receive a complaint or are subject to a disciplinary investigation, you can ask for the assistance of fellow doctors. We are just a telephone call away.

Furthermore if that complaint turns into a criminal negligence claim [sic: there is no mention of a *civil* negligence claim, which is presumably to what the material is really referring] that is not covered by NHS indemnity, you have the **peace of mind** of knowing that you have, as an integral part of MDU membership, a policy of insurance, underwritten by Converium Insurance (UK) Ltd, which can indemnify you up to £10 million subject to the terms and conditions of the policy.

MDU membership is not only for when times are difficult. **To help you understand the law and your ethical requirements**, you can access the MDU's range of risk management tools and advisory publications, while **to assist with your professional development** you can make use of our helpful educational support programme, and our extensive website of articles and case histories.

More UK doctors are members of the MDU than any other medical defence organisation. We look forward to welcoming you into membership soon."

27. Mr Johnson would agree with the comment about the litigious nature of the current environment. His evidence (which was consistent with the MDU's experience) was that doctors working in his field of orthopaedic surgery face a higher incidence of claims than those in most other fields, his assessment being that (unlike himself) most of his colleagues have had claims against them. The brochure also lists certain of the particular advantages of membership of the MDU, as follows:

“24-Hour telephone advice on the ethical and legal aspects of clinical practice provided by specially trained doctors, dentists, nurses and lawyers

Support with [National Clinical Assessment Authority] investigations

Support in preparing a case and representation at [Primary Care Trust], NHS trust and disciplinary hearings

Support in responding to a complaint and representation at GMC hearings

Support with CHRE referrals to the High Court as a result of a GMC decision

Support in preparing responses to patients' complaints

Support with criminal investigations and proceedings arising from clinical practice

Support in preparing a case and representation in a Coroner's Court

Advice and representation in dealing with the press or media enquiries ...

Insurance cover for Good Samaritan acts worldwide

Indemnity for claims arising out of fee paying services (Category 2 work) such as preparing insurance reports

Insurance cover for claims arising from private work (at no extra charge, up to £7,000 income per annum, subject to type of work)

Should your private income exceed £7,000, you can request for your cover to be extended ...

In addition, MDU membership can provide you with:

Invaluable advice

Advice to help you avoid common pitfalls of practice and to keep you up-to-date on medico-legal issues, including:

- MDU medico-legal advice booklets covering areas such as consent, confidentiality, record keeping and many others
- Online risk management modules to help you identify and reduce risk
- The popular and informative MDU Journal
- Regular emails on medico-legal 'hot topics'

Mr Johnson's membership of the MDU

28. Mr Johnson's annual subscription to the MDU was £5,600 for the year ended 31 March 1998, and it increased in each subsequent year until his last year (that ended 31 March 2002), when it was £10,000. The premiums he paid reflected that his practice was exclusively a private one; and they provided the full range of cover for him that the MDU offered, including, after July 2000, indemnity insurance cover via MDUSL. They also reflected a weighting that the MDU attaches to the doctor's specialty according to its position on the risk scale. For example, obstetrics (not Mr Johnson's field) is a high risk area and orthopaedics (which is) is regarded as a fairly high risk area. Dr Tomkins's evidence was that the MDU's experience showed that an orthopaedic surgeon could expect one professional negligence claim every ten years. Mr Johnson, however, had attracted none. Dr Tomkins gave some evidence as to the incidence of claims against orthopaedic surgeons in private practice over the 15-year period from 1990. 49% had not been the subject of any claims and 51% had had at least one claim. Of those claims, the MDU paid out on 22% of them. The others proved to have no merit. An MDU review of private orthopaedic claims carried out in 2002 of a prior ten-year period focused on 192 claims that had led to £16.6 million being paid out in compensation and legal costs, making orthopaedics the most costly private surgical specialty after obstetrics. Claims relating to lower limb surgery were the most prevalent, with spinal claims (although less frequent) being the most expensive in costs and damages. The most common procedure to be performed on the wrong side was arthroscopy. The report found that "Cases commonly arose through

incorrect marking of the operative site, either because the patient was not involved in identifying the site or because members of the surgical team did not communicate clearly with one another.”

29. The MDU’s practice was to send its members an annual renewal invitation, containing relevant renewal information. Mr Johnson paid his annual subscription by direct debit and so it was not necessary for him to sign and return the invitation. The only renewal invitation I was shown was that sent to him in about March 2001 (just before the due date for the renewal of his subscription for the year commencing 1 April 2001). It is not suggested that Mr Johnson actually read all of it or applied his mind to what it said, but it is admitted that it was a notification to him of its terms. They contain the following provisions, which are relevant to the issue as to whether he consented to the processing of his personal data by the MDU and MDUSL for their own risk management purposes and whether he was informed they were to be used for those purposes. I shall later refer to this as “the processing agreement”:

“I agree that by renewing my membership I consent to [MDUSL], the MDU and the Zurich Insurance Company processing information about me, including sensitive personal data, (Personal Data) for administration of my membership, the insurance policy and indemnity claims, *risk management*, marketing and *advisory* purposes. I consent to [MDUSL], the MDU and the Zurich Insurance Company disclosing my Personal Data to legal advisors, regulatory bodies, the Compensation Recovery Unit and to other medical defence organisations as part of their advisory and claims handling process as well as to third parties.

I consent to the transmission of my Personal Data overseas.

I acknowledge that I have the right to apply for a copy of my personal data (for which [MDUSL] may make a small charge) and to have any inaccuracies corrected.” (My emphases in both places: these words are relevant to the later discussion)

The MDU’s risk assessment practice and policy

30. Dr Stephen Green has been head of risk management for the MDU since 1994 (he is actually employed by MDUSL). He qualified as a medical practitioner in 1975 and, after various hospital training posts, trained as a general practitioner. He practised as a GP until March 1992, when he joined the MDU as a medico-legal adviser. In 2002, he was working full time for the MDU, but he has since resumed part-time practice as a GP. He explained that the MDU has, it considers, an obligation towards all its members to protect its funds and regards it as prudent to have an internal procedure for carrying out risk assessments with regard to members about whom it has concerns. That procedure in relation to any member involves a consideration of his case history, which is contained in files opened by the MDU (or MDUSL on its behalf) following any contact made with the MDU either by the member himself or by another member in relation to him. Such contact will typically be made in circumstances in which the member seeks advice, assistance or insurance indemnity. A file will normally only be opened in relation to cases in which correspondence in relation to the matter is already in existence and is provided to the MDU. Dr Green explained that his department also provides and advertises a clinical risk-management service to MDU members and he accepted that it had been doing so since at least about the mid 1990s.

31. The MDU's risk assessment procedure in operation by 2002 (when Mr Johnson's membership was terminated) dates from early 1998, when the MDU executive first implemented a formal procedure directed at identifying and assessing members whose membership might represent a disproportionate risk to MDU funds. Dr Tomkins said that the MDU had been giving thought to a risk assessment procedure since 1994. Dr Green, as head of the risk management department, had a central role in its formulation. The procedure was based on the MDU's experience of the underlying risk factors in complaints and claims reported by members. In devising the procedure, the MDU identified common features in cases reported by members which might be regarded as assisting as an early warning system of future losses. This was regarded as important because the benefits of MDU membership were and are provided on the "occurrence" basis I have mentioned. In time, the risk review process became carried out by MDUSL, but nothing turns on that.
32. Dr Green produced in evidence a document headed "Risk Assessment Procedure", which he said dated from May 1998 and was the subject of amendments resulting in a final version dated April 1999. It formed the core of the MDU's risk review policy but is drawn only in very general terms. It opens by stating that some members present a disproportionate risk to MDU funds and can be identified in a number of ways, and it gives three generalised explanations of how they might do so (including "having an unfavourable track record of claims/complaints/disciplinary matters"). It summarised the essence of the review procedure, including the scoring of the subject member. It regarded a score of up to 49 as representing a low risk; one of 50 to 74 as medium risk; and one of 75 and above as high risk. Cases with scores of over 50 were referred to the Risk Assessment Group ("the RAG"), a committee of medical practitioners appointed by the Board. The RAG's function was to consider the subject member's case, and make recommendations to the Board as to how it should be dealt with, and the document summarised the options so open to the RAG. It suggests that only a score of above 80 will deserve a recommendation of article 11 treatment. As I shall explain, Mr Johnson's score was exactly 80. It is not, however, said that this undermines the lawfulness of the recommendation that the RAG made in his case, namely that his membership should not be renewed after his subscription expiry date of 31 March 2002. Mr Johnson expressly disclaims any criticism of the fairness of the RAG's procedure or recommendation, or indeed of the ultimate decision itself, which was made by Dr Tomkins acting under a delegated power from the Board. His case is built exclusively on the assertion that the recommendation and decision were probably inevitable given the material with which the RAG was presented and that the real problem was that that material had been unfairly processed at an earlier stage. His case focuses on that earlier stage.
33. The 1998 document provides little detail as to the risk assessment procedure that was devised and has in practice been operated since then. The procedure was more fully explained in the evidence. It involves the completion in relation to the subject member of three documents: a Risk Assessment Review form ("the RAR form"); a pro forma score sheet ("the score sheet"); and a Risk Assessment Group sheet ("the RAG sheet"). The work is carried out by an MDU risk manager. In an appropriate case, the completed documents will all be referred to the RAG for consideration. Dr Green's evidence was that about 50% of members who are the subject of a risk assessment review have their cases referred to the RAG. It was still the practice of the MDU in 2001 and 2002 (when Mr Johnson's case came up for review) that a score of 50 or

more was the level at which there would be a reference to the RAG, but Dr Green said that in cases where special factors were present there could be a reference even if the score was lower (for example, if it turned out that the member had provided misleading information to the MDU when applying for membership). The review of a member may lead to one of several outcomes: for example, (i) he may be notified under article 11(a) that his membership will not be renewed after the expiry of his current subscription; (ii) his membership may be terminated under Article 11(b); or (iii) he may be retained on the adverse risk register, with any instances of further contact being closely monitored. I now refer in more detail to the RAR form, the score sheet and the RAG sheet.

The RAR form

34. The completion of the RAR form is based on files opened in respect of the member. It will contain a summary of the member's case history. Any allegation, claim or complaint in respect of a member which is the subject of contact by that member with the MDU will generally have resulted in the opening of a file in the member's name. These files are so-called "lead files". Files opened with respect to like contact made by another member, but in which the member in question is also identified, are known as "non-lead files". The files are regarded by the MDU as the member's case history. When a file is opened a brief summary of the nature of the matter with which it is concerned is given to it. This is known as the "day one summary." When a risk manager is required to consider a particular member, he will consider the day one summary in relation to each file and will also review some or all of the underlying files, which will be held either in electronic or manual form. The usual practice is for review managers to consider the member's files over the previous ten years or, if there is a significant number of them, then at least the last ten files. Both assistance and advice files will be reviewed, the task being to identify potential risk factors. The risk manager will make summaries of his review in the RAR form and may add his own observations on matters that occurred to him in his review.
35. Dr Green made it clear, as did all the MDU witnesses (in particular, Dr Roberts, the risk manager who dealt with Mr Johnson's case), that it is no part of the review procedure for the risk manager, or anyone else, to form or express a judgment on the truth or otherwise of any allegations against the member recorded in the files. If the outcome of a particular allegation is known, it will be included in the review, but it will not always be known: the member may not have reported it. Even if the outcome is known and favourable, that is not regarded as a factor material to the risk assessment exercise. The MDU's risk assessment policy is based on the principle that it is the nature of the *allegation* or the *incident*, not its ultimate outcome, which is regarded as potentially relevant. It is the fact that an allegation has been made that is regarded as predictive in terms of future risk to the MDU's funds; and the rights or wrongs of the particular allegation or incident are regarded as immaterial. The purpose of the procedure is to identify markers for future potential risk. Dr Green did, however, also make clear in cross-examination that the allegations are looked at in the context in which they had been made and that the RAR form would set out that context. He said that it would seem to him to be unfair if the form merely set out a list of allegations, with no other information at all.
36. The MDU's experience in these respects is, as Dr Tomkins further explained, that the making of a claim or complaint, regardless of its merits, can be a marker of the

likelihood of a future claim or complaint. The MDU engages in no attempt to establish the validity or otherwise of the allegation when engaging in a risk assessment review in relation to one of its members, or to assess blame or culpability, although if, by the time of the review any claim is a settled claim (that is, the MDU has made a payment), the MDU will take into account the fact of the settlement. In practice, it is obvious that the MDU could anyway rarely, if ever, conclusively investigate the merits of an incident or an allegation. The MDU's policy has been developed against a background in which the MDU's experience has taught it that there is no direct connection between clinical incompetence and the making of a claim or complaint. There are many doctors – the so-called “benign incompetents” (long on bedside manner, charm and communication skills but short on clinical skills) - who pose a risk to their patients but who will never suffer a complaint or claim; by contrast, a doctor who is clinically highly competent can attract claims; and there is often a long time-lag between the occurrence and the claim. Dr Tomkins referred to a study by Charles Vincent who had analysed some 8.5 million hospital admissions in three specialities and their related clinical records and had estimated that there had been avoidable adverse incidents in 5% of the cases, or in relation to 425,000 patients. But there had not been 425,000 claims or complaints.

37. Dr Tomkins accepted that it is possible that the consequence of the policy is that a doctor who has been unlucky in terms of the incidents, complaints and claims in which he has become involved, but who may in fact have done nothing wrong, could find himself excluded from the MDU. She also accepted that the members are not told the nature of the MDU risk assessment policy but pointed out that they do have a copy of the memorandum and articles of the MDU, article 11(a) of which makes it clear that the MDU has an absolute discretion not to renew a member's membership. She said the MDU had also always made clear to its members that the benefits of membership are discretionary and that (prior to 2000, since when members have had the benefit of a policy of indemnity insurance) it did not invariably indemnify members against negligence claims. She accepted, however, that the general expectation of MDU members was that, even though the MDU had a discretion in the matter, its policy was never to exercise the discretion against them in respect of medical negligence claims. She regarded the Irish cerebral palsy cases as exceptional ones.
38. It was put to Dr Tomkins in cross-examination that a fairer way of summarising the files would be to include a brief summary of the member's response to the allegation against him. She rightly accepted that that could be done, and accepted that the member might perceive it to be a fairer approach but she disagreed that it would in fact be fairer to the member if it was done. The inclusion of the member's comments would still not enable the RAG to form a judgment on the merits or otherwise of the claim. They could only do that if they conducted an inquiry into the claim or complaint, which is something they are not doing or trying to do. Nor, of course, could they do it. They know the basis on which the RAR form is compiled, namely by reference to allegations. They are making no judgment about the clinical competence of the practitioner, but only about future risk to MDU funds. Dr Green confirmed this, explaining that the basis of the procedure would have been discussed with the RAG members when the procedure was first introduced in 1999. Dr Roberts's evidence was emphatically (and repeatedly) to the same effect.

39. Dr Tomkins was also asked why the MDU did not, as a matter of practice, consult the member in relation to the risk review exercise and ask for further information or explanations from him. Again, she accepted that the MDU could do this, but gave the same explanation as to why it did not: the RAG is not judging merits or clinical competence, it is assessing the potential risk to MDU funds. She very fairly accepted that she was not saying that, were this to be done, it could and would make no difference to the outcome of the RAG's consideration. But she said it was not part of the MDU risk review policy to do it. She also made the point that the task the RAG performs is not just a mechanical one of totting up scores and looking at allegations. Whilst the score may be absolute, the RAG will look at all the factors of the case set out in the material before them in coming to their recommendation.

The score sheet

40. The MDU's pro forma score sheet lists some 23 or so criteria derived from its experience of cases over the years, and the subject member is given a standard score against such of them as apply to him. The scoring provides no more than a general guide as to whether the review is to be taken further. The practice is that if it is more than 50 the member's case is referred for consideration by the RAG, although in certain cases a member who scores less than 50 may also be so referred if the review gives rise to particular concern. It is accepted that there is an element of subjectivity in the consideration by the risk manager as to whether a score should be given against any particular heading, but the outcome of the scoring is anyway not regarded as decisive as to the future course of the review. The scoring system looks only for negative criteria, since that is what the MDU is concerned with in trying to identify potential risk to its funds. An important feature of the scoring system is that if a particular complaint, falling within the listed criteria, is made against the member, the complaint will carry the standard score, even though it may be that the file will also show that the outcome of the complaint was that it was unfounded.

The RAG sheet

41. The RAG sheet is submitted to the RAG together with the RAR form and score sheet. It identifies the date of the RAG meeting and extracts certain of the basic information that is set out more fully in the RAR form.

The RAG meeting

42. The RAR form, score sheet and RAG sheet are considered at a meeting of the RAG. They are provided to the RAG about a week in advance of the meeting. Originally the RAG used to meet once a month but, by 2002, it was holding about six meetings a year, approximately once every two months. It usually considers five or six cases at each meeting. The RAG normally comprises about four members. They are very experienced clinicians, at least one of whom will have knowledge of the medical speciality of the member whose case is being considered. Some of those making up the RAG will be long-standing members of the MDU's Council and Cases Committee. Dr Tomkins's evidence was that they would have a very good understanding of the context in which MDU members report matters to the MDU. Dr Green's evidence was to the same effect. A risk manager will be present in order to answer any questions the RAG may have on the documents, although the underlying files are not brought to the meeting. Dr Green attends RAG meetings in his capacity

as head of risk management, as does Dr Tomkins in her capacity as the professional services director: both attend in a non-voting capacity. Her function is to give any necessary advice to the RAG on the procedures it should follow. Neither Dr Green nor Dr Tomkins takes any part in the RAG's discussion of the merits of the case. After considering the matter, the RAG makes its recommendation to the Board. Minutes of RAG meetings are not kept, but the principal considerations leading to its decisions are recorded on the RAG sheet. Dr Green said that in his experience RAG members would occasionally (perhaps once every other meeting) ask for further information in relation to a particular case and that would be dealt with by adjourning the case until the next RAG meeting.

The decision of the MDU Board

43. The RAG will make a recommendation to the Board, but any decision made is that of the Board itself, which is not bound by the recommendation. In practice, decisions following RAG recommendations are made by Dr Tomkins acting under her delegated authority. She said that she could recollect only one case in which she had declined to follow the RAG's recommendation to terminate membership, although she could not remember why. She said each case is considered on its own facts and merits and that the member's score is not automatically determinative of the outcome. She had exercised the Board's discretion under article 11(a) in relation to a member with a score as low as 15 and had declined to exercise it in relation to one whose score exceeded 100.

The Risk Assessment Review in relation to Mr Johnson

44. In May 2001, the MDU's Board referred Mr Johnson for a risk review. That decision arose out of a recommendation of the Advisory Management Committee that he should be so referred, following a consideration of his file No. 0001331. The case was referred to Dr Karen Roberts. Dr Roberts has both medical and legal qualifications. She had joined the MDU in 1999 as a Senior Medical Claims handler and on 2 April 2001 she became employed by MDUSL as a clinical risk manager. There were about four other risk managers also carrying out reviews. Dr Roberts had received training for the task, in particular that her function was to summarise allegations against the member although she also understood that they had to be summarised in a sufficient context to show the circumstances in which they had been made. The review would also include the outcome of the allegation, if known, although often it will not. In Mr Johnson's case, as in others, Dr Roberts's task was to prepare an RAR Form, a score sheet and a RAG sheet. She had previously prepared like documentation in other cases and she followed the usual practice. Since 2001, she has carried out about one or two risk reviews per month.
45. Dr Roberts worked on a blank RAR form, score sheet and RAG sheet on an MDUSL computer. She completed the RAR form on 27 November 2001, recording in its first six boxes Mr Johnson's initials (not his name), address, MDU membership number, GMC number, the date he joined the MDU (recorded as 1 October 1986: she made no reference to his prior period of membership), the date of the next renewal of his membership (1 April 2002), his qualifications ("MD MB ChB FRCS (Orth)"), his surgical speciality ("Orth/Trauma Surg"), and his non-indemnified income (£125,000, being his private practice income and so relevant to the professional indemnity cover

provided). The form is deliberately anonymous and if (as with Mr Johnson) the case is referred to the RAG, they will not know the identity of the member.

46. Dr Roberts derived from Mr Johnson's case history (held on computer under his MDU membership number) that 17 files had been opened for him since 1991 (the practice is to go back ten years). She recorded this in the RAR form, describing 11 files as "active" (an active file is one that has not been closed on the system, although she added that seven such files were apparently either inactive or raised statute-barred allegations) and the other six as "advice" files. She wrote "Nil" against "Costs", "Indemnity" and "Legal" and recorded a figure of £300 for "Reserves". That meant that the matters raised in the various files had not resulted in any call on MDU funds, although a small (and unexplained) reserve of £300 had been provided for.
47. Dr Roberts listed in the RAR form each of the 17 files and their day one summaries. She also retrieved and reviewed ten of the underlying files going back to 1995: with regard to the earlier ones, she merely set out the day one summaries. She gave a compressed summary of each file she reviewed. Mr Johnson's RAR form as completed by Dr Roberts was central to the inquiry at the trial and there is no alternative to setting out her summary of the 17 files.

The 17 files summarised in the RAR form

48. Each file was summarised in a separate box. I will not re-create the precise format of the RAR form, but will simply set out the summary for each file, giving its reference number, its day one summary (in italics), and (where applicable) Dr Roberts's additional summary. She started with the most recent file and worked backwards. The files were recorded as follows (the first two digits of the file number indicate the year it was opened):

"0010691

GMC complaint re fee for private treatment and dissatisfaction with result of arthroscopy left knee

Complaint to GMC that DPJ did not complete operation that he contracted to do (also disputed fees).

Operation record of 29.01.98:

- resection flap tear posterior horn medial meniscus
- partial resection horizontal cleavage tear lat meniscus
- complete resection inf leaf
- debridement lat fem condyle + superficial chondroplasty

Noted good recovery at 2/52 review.

Patient requested further appointment 10/12 later – letter 11.11.98, pain and swelling related to squash, offered further arthroscopy but declined.

NHS appointment (with a colleague) 16/12 later – letter 15.03.00 indicates degeneration lat meniscus, post horn tear, residual tear med meniscus, free flap, early degeneration.

Letter from patient to DPJ 10/00 expressed dissatisfaction, further appointment offered, patient then sent complaint to GMC. Response to GMC by DPJ.

GMC indicated 2.4.01 that taking no further action.

GMC did criticise communication with patient.

0010574

GMC complaint re inaccurate and incomplete medico-legal report: failure to examine; failure to consider previous expert report; failure to consider history.

DPJ asked to provide a second expert report on condition and prognosis relating to injuries sustained by the patient following an RTA. DPJ provided a report which indicated that following the attempted history he declined to continue with the report when the patient became aggressive and because of concern re the validity of the answers he received.

Patient complained to GMC. Complaint at stage of preliminary screening. DPJ provided comments. Outcome awaited.

0007509

Concern re ownership of MDU assets following proposed changes with Zurich Insurance

Advice file.

0007466

Advice re breakdown of dr/patient relationship/defamation re alleged erroneous prognosis; disappointment with treatment outcome

Complaint

Verbal complaint by husband during consultation with patient and husband. Unhappy with result/recovery following knee surgery. DPJ offered explanation during consultation and indicated that as dr/pt relationship broken down they should return to GP to seek alternative treatment. Also indicated if patient wanted to continue to see him could do so if they were happy to continue taking his advice.

Also wrote to explain to GP.

Informed MDU of situation and nothing further heard.

0001331 [misrecorded by Dr Roberts as 0001311]

Suspension of inpatient and outpatient admitting rights pending investigation into alleged breach of regulations; member asked other member of staff to log into computer data, to which he had no access.

Member notified MDU of incident 2/00. The hospital manager had been approached by two separate junior members of administrative staff who reported that mbr had asked them to log onto system to which he had no access. Hospital manager indicated that similar problem had occurred in 1999, following which member assured management that he recognised error and would not repeat.

Suspended following final occurrence.

Member advised that this is a BMA issue, or that private legal proceedings an option. Board of Management decision that member be not assisted in this case and that member be referred to RA Group.

9910222

Witness statement for high court hearing re claim against BUPA for non-payment of fees following orthopaedic surgery at clinic which is unrecognised by BUPA and defamation of character

Non-lead – another member was asked to provide a witness statement by DPJ in claim brought by him [DPJ] against BUPA re alleged non payment of fees and alleged defamation. DPJ appears to have been bringing private action, outcome unknown.

9810073

Refusal to appear as expert witness for court hearing 25/01/99 following witness summons by solicitors who have outstanding fees for previous case

Previous non-payment of DPJ's fees by solicitors. Advised that will be obliged to appear as expert witness if subpoenaed. At same time can inform solicitors of reasonable fees and if solicitors' [sic] decline then option of seeking to get summons set aside.

9710810

Concern re circulation of publicity leaflet to GPs by colleague (member) following request for private second opinion for knee pain

Advice file

Non-lead, a [redaction] had been asked by GP to comment upon the leaflet that DPJ was circulating as the GP had concerns. Forwarded to MDU for advice. Suggestion that leaflet might be vulnerable to criticism by GMC with regard to suggesting superiority over other practitioners.

9608165

Concern re criticism of clinical skills by colleague in medical report for personal injury claim re exacerbation of anterior knee pain following fall

Mbr referred matter to GMC at the same time as writing to the MDU. Concern was related to part of a medical report provided by a colleague for the claimant. Mbr was concerned that it denigrated his clinical skills, clinical exposure to knees, intelligence and background reading. Mbr independently referred to GMC, matter left with the GMC. Nothing further heard.

9510999

Defamatory remarks in 'leaked' memo criticising member's admitting rights to private hospital

File not seen. Advice file.

9500242

Concern re letter from medical advisor at Western Provident Association re discretionary recognition for surgery

Advice file.

In the main employment/contractual matter and member advised to contact BMA. From brief correspondence it appears that member had been in correspondence with WPA from 1992 regarding refusal to recognise for surgery.

9410740

Letter from PPP re shortfall on account

9404163

Amorous patient

9302572

Concern that re-advertised post for consultant senior lecturer in orthopaedics was withdrawn for political or racial reasons

9208720

Request for information re formation and registration of clinical private orthopaedic companies set up by consultant

Advice file.

9205597

Advice re member publicising in Yellow Pages

Advice file.

9107652

Request for assistance from member who works in orthopaedic field and who has been refused admission rights by private hospital because he does not hold a local consultant appointment

Advice file.

49. Those were the files that Dr Roberts identified and (as to some) reviewed. All were “lead files” apart from files 991022 and 9710810, which were “non-lead files”. The 11 “active” files were 0010691, 0010574, 0007466, 0001331, 9910222, 9810073, 9710810, 9608165, 9410740, 9404163 and 9302572. The six advice files were 0007509, 9510999, 9500242, 9208720, 9205597 and 9107652. Dr Roberts’s evidence was that in her summaries of the files she tried to be brief and factual. She included the outcome of any reported incident if the file disclosed it, but said that often it will not be known from the file. She made clear, in line with Dr Green and Dr Tomkins, that it is the *occurrence* of the allegations and incidents which is considered in completing the RAR form, not the culpability (if any) of the member in relation to the allegation or incident, a matter which the MDU is in no position to judge. She said that it is also immaterial whether any assistance was given to the member on any particular matter. In that connection, it is only the practice of the MDU to give assistance in respect of claims or complaints in relation to patient-related matters. In

Mr Johnson's case, for example, the MDU declined to assist him in relation to the computer security issue the subject of file 0001331, that not being regarded as patient-related.

50. I will later return in more detail to the subject matter of each file, but one factual matter to which I draw attention here is that, in relation to file 0010574, Dr Roberts recorded that the outcome was "awaited". In fact, by the time she completed the RAR form, the outcome was known. Mr Johnson had reported it in a letter to the MDU of 12 April 2001 and it was that the complaint had been screened out as having no substance. In the same letter, he also raised issues relating to matters arising under file 0010691, and his letter was placed in that file, and not in file 0010574. Hence Dr Roberts's mistake. Her evidence was, however, that a favourable outcome to a particular incident is ordinarily immaterial to the RAG's assessment: what is material that the incident occurred or that the allegation was made.
51. Having so listed and summarised the files, Dr Roberts added her own observations to the RAR form. These were points she regarded as relevant for consideration by the RAG. She also included a list of possible actions for the RAG to consider. Her observations and list were as follows:

"Observations

- The 3 patient complaints have all occurred in the last 15 months of practice. Two of these are GMC complaints.
- Most recent GMC case not taken further, but GMC criticised communication with patient in letter to DPJ. DPJ disagreed with letter and sought MDU advice on whether he could take this further with the GMC.
- A selection of advice files have been reviewed as four related to perceived defamation. DPJ does not appear to take criticism well. Claim brought by mbr against BUPA.
- Suspension – outcome unknown – decision taken that not MDU matter. Evidence that two junior staff members were asked by mbr to log on to database to which he had not access. There had been an episode 12 months earlier and when a repeat occurred the mbr was suspended by the hospital. Unknown whether mbr still practising privately (no NHS work) but likely to be so as paying high subscription rate.
- RA score 60. If consider that 'failure to change behaviour' applies, in view of repeated breach of computer security, reaches score of 80.
- There are no claims against mbr.
- Potential concerns in the past re the way in which DPJ has advertised.

Consider:

1. Refer to RAG.
2. Place on register and review 6 months.

3. Non renewal of membership.
4. Erasure under Article 11.”

52. With regard to her “observations,” Dr Roberts’s evidence about the first of them was that the number of complaints and the frequency with which they occur are two aspects that the MDU considers when assessing future risk issues. As for the second observation, she said it was very unusual then, and still is unusual, for a member to wish to question the advice of the GMC in relation to a complaint that the GMC was not itself taking further. She said that it could or might provide an indication as to the way the member reacted to situations and might provide a marker for future risk. It was because it was unusual that she thought it appropriate to draw it expressly to the RAG’s attention. More generally, she said that Mr Johnson was a member who had “an unusual pattern of cases and an unusual number of cases where adversarial situations occurred.” As for her third observation, she said that her comment that “DPJ does not appear to take criticism well” was influenced by the four files which related to allegations which were apparently defamatory of him and also by his reaction to the GMC’s criticism of him. As for the fourth observation, she said that even if her chosen language might suggest that she was making a judgment on the suspension issue, she was not in fact doing so and that the RAG, which understands the risk assessment procedure, would know she was not doing so. She also pointed out that she had there made clear that the outcome of the suspension was unknown. As for the fifth observation, it was put to Dr Roberts that if the whole scheme was based exclusively on allegations, there was no logical reason for her not to add the extra 20 points herself (I shall shortly come to the scoring process in more detail). That point appeared to me to be soundly made. Her explanation was that this is not a score which is added very often, she had not herself applied it before and she thought her thinking at the time was that she was unsure whether she should apply it and so she left it to the RAG to consider it themselves. The sixth observation was that there were no claims against Mr Johnson. That was a positive point, which I understood Dr Roberts to say was included as part of the overall context: the RAG would balance the negative points against the plus point reflected in this observation (I am not entirely clear how that squares with the MDU’s basic policy of looking only for risk factors, but I suppose the answer is that the compilation of the RAR form is not an entirely mechanistic operation). As for the final observation, Dr Roberts’s evidence was that this related exclusively to file 971010. She raised this point because it was not usual for another person to raise concerns about a member’s advertising.
53. Turning to Dr Roberts’s “Consider” section, item 1 does not appear to me to be a real alternative for anyone’s consideration: under the risk review procedure, Mr Johnson’s score of 60 meant that his case was inevitably going to the RAG, and so alternatives 2 to 4 were the only real ones for the RAG.
54. The next document that Dr Roberts completed in the risk assessment exercise was the score sheet. Each item on it applicable to the subject member is scored according to a standard score (some attract 5 points, most attract 10, but in certain instances up to 15 or 20 points can be scored). The standard form score sheet list is as follows, and I have added to it Mr Johnson’s score against those headings which were regarded as applicable to his case, which I have highlighted in bold:

“Qualifications inadequate for specialty

Training incomplete

Not on relevant Specialist Register of GMC/GDC

Outside area of expertise/competence

Number of complaints & claims files in last 10 years: 0 – 5 [0]; 6 – 10; 11 – 15; 16 – 20; 20+

Number of settled claims in last 10 years

Average time (months) interval between claim/complaint notifications: 0 -5 [20] ; 6 -12; 13 – 18; 19 - 24

Rudeness/attitude/derogatory remarks

Lack of co-operation with MDU

Misled/failure to notify/declare on application form

GMC/GDC involvement: 10

Guilty of serious professional misconduct/restricted practice

Disciplinary/suspension problem: 10

Fraud/criminal allegations/dishonesty: 10

Technical competence questionable

Allegations sexual impropriety

Records: inadequate/missing/altered

Health problems/alcohol/drug abuse

Consent problems

Concern/criticised by expert

Dispute with colleagues: 5

Private sector work only: 5

Failure to change behaviour

Risk Assessment Score: 60”

55. In completing Mr Johnson’s score sheet, Dr Roberts’s evidence was that she was no more judgmental than she had been when compiling the RAR form: she did not form any view either way on the merits of the underlying incidents, she merely scored Mr Johnson according to whether or not an allegation had been made, or incident occurred, which she regarded as falling within one or more of the score sheet

categories. I comment that certain of the items on the score sheet can be read as if they refer to matters of established fact rather than unproven allegations (compare, for example, “allegations sexual impropriety” with “Failure to change behaviour”: if it is all about, and known to be all about, nothing but “allegations”, why include that word anywhere?). The thrust of all the MDU evidence, which I accept, was however that everyone involved in the risk assessment procedure, including the RAG, would have understood that the score sheet was only listing items which were the subject of allegations against the subject member: the drafting of the score sheet may have been imperfect, and have reflected elements of apparent internal inconsistency, but the RAG would not have been confused by it.

56. In elaboration of Mr Johnson’s score sheet, I point out first that he received no scores for anything raised in either of the two non-lead files. Even if a non-lead file records a complaint against the member, that complaint is not scored against him. It is only complaints or other matters which are reported by the member himself and are recorded in the lead files that are capable of being so scored. Nevertheless, Dr Green accepted that non-lead files may include significant allegations or issues relating to the member and so they may be taken into account by the RAG when it reviews the case.
57. The first applicable item in Mr Johnson’s score sheet was “Number of complaints & claims files in last 10 years.” A different score applies according to which of five potential brackets the member falls in. As Mr Johnson had been the subject of less than five complaints (only three), he scored 0 under this head (the maximum is 20 points for more than 20 complaints in the previous 10 years). The MDU’s explanation of a nil score for less than five complaints or claims is that any member may be the subject of at least some claims or complaints, but the MDU’s concern increases proportionately according to their total number. “Claims” are those in which damages are or might be sought against the member and could give rise to a claim for indemnity. “Complaints” are criticisms of the member’s conduct but do not include a damages claim. “Complaint” files may involve the provision of advice or assistance, and perhaps indemnity, for example in relation to any legal costs that may be incurred in dealing with it.
58. The next applicable heading was the “Average time (months) interval between claim/complaint notifications”. Again, the scoring depends on the bracket in which the member falls. The brackets range from 19 to 24 months (with a minimum of 5 points) to 0 to 5 months (with a maximum of 20). Mr Johnson was in the maximum bracket, as the three complaints against him had been notified to the MDU within a five-month bracket in 2000 (0007466 on 12 September; 0010574 on 20 December; and 0010691 on 27 December). Dr Green said the MDU’s experience is that one of the indicators of increased risk is the acceleration of the reporting of claims or complaints.
59. Next, Mr Johnson scored a standard 10 points because of the involvement of the GMC in relation to the complaints the subject of files 0010574 and 0010691. Dr Green’s evidence was that the involvement of the GMC is an indicator of increased risk. He emphasised in cross-examination that the fact that Mr Johnson was the subject of two GMC complaints in a relatively short period of time put him into a very small category of members – his evidence, based on some research carried out over a 15-year period from 1986 to 2001, was that over that period fewer than 1% of

orthopaedic consultants had two such complaints. Even though both Mr Johnson's GMC complaints were screened out, Dr Green's evidence was also that the MDU's experience is that a doctor against whom an unfounded complaint is made may be as big a potential future risk as one against whom a complaint of substance is made.

60. Mr Johnson next scored 10 points each for a "Disciplinary/suspension problem", relating to the incidents covered in file 0001331; and for alleged dishonesty, under the heading "Fraud/criminal allegations/dishonesty". Dr Roberts's evidence was that the file 0001331 incidents involved an allegation of dishonesty against Mr Johnson. She was satisfied by the correspondence in that file that it was alleged against Mr Johnson that, in seeking computer access, he had knowingly acted in a way he knew he should not have acted; she also had in mind that unauthorised access to computer data was potentially a criminal offence under the DPA. Dr Green's evidence was that the MDU's experience is that factors giving rise to these two 10-point scores are an indicator of increased risk.
61. Next, Mr Johnson scored a standard 5 points for "Dispute with colleagues", files 0001331, 9510999 and 9500242 all possibly involving such disputes (Dr Roberts could not recall which particular file or files she had in mind). Dr Green's evidence was that this too was regarded as an indicator of increased risk: clinical practice is a team effort and problems are more likely to occur if relations between the team members are difficult.
62. Finally, Mr Johnson was given a standard 5 points against "Private sector work only". Dr Roberts had deduced (correctly) from his subscription rate that he was exclusively in private practice. Dr Green's evidence was that practitioners with an exclusively private practice can generate more claims than those with an NHS practice as well. He said the MDU had no specific reasons as to why this was, but suggested it could be to do with factors relating to the patients, who (as private payers) have a higher expectation of a positive outcome; or relating to where the treatment takes place; or relating to the practitioners themselves. He also said that the case mix in the private sector is different from that undertaken in the NHS.
63. Dr Roberts's total score for Mr Johnson was, therefore, 60. I have noted that in her observations in the RAR form, she drew the RAG's attention to the possibility of adding a further standard 20 points for "Failure to change behaviour" – a reference to the renewed complaint against Mr Johnson with regard to computer security (file 0001331). The RAG did add 20 points for this, taking the total score to 80. Dr Green's evidence was that it is important that practitioners heed, learn from and respond to criticism. An alleged failure so to respond is viewed as a cause for concern.
64. Following the completion of the RAR form and score sheet, Dr Roberts prepared the RAG sheet. This summarised the core information about Mr Johnson set out in the RAR form, set out the four matters that Dr Roberts had listed in it as ones to "Consider", and included the following observations:

“ Observations

- Suspended by private hospital following alleged repetition of violation of computer security by asking 2 junior, non-clinical members of staff to log

on to the system. Following previous episode member had provided assurance to hospital management that would not be repeated.

- Member has entered into a number of disputes with colleagues/management and has brought a private action against BUPA for defamation and non-payment of fees. Mbr also did not accept criticism from GMC.
- Concerns re the way mbr has advertised.”

65. Dr Green reviewed the papers that Dr Roberts had prepared for submission to the RAG but did not refer to the underlying files.

The RAG meeting

66. This took place on 15 January 2002. Mr Johnson was not invited to give his comments on Dr Roberts’s work in advance of the meeting: he had no idea that the MDU was conducting the review. Dr Roberts was in attendance in order to answer any questions the RAG might have arising out of the RAR form, score sheet or RAG sheet. In accordance with MDU practice, the manual files were not taken to the meeting. Dr Green and Dr Tomkins were also present. No evidence was given as to the identities of the members of the RAG who considered Mr Johnson’s case.

67. There are no minutes of the RAG’s considerations of Mr Johnson’s case. All there is by way of any sort of note of them are some manuscript remarks on copies of the RAG sheet (copies being provided to all attendees). Towards the top of the first page of her copy, Dr Tomkins wrote “11a” (a reference to article 11(a)). She wrote that during the meeting. Lower down, she wrote “Put him on the reg [register] and tell him he’s on it”, which in her oral evidence she said she wrote after reading the RAR form, score sheet and RAG sheet, but *before* the RAG meeting. The “register” is the MDU’s risk register, on which are entered those members regarded by the MDU as posing a risk of a future drain on its funds. Dr Tomkins confirmed, however, that this note reflected her own private thoughts, which she did not convey to the RAG at the meeting. Below that, she wrote “Private sector only”, conveying that Mr Johnson had an exclusively private practice, which she said she wrote during the meeting.

68. On the second page of the RAG sheet, there is a reference to an attendee with the initials DM (a RAG member who was not identified in the evidence, but who Dr Green said was a consultant orthopaedic surgeon: as I have said, it is the practice of the MDU to include at least one RAG member who practises in the same field as the doctor whose case is being considered), against and below which are the words “Accid. waiting to happen. ? 11(a). Discn re other – 2 GMC – illegal access to computer. Ask what doing? Long discn.” These notes were made by Dr Green during the meeting, who was recording what, at least in part, DM had said. Dr Green recalled the explanation for the penultimate phrase in that note, and said it was that the RAG had discussed the financial exposure to which the MDU might be subject in relation to Mr Johnson’s ongoing work. They knew he had been suspended from one hospital and were unclear as to whether he was still actively practising. That explanation is supported by the fact that, following the RAG meeting, the MDU’s risk management department made an internal inquiry as to Mr Johnson’s then current clinical activity, to which the response (on 17 January 2002) was a “don’t know”. As regards the “long

been suspended for illegally accessing computer systems in a private hospital twice and that his track record suggested a difficult personality with regard to current disputes with colleagues.”

The decision not to renew Mr Johnson’s membership of the MDU

72. On 16 January 2002, acting under her delegated power, Dr Tomkins considered the RAG’s recommendation and made the decision that the MDU would not renew Mr Johnson’s membership on 1 April 2002. She wrote to him on 17 January 2002 notifying him that the Board had “exercised its discretion in accordance with Article 11a of the Memorandum and Articles of Association. I must, therefore, advise you that The MDU will not renew your membership with effect from 1st April 2002.” She added that the Board had an absolute discretion to decide upon continuing membership under article 11(a) and enclosed a copy of article 11.
73. Mr Johnson responded on 22 January 2002, saying that the letter of 17 January had come as a complete surprise and had “very serious implications for my continued practice and livelihood.” He said that in 25 years of membership he had never been accused of negligent practice and had never had to seek the MDU’s assistance with the defence of any claim. He asked for the reasons and grounds for the decision and for all the information upon which it was based. He asked for copies of all the correspondence and data held on his file and enclosed the standard £10 fee payable under the DPA. No reasons were provided to him, because it is the Board’s practice not to provide reasons; and Dr Tomkins wrote to him on 22 January 2002 informing him that the Board was not required to provide reasons. He was, however, entitled to proper disclosure under the DPA, as Dr Tomkins acknowledged in her letter, and she said in evidence that other members in similar circumstances had made a like request. On 1 March 2002, the MDU (by Mr Nicholas Bowman, the MDU secretary) provided Mr Johnson with information pursuant to his DPA request. On 4 March 2002, Mr Johnson wrote to Mr Bowman complaining that the data provided was incomplete. On 8 March 2002, Mr Bowman responded with certain further information, which he said had previously been accidentally omitted, and said that the MDU was satisfied that it had properly complied with Mr Johnson’s request.
74. Mr Johnson applied for membership of the MPS on 22 January 2002. In his application form, he said that no claims for compensation or complaints had ever been made against him, although in his covering letter he referred to two complaints made to the GMC in 1999, both of which he said were dismissed at the preliminary investigation stage. On 26 March 2002, the MPS asked the MDU to “forward details of [Mr Johnson’s] current and past claims and case experience, in accordance with our agreed protocol” and enclosed his authority to release it. Mrs Moss, a clinical risk manager with MDUSL, responded on 27 March 2002. Her accompanying schedule listed the 17 files in the RAR form, giving (i) the year of opening, (ii) the day one summary of each, and (iii) whether the files were active, lead or non-lead files. A £5,000 legal reserve for costs (in addition to a £100 reserve) was included in relation to file No. 0010574, although that was the file in respect of which the complaint had been screened out. Two other files also each showed a £100 reserve. That information had not previously been provided by the MDU to Mr Johnson, but Dr Tomkins’s evidence was that if Mr Johnson (or any other member) had asked for details of their case history – the MDU calls it a “letter of good standing” – they would have provided it to him in the same format as it was provided to the MPS.

75. Mr Johnson obtained membership with the MPS with effect from 31 March 2002. It is a mutual medical protection organisation dating from 1892 and now operating internationally in over 40 countries. His subscription for the year ending 30 March 2003 was £7,765 (£2,235 less than his MDU subscription for the year ended 31 March 2002). The rate was fixed by reference to his medical specialty of orthopaedic surgery and the size of his private practice: he had stated it in his application form as being between £50,000 and £75,000 a year net of practice expenses. Whilst that subscription was lower than his MDU subscription, he was also getting less for it: as regards indemnity cover, he had previously enjoyed the benefit of the contractual cover provided by the indemnity policy with Zurich. With the MPS, however, he only enjoyed the like discretionary indemnity cover that (until July 2000) had been provided by the MDU: the MPS is not an insurance company and, as with the MDU, the benefits of membership of it are discretionary. They are similarly provided on an occurrence basis. Equally, however, as Dr Tomkins pointed out, the MDU subscriptions in at least some categories of membership were historically higher than the MPS's even during the period when it was only providing discretionary indemnity cover.
76. An undated claim letter from solicitors followed on about 1 April 2002. The MDU responded on 9 April 2002, explaining (inter alia) that, despite the termination of his membership, Mr Johnson could still approach the MDU for assistance in respect of any incident arising from his period of membership: this was consistent with the MDU's assistance being on the "occurrence" basis. The claim form was issued on 11 February 2003.

The nature of Mr Johnson's claims

77. I have explained that it is no part of Mr Johnson's case to challenge the fairness of the RAG's procedure or the recommendation it made on the basis of the material before it. Mr Howe QC, for Mr Johnson, nevertheless submitted that the decision-making process leading to the termination of Mr Johnson's membership of the MDU was clearly incompatible with present day concepts of procedural and substantive fairness. He was referring there to the process carried out by Dr Roberts and said it was obvious that a process in which no attempt is made to check facts with, or invite observations from, the person affected by the review has an inherent risk of error, misunderstanding and unfairness. He described the process as "intrinsically grossly unfair thanks to the arbitrary nature of the point-scoring system and the MDU's intentional failure to take any steps to distinguish between serious, and frivolous or irrelevant, claims or complaints."
78. General points of that sort have an instinctive appeal to a lawyer but I do not regard them by themselves – and apart from the critical question of whether Dr Roberts's activities involved a breach of the MDU's obligations under the DPA – as carrying Mr Johnson anywhere. When performing its risk review in relation to Mr Johnson, the MDU was not performing a judicial, quasi-judicial or disciplinary function. Mr Howe's points ignore that the MDU is a commercial organisation which has a duty, in the interests of its members, to protect its funds and which, in that context, properly operates a commercially devised risk management procedure with a view to minimising the risk posed, or potentially posed, to those funds by particular members. It is not obliged to admit anyone to its membership in the first place; under article 11, it has an absolute discretion to terminate the membership of those members whom it

has agreed to admit; and it is not required to give its reasons for any such decision. Its decisions in these respects are commercial ones in respect of which in principle – save perhaps in a case in which an assertion of bad faith is made, and none is here – it is unaccountable to the affected member. That is implicitly recognised in the present case, in which (contrary to the unarguable assertions originally advanced by his solicitors) Mr Johnson now makes no claim that the termination of his membership of the MDU involved a breach of contract or gave him any other remedy under the general law.

79. The only challenge that Mr Johnson does mount is a rather narrower one turning on the fairness of the gathering of the material that was put before the RAG. His case is founded on the propositions (i) that the exercise involved a material element of unfair processing under the DPA, which (ii) inevitably caused the subsequent decision to terminate his membership, which (iii) in turn caused him loss and damage. His claim in fact asserts that the MDU committed breaches of three of the data protection principles identified in the DPA, although his particular case just summarised relies only on an alleged breach of one of them. The heart of the unfairness charge that Mr Johnson levels against the preparation of the material that Dr Roberts put before the RAG is that it did not fairly reflect his case in relation to each of the allegations. His case is that it was not enough for the MDU merely to identify allegations and score them. The fairness requirements in relation to processing under the DPA demanded that the MDU should not just have made a selection from the material it had in its files, it ought also to have sought Mr Johnson's input on its assessment of the contents of those files in carrying out its risk review. The case is also that the scoring system was irrational and arbitrary and that its application to Mr Johnson was likely to, and in fact did, lead to an irrational and arbitrary result.
80. That is, I hope, a sufficient thumbnail summary of the main issue of liability that I have to decide. Mr Johnson has, however, also made other claims in these proceedings, to which I should refer. One claim was under section 7(9) of the DPA, for a right of access to his personal data. That claim was tried by Laddie J as a preliminary issue in February 2004. His decision was that, following Mr Johnson's request of 22 January 2002, the MDU had fully complied with its section 7 obligations and he ordered Mr Johnson to pay the costs of that issue. Permission to appeal was refused both by Laddie J and the Court of Appeal. Nothing more needs to be said about that.
81. Until the commencement of the trial before me, Mr Johnson was also pursuing a claim under section 10 of the DPA (Right to prevent processing likely to cause damage or distress). On day two of the trial, Mr Howe abandoned that claim.
82. Mr Johnson also has claims under section 14(1) and (2) of the DPA (Rectification, blocking, erasure and destruction). They remain alive and are based on alleged breaches of the fourth data protection principle in Part I of Schedule I to the DPA, which requires that "Personal data shall be accurate and, where necessary, kept up to date." The determination of that claim requires a judgment on countless issues identified in a Scott Schedule (Schedule II in the proceedings) setting out the parties' arguments and counter-arguments on the alleged inaccuracies. The exercise, if it is to be performed, is potentially an enormous one. On day nine of the trial, when Mr Spearman QC, for the MDU, had just embarked on his closing submissions in relation to the Schedule II claim, Mr Howe stated that he was content that the further

consideration of that claim should be deferred until after the delivery of this judgment. Mr Spearman very fairly reminded Mr Howe that, on one interpretation of Mr Johnson's pleaded case, it was being asserted that the alleged inaccuracies in the data had also contributed causally to the decision not to renew his membership; and the central issue I am required to decide in this judgment is whether any alleged breaches by the MDU of their obligations under the DPA could be said to have caused that decision. The deferral of the Schedule II issues until after this judgment would necessarily mean that the alleged inaccuracies could not be brought into consideration on that issue. Mr Howe accepted that, but made it plain that he was not giving up anything very material. That is because Mr Johnson's primary case is that the RAG recommendation was caused by unfair processing of his data in breach of the first data protection principle; and, to the extent that any of the alleged Schedule II inaccuracies is also alleged to have constituted relevant unfairness for the purposes of that principle, a separate list of them is in Schedule I, the unfairness schedule. The practical position is that I am, therefore, not required at this stage to consider Mr Johnson's separate case based on the alleged breach of the fourth data protection principle.

83. The primary claim I am concerned with is under section 13 of the DPA (Compensation for failure to comply with certain requirements). I have explained that Mr Johnson's case is that he is entitled to such compensation because he says the MDU's alleged unfair processing of his data in breach of the first data protection principle was directly causative of the termination of his MDU membership. All aspects of that claim are in issue, and I now turn to it. I must first refer to the relevant provisions of the DPA.

The Data Protection Act 1998

84. The preamble to the DPA describes it as making "new provision" for the regulating of the processing of information relating to individuals, and it was enacted so as to give national effect to Directive 95/46/EC. The Directive was adopted on 24 October 1995 and was to be implemented by member states by 25 October 1998. The DPA must, if possible, be interpreted in a manner consistent with the Directive, and to that end reference can be made to the Directive for assistance. I refer first to certain of the basic interpretative provisions in Part I, contained in section 1, and will then also set out the material parts of sections 4 and 13:

"Basic interpretative provisions

1.-(1) In this Act, unless the context otherwise requires –

'data' means information which –

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

(d) does not fall within paragraph (a), (b) or (c) but forms part of the accessible record as defined by section 68; or ...

‘data controller’ means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

‘data processor’, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

‘data subject’ means an individual who is the subject of personal data;

‘personal data’ means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

‘processing’, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including –

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data; ...

‘relevant filing system’ means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is accessible.

(2) In this Act, unless the context otherwise requires –

(a) ‘obtaining’ or ‘recording’, in relation to personal data, includes using or obtaining or recording the information to be contained in the data, and

(b) ‘using’ or ‘disclosing’, in relation to personal data, includes using or disclosing the information contained in the data. ...

4. – (1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule I.

(2) Those principles are to be interpreted in accordance with Part II of Schedule I.

(3) Schedule 2 (which applies to all personal data) ... [sets] out conditions applying for the purposes of the first principle; ...

(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller. ...

Compensation for failure to comply with certain requirements.

13. – (1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if –

(a) the individual also suffers damage by reason of the contravention, or

(b) the contravention relates to the processing of personal data for the special purposes.

(3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.”

85. Those are the central provisions in the body of the DPA which are relevant to the claim. I must now set out the provisions in Schedule I which identify the data protection principles said to have been breached by the MDU and which relate to their interpretation. Part I of Schedule I lists the principles and Part II provides an interpretation of them. Schedule 2 identifies the “Conditions relevant for purposes of the first principle” but it is no part of Mr Johnson’s case that none of the Schedule 2 conditions was met and so I need not consider Schedule 2 further (paragraph 1(a) below of the first data protection principle shows why).

“SCHEDULE I

THE DATA PROTECTION PRINCIPLES

PART I

THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, ...

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes. ...

PART II

INTERPRETATION OF THE PRINCIPLES IN PART I

The first principle

1. – (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed. ...

2. – (1) Subject to paragraph 3 [which is not material], for the purposes of the first principle personal data are not to be treated as processed fairly unless –

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) ‘the relevant time’ means –

(a) the time when the data controller first processes the data, or ...

(3) The information referred to in sub-paragraph (1) is as follows, namely –

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair. ...”

Was there any processing of Mr Johnson's personal data?

86. Mr Johnson's primary complaint is that the MDU processed his personal data unfairly in breach of the first data protection principle. It is that breach, and that alone, that is said to have caused the non-renewal of his MDU membership. The first issue is whether MDU did in fact "process" any of his personal data. The only acts of processing alleged by Mr Johnson are (i) selecting the information contained in his personal data and thereby presenting a false picture of the situation, and (ii) holding inaccurate personal data. Only the first act is relied upon in relation to the alleged breach by the MDU of the first data protection principle. The reference in it to the selection of information is a reference to Dr Roberts's activities in preparing the material for the RAG. Mr Spearman's submission was that that selection of information did not amount to "processing" either for the purposes of that principle or at all. If that is correct, it provides a complete answer to the claim. Mr Howe submitted that it was incorrect.
87. The definition of "data" in section 1(1) of the DPA shows that it encompasses information which is "being processed by means of equipment operating automatically in response to instructions given for that purpose" as well as information that is recorded with the intention that it should be processed by means of such equipment. Those parts of the definition refer to information stored on a computerised system. But "data" can also encompass information recorded as "part of a relevant filing system or with the intention that it should form part of a relevant filing system, ...". That part of the definition extends to information held within certain types of *manual* filing systems, although such a system has to be a "relevant" one. A "relevant filing system" is defined in section 1(1) as meaning a "structured" filing system as there explained and its meaning was considered by the Court of Appeal in *Durant v. Financial Services Authority* [2000] FSR 28, in particular in paragraph 50 of the judgment of Auld LJ.
88. In the present case, 12 of Mr Johnson's files were manual ones and it is not suggested by Mr Howe that any of them amounted to a "relevant filing system" within the relevant definitions. Of the other files, three (0010691, 0010574 and 0001331) were held in electronic form; one (9208720) was held on a compact disc (which was similarly capable of being electronically searched); and one (9205597) was held on a microfiche file, which was not readily searchable and which I understood to be agreed to be outside the definition of "data" within the definition in section 1(1). The day one summaries in relation to all the files were, however, computerised: they formed part of Mr Johnson's case history, which also included the numbers of the various files relating to him and identified any applicable reserves or costs provisions.
89. As it is disclaimed that any of the manual files constituted a relevant filing system, Mr Spearman said it followed that there was no relevant processing of any of those files by Dr Roberts. Nor, he said, did her selection of material from the computerised files amount to "processing". Mr Spearman referred to various recitals of the Directive, which he said provide the basis upon which the relevant provisions of the DPA have to be interpreted. He referred to recitals (2), (3), (10) and (11), which emphasise the intention of the Directive as being to protect individuals' right to privacy. He then focused on recitals (15) and (27). The latter is concerned primarily with manual filing systems, but the former provides:

“(15) Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question.”

90. Mr Spearman said that showed that, in relation to computerised data, only its “automated” processing will amount to relevant processing. He referred also to article 3 of the Directive (in a part headed “Scope”), which he said was similarly in line. In doing so, he did not overlook the definition in article 2(b). Article 2(b) and paragraph 1 of article 3 provide respectively:

“(b) ‘processing of personal data’ (‘processing’) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction; ...

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.”

91. Mr Spearman said that the intention reflected in recital (15) and article 3 was faithfully reflected in the DPA but that the DPA had achieved it by a different drafting technique. Whilst he recognised that article 2(b) appeared to recognise that “processing” could be done by automatic or non-automatic means, he said this could not override the effect of article 3, which he said made it clear that it was only the automatic processing of computerised data that constituted relevant processing (a submission which does not perhaps pay full recognition to the “or partly”). Reverting to the DPA, he said that section 1(1) defined “processing” in an open-ended way, and I understood him to recognise that Dr Roberts’s “selection” of information from the four computerised files could, on the face of it, be said to amount to “any operation or set of operations on the information or data, including ... use of the information or data...” within that definition. The definition of “using” in section 1(2) was also consistent with that. Mr Spearman’s point was, however, that the apparently open-ended sense of those parts of the section 1(1) definitions is subject to a narrowing effect by the earlier definition of “data”. His submission was that, in relation to electronically held data, it will only be “data” within the meaning of the DPA if it is (or is intended to be) “processed by means of equipment operating automatically in response to instructions given for that purpose.” The key word for the purposes of the submission is “automatically” and he said that it is in that provision that is to be found the national equivalent of the provisions in recital (15) of the Directive (“automated” processing) and article 3 (“automatic means”). It follows, said Mr Spearman, that it is only data that is (or is intended to be) processed automatically in response to relevant instructions that is “data” within the meaning of the DPA; the definition of “processing” of data in section 1(1) has, therefore, to be interpreted as referring only to various types of operation in relation to “data” within the meaning of the prior definition; and that means “data” which is processed automatically. Here, he says, Dr Roberts was not engaging in any “automatic” processing of Mr Johnson’s data. In relation to the four electronic files, she was not making her selection by any

“automatic” process. She made it by applying her own, non-automatic judgment to a computer database. In relation to the manual files, they do not come into the picture at all because they are not part of a “relevant filing system”. There was, therefore, no relevant processing at all of Mr Johnson’s personal data.

92. In response, Mr Howe relied upon the decision of the Court of Appeal in *Campbell v. MGN Ltd* [2003] QB 633 as providing a resolution of this debate. In delivering the judgment of the court, Lord Phillips of Worth Matravers MR said:

“101. The definition of ‘processing’ in the Directive and the Act alike is very wide. ‘Use of the information or data’ and ‘disclosure of information or data by transmission, dissemination or *otherwise making available*’ are phrases, given their natural meaning, which embrace the publication of hard copies of documents on which the data has been printed. Is such a meaning consistent with an interpretation which gives effect, in a sensible manner, to the objects of the Act?

102. While the Act extends to certain manual filing systems, it is otherwise concerned with the automated processing of personal information. Almost all of the provisions of the Act relate to activities prior to the moment when that information is transferred to hard copies. It would conflict with the overall nature and object of the Directive and the Act to seek to apply their provisions to the acts of those who distribute and make available to the public the product of prior data processing in which they have not been concerned. Extending ‘processing’ to embrace such activities need not, however, have that result.

103. The Directive and the Act define processing as ‘any operation or set of operations’. At one end of the process ‘obtaining the information’ is included, and at the other end ‘using the information’. While neither activity in itself may sensibly amount to processing, if that activity is carried on by, or at the instigation of, a ‘data controller’, as defined, and is linked to automated processing of the data, we can see no reason why the entire set of operations should not fall within the scope of the legislation. On the contrary, we consider that there are good reasons why it should.

93. The critical paragraph is paragraph 103, which Mr Howe said encapsulated the correct approach to the interpretation of section 1 of the DPA. His submission was that it is enough that the material representing the selection that Dr Roberts made (whether it was derived from the manual files or the computerised files) was then held on a computer. Article 2(b) of the Directive shows that the “processing” of data includes “any operation” performed upon it, “whether or not by automatic means” and includes the various activities there listed; and the opening words of article 3.1 are consistent with that: “... processing ... wholly or partly by automatic means... “. Mr Howe said that, in paragraph 103 of *Campbell*, the court had recognised that there could be relevant processing when part of the operation was automatic and part was manual.
94. He said that in the present case, the *manual* part of the operation was Dr Roberts going through the files (including the manual files), and looking for information. The *automatic* part was when the selected information was put into the computer-created document on which she was working, namely the RAR form. At that point, he said, the information so selected became “data” within the definition in section 1(1). He

said this interpretation is supported by section 1(2) of the DPA, which expands the earlier definitions of certain of the activities that will amount to “processing”. Section 1(2)(a), which can be regarded as referring to the “front end” of a relevant operation, refers to “... obtaining or recording *the information to be contained* in the data”; and section 1(2)(b), which can be regarded as referring to the “back end”, refers to “using or disclosing *information contained* in the data.” Those definitions show that “information” only becomes “data” either when it is first recorded with the intention of being put into an automatic system or when it is in fact put into such a system. But the definition of “processing”, as expanded by section 1(2), shows that the “obtaining” of information intended to be contained in, and which is in fact entered into, such an automatic system will be “processing”. In Mr Howe’s submission it follows that not only was Dr Roberts’s selection from the four computerised files an act of “processing”, so was her selection from the manual files, even though none was, or was part of, a “relevant filing system”.

95. Mr Howe submitted that this interpretation gives full effect to the Directive. Article 2(a) defines “personal data” as “any information relating to an identified or identifiable natural person ...” and so is not limited to data held in an automatic system. Article 2(b) defines “processing” of such data in the way I have earlier set out, i.e. “whether or not by automatic means”. Article 3.1 then has the effect of narrowing the apparent width of those definitions by showing that, as regards manual filing systems, operations carried out in relation to them will only amount to “processing” if they are part of a filing system which the DPA defines as a “relevant filing system” (compare the definition in article 2(c)). Mr Howe submitted that, by way of giving effect to the apparently clear provisions of the Directive, the DPA has used the word “information” in the broad sense in which “personal data” is used in the Directive and has given “data” the narrower meaning to be found in section 1(1). Had section 1(1) stopped with its definition of “data”, Mr Howe recognised that purely manual processing (whether before or after any automatic processing) would or might have been excluded from any relevant concept of processing. But it did not stop there, and the subsequent definitions make it clear that manual processing before or after any automatic processing is covered by the subsequent definitions.
96. As between those rival submissions on the interpretation of what I regard as the less than clear provisions of the DPA, I prefer and accept Mr Howe’s submission, for the reasons he gave, which I regard as reflecting the language of the DPA and, in turn, that of the Directive. Mr Spearman’s submission appears to me to give insufficient weight to the definitions of “processing” in section 1(1), as expanded by section 1(2).
97. I accept, therefore, that Dr Roberts’s selection of material from the various manual and microfiche files and their inputting into a computer amounted to “processing” within the meaning of the definition of “processing” in section 1(1) as expanded in section 1(2)(a); and that it makes no difference that none of such files was or formed part of a “relevant filing system.” I accept also that her selection of information from the computerised files for inputting into the computer similarly amounted to “processing” within the meaning of that definition as elaborated in section 1(2)(a) and/or (b).

98. Having held that there was relevant processing of Mr Johnson's personal data within the meaning of the first data protection principle, the next question I have to consider is whether there was any breach of that principle by the MDU. The only issue here is whether Mr Johnson's data was processed "fairly". The complaint advanced by him that it was not is in part based on the assertion that the MDU did not comply with paragraph 2(1)(a) or (b) of Part II of Schedule I because he was not provided with certain of the information prescribed by paragraph 2(3). Paragraph 2(1)(a) relates to data obtained from Mr Johnson himself (the lead files) and paragraph 2(1)(b) relates to data obtained from others (the two non-lead files). Paragraph 2(1)(a) does not specify by when the paragraph 2(3) information has to be provided. Paragraph 2(1)(b), read with paragraph 2(2)(a), shows that, in a case to which that paragraph applies, it must be provided either before the data controller processes the data or as soon as practicable afterwards.
99. It is accepted that Mr Johnson was informed of the identity of the data controller and representative for the purposes of paragraphs 2(3)(a) and (b). What is not accepted is that he was also informed of "the purpose or purposes for which the data [were] intended to be processed" as required by paragraph 2(3)(c) or that he was given the "further information" necessary under paragraph 2(3)(d). In considering this, it will be convenient to deal separately with the processing of (a) the lead files and (b) the non-lead files.

(a) The processing of the lead files

100. As to the point based on paragraph 2(3)(c), the MDU asserts that Mr Johnson was duly informed of the relevant purpose or purposes and it relies upon what I have called "the processing agreement". That is the March 2001 document by reference to which, when renewing his membership, Mr Johnson agreed to the processing by MDUSL and the MDU of his personal data for "risk management" purposes. It is said that that is precisely what Mr Johnson's personal data were used for when MDU carried out its risk review. The processing agreement was sent to Mr Johnson in March 2001 – during the period when the transitional provisions of the DPA were in operation – and Mr Spearman submitted that it was obviously drafted in the way it was in order to cater for the requirements of the DPA. The MDU's argument on this issue is straightforward and calls for no elaboration.
101. Mr Howe's contrary argument is that that is to misinterpret the processing agreement. He said that risk management is one of the services offered by the MDU to its members. It was not disputed that the MDU provided risk management advice to its members during Mr Johnson's membership, as Dr Green accepted. Mr Howe submitted that the natural sense of the "risk management" reference in the processing agreement was that it was, therefore, referring not to the MDU's internal risk management, but to advice on risk management that it might give to its members.
102. I do not accept that argument. Sandwiched, as "risk management" is, between "administration of my membership, the insurance policy and indemnity claims" and "marketing" it is included within a clutch of activities concerned with the inward looking interests of the MDU, MDUSL and Zurich. I consider that, by being so included, the natural meaning of the "risk management" referred to is the internal risk management of those entities. The type of risk management to which Mr Howe submitted that it referred, namely, the member's own risk management, is more

naturally included within the general concept of “advisory [services]” at the end of that list, which I regard as referring primarily to advice about the member’s affairs. I find that Mr Johnson consented to the use by the MDU and MDUSL to the processing of his personal data for MDU risk management purposes; and that the renewal invitation informed him of the purpose for which his data was to be used so as to satisfy paragraph 2(3)(c).

103. That is not the end of the point because Mr Howe also submitted that the processing agreement still did not give Mr Johnson (or any other MDU member) a sufficient explanation of the range of risk management purposes for which his personal data would or might be used. In particular, it did not advise members that their personal data could be used adversely to them. It did not, therefore, adequately explain the purposes for which it might be processed. That submission has caused me some anxiety, because I am disposed to accept that the average MDU member is unlikely to have concluded from the reference to “risk management” in the processing agreement that his data could or might be used against him in the way that Mr Johnson’s was. If so, however, I consider that that is probably because he would not focus with sufficient care on what the reference to “risk management” might entail. Mr Johnson’s evidence was, however, that he always regarded the MDU as, to all intents and purposes, an insurer; and I presume that most doctors similarly so viewed the MDU. Insurers, or institutions like the MDU carrying on functions similar to those of insurers, are pre-eminently concerned with internal risk management; and I consider that the application of any proper consideration by a doctor to the terms of the processing agreement would or should have informed him sufficiently of the likely ambit of the “risk management” referred to. It must naturally include (amongst other things) the level of subscriptions to be levied; whether doctors practising within a particular field ought to pay higher subscriptions than others; whether particular doctors within a particular field ought, because of their record, to pay higher subscriptions than their colleagues; and whether the MDU was prepared to continue the membership of any particular member. In my judgment, all this (and no doubt more) is naturally embraced in “risk management” and I find that, by the use of that term, the MDU adequately explained to its members that their personal data might be used for these various purposes.
104. The other issue arising under paragraph 2(3) of Part II of Schedule I is whether the MDU provided Mr Johnson with any *further* information which it was necessary for him to have in satisfaction of paragraph 2(3)(d). Mr Johnson’s case on this is that, once Dr Roberts had concluded her preparation of the RAR form, the score sheet and the RAG sheet, the MDU should have submitted them to him for his comments, together with the underlying files from which the information in the RAR form was derived. Mr Johnson would then have had the opportunity to make his input into the risk review exercise that the MDU was undertaking, which would then have been before the RAG.
105. In order to deal with that submission, I consider it helpful first to refer to the provisions of the Directive from which paragraphs 2(1)(a) and (b) are derived, namely recital (38)/article 10 and recital (39)/article 11 respectively. They provide, so far as material, as follows:

“(38) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where the data are

collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection.

(39) Whereas certain processing operations involve data which the controller has not collected directly from the data subject; whereas, furthermore, data can be legitimately disclosed to a third party, even if the disclosure was not anticipated at the time the data were collected from the data subject; whereas, in all these cases, the data subject should be informed when the data are recorded or at the latest when the data are first disclosed to a third party. ...

SECTION IV

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

Article 10

Information in cases of collection data from the data subject

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

- (a) the identity of the controller and his representative, if any;
- (b) the purposes of the processing for which the data are intended;
- (c) any further information such as
 - the recipients or categories of recipients of the data,
 - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
 - the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which data are collected, to guarantee fair processing in respect of the data subject.

Article 11

Information where the data have not been obtained from the data subject

1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:

- (a) the identity of the controller and of his representative, if any;

(b) the purpose of the processing;

(c) any further information such as

- the categories of data concerned,

- the recipients or categories of recipients,

- the existence of the right of access to and the right to rectify data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed to guarantee fair processing in respect of the data subject. ...”

106. Coming now to the point based on paragraph 2(3)(d), I consider, first, that in so far as article 10 may be viewed as casting light on the type of “further information” that paragraph 2(3)(d) has in mind, it provides no support for the proposition that compliance with the fair processing requirements of the first data protection principle required Dr Roberts’s processing exercise to be followed by a consultation with Mr Johnson. Nor, in my judgment, does the more succinct language of paragraph 2(3)(d) support the proposition. That sub-paragraph is not concerned with explaining the “purposes” of the processing, a matter which is covered by paragraph 2(3)(c). Nor is it about consulting with the data subject. It is about providing him with certain “further information” having regard to “the specific circumstances in which the data are or are to be processed.” That is not naturally to be interpreted as requiring the data controller to engage in a consultation exercise after the completion of the processing. Article 10 suggests that it might (inter alia) require the data subject to be told of his right of access to, and to rectify, his personal data, but in this case Mr Johnson had already been told of those rights in the processing agreement. In a case in which the data was, for example, being, or was to be, processed by a “data processor” as defined in section 1(1) of the DPA, it might also require notice of that to be given to the data subject. But I do not accept that the paragraph 2(3)(d) extends to the lengths of requiring the MDU to have consulted with Mr Johnson as part of the processing exercise.
107. Secondly, I anyway cannot see how the suggested consultation procedure can be part of the processing exercise. The complaint is that, having processed the personal data from the lead files, Dr Roberts did not consult Mr Johnson about the fruit of her work. But by then the relevant processing had been done and the suggested consultation cannot naturally be regarded as a continuation of the processing. Mr Johnson’s complaint that he was not consulted about Dr Roberts’s work is, in substance, nothing other than a complaint that he was not entitled to make representations to the RAG about his case. He has specifically disclaimed that he had any right to do so, and so his case under this head is nothing other than an attempt to say that he should have enjoyed a like right at an earlier stage and as part of the processing exercise. In my judgment, that contention is misconceived.
108. Thirdly, Mr Johnson’s point that, as part of the processing exercise, proper compliance with paragraph 2(3)(d) required the MDU to go to the lengths of

providing Dr Roberts's selection of his data to him for his comments prior to its submission to the RAG appears to me to be anyway wrong in principle. It is easy to have instinctive sympathy with the proposition that, in broad terms, it would have been "fair" for the MDU to have done this. Having heard Mr Johnson give oral evidence, there is no doubt that, given that opportunity, he would have taken it and would have argued his corner in response to every point, and at length. This goes back to Mr Howe's general point that the risk review procedure actually adopted by the MDU was inherently unfair, one criticism he made being that Mr Johnson was given no opportunity of making representations on his case following the completion of the processing exercise.

109. In considering this, I regard the starting point as the MDU's risk assessment policy. As I have explained, and find, that policy was one under which the MDU assessed a member's potential risk to MDU funds by reference exclusively to the allegations made against him, or the nature of the incidents in which he was allegedly involved. Whether the allegation was justified or not was regarded by the policy as irrelevant, as was (at least generally) the outcome of the allegation (if known). It is easy for an outsider, with no experience of the type of risk management in which the MDU was engaged, to leap to a judgment that such a policy was unfair and that a fairer one - which might perhaps be expected to enable a more reliable assessment of future risk - would be one in which the merits of each allegation are, so far as possible, assessed, although there are obvious limits to that possibility. If a policy of that sort were one that the MDU in fact employed, it is also easy to see that a fair assessment of the merits could only be arrived at after (at least) consulting the subject member for his comments on the allegations made against him.
110. That, however, is not the policy that the MDU has developed and adopted and, with respect to Mr Howe's unqualified submission to the contrary, I regard it as no part of the court's function to pass judgment on the merits of the policy that it did adopt. The policy was devised as a result of the MDU's own experience and its formulation was essentially a matter of commercial judgment exercised in what I have no doubt was complete good faith in the interests of the members of the MDU generally. It was also formulated against the background of a contractual relationship between the MDU and its members under which the MDU had and has an absolute discretion to terminate a member's membership and in which it was in the interests of all members that it should have a sound risk assessment policy. There might be legitimate scope for disagreement between those competent to judge these things as to whether the MDU risk assessment policy was sound or otherwise, or as to whether it could be improved. But I have no reason to believe that it was arrived at other than after proper consideration and that it was regarded as other than the most appropriate policy for the needs of the MDU. Mr Johnson might, and clearly does, view it as an unfair one, but in my judgment that assessment is not one to which any regard should be accorded in the present context: Mr Johnson is no doubt very skilled in his own sphere of expertise, but his expertise does not extend to matters of risk management. Like all MDU members, he must take the MDU risk assessment policy as he finds it; and, given its nature, I see no basis on which it can be said that his input was necessary in order that the data could be fairly processed. The MDU could process his data in the circumstances in which it did perfectly fairly without his input, and the evidence from the MDU witnesses satisfied me that his input would be unlikely to

have made any difference to the assessment of his case: because, put shortly, the policy regards a member's input as essentially irrelevant.

111. In my judgment, therefore, as regards the processing of the lead files, and contrary to Mr Johnson's submission, no "further information" also needed to be provided to him in compliance with paragraphs 2(1)(a) and 2(3)(d). I do not accept that the enactment of the DPA had the consequence of requiring the MDU to change its risk assessment policy.

(b) The processing of the non-lead files

112. Those conclusions apply, however, only to the data obtained from Mr Johnson and contained in the lead files. As regards data deriving from other MDU members - that contained in the non-lead files - I take the view that different considerations apply. The non-lead file data comprises data of whose existence Mr Johnson was unaware and whose accuracy he had had no occasion to consider, let alone check. I consider that there is also a question as to whether Mr Johnson's consent in the processing agreement can be regarded as having extended to the personal data about him collected by the MDU from third parties. As Mr Howe submitted, I consider it follows that the fair processing requirements of paragraphs 2(1)(b), 2(2)(a) and 2(3) of Part II of Schedule I (read in conjunction with article 11) required the MDU, either at the time of or promptly following Dr Roberts's processing of the data in the non-lead files, to notify Mr Johnson of the existence of that data and (at least) of (a) the purpose for which it was being, or had been, processed and (b) his right of access to, and to rectify, such data. I find, therefore, that the MDU's processing of the personal data in the non-lead files must be regarded as having been unfair (see paragraph 2(1)). I add, for the avoidance of doubt, that, for like reasons already given in relation to the lead files, I do not regard the fair processing of the non-lead files also to have required the MDU to consult with Mr Johnson about the processing exercise or to have invited his representations upon it.

Paragraphs 2(1) and (3) of Part II of Schedule I - conclusion

113. The result is that I find that the MDU's processing of the personal data in the lead files cannot be regarded by reference to the requirements of paragraph 2 of Part II of Schedule I as having been unfair; but I conclude that its processing of the personal data in the non-lead files can, by such reference, be regarded as having been unfair.

Was the processing anyway unfair?

114. That does not wholly dispose of Mr Johnson's case that the processing of the personal data in the lead files was unfair. The exclusion of paragraphs 2(1)(a) and (3) from consideration in relation to the lead files only closes one route by which Mr Johnson might have been able to demonstrate an element of presumed unfair processing for the purposes of the first data protection principle. There remains the more general question of whether - even though I have held those paragraphs do not apply - the processing of Mr Johnson's personal data was anyway fair.
115. In seeking to make good his more general point that the processing was relevantly unfair, Mr Howe relied on certain decisions of the Data Protection Tribunal given in relation to issues arising under the former Data Protection Act 1984. He accepted that

there are material differences between the 1984 Act and the DPA, but pointed out that, as regards the question of fairness, there was no material change: in particular, the first data protection principle in Part I of Schedule I to the 1984 Act was in terms essentially similar to that in the DPA.

116. The first case was *CCN Systems Limited v. The Data Protection Registrar*, February 1991, unreported. The tribunal was chaired by Mr Aubrey L. Diamond. The case concerned the actions by credit reference agencies of extracting from their database for supply to customers certain types of third party information, activities that had given rise to complaints. An example of the type of complaint considered was one in which the agency's file relating to X, an applicant for credit, included an entry showing a judgment against Y, the only link between X and Y being that the former had sold the latter a house and so they had at different times lived at the same address. The inclusion of an entry of this sort against X was part of CCN's deliberate policy. The issue was whether this practice involved an unfair processing of personal data, the particular alleged unfairness being the processing of data in relation to (in my example) X by reference to his current or previous address under which information is extracted relating to any other individual recorded at any time as residing there. The evidence showed that third party information of the sort entered against X was of value to a grantor of credit, in that it had a predictive value which was not dependent on a known link between X and Y; although the tribunal also found that the primary value of third party information to credit grantors arose in cases where the details known about the applicant for credit were inadequate. The tribunal found, however, that the presence of third party information can lead to an applicant being refused credit; and CCN's position was that such information was required by their customers, the grantors of credit.
117. The tribunal's conclusion was that CCN's practice involved unfair processing for the purposes of the first data protection principle. They said:

“51. The word ‘fairly’ in the First Principle is not defined in the Act, and no guidance is given as to its interpretation. In determining its meaning we must have regard to the purpose of the Data Protection Act. It is quite clear, from the Act as a whole and in particular from the Data Protection Principles set out in Schedule 1, that the purpose of the Act is to protect the rights of the individual about whom data is obtained, stored, processed or supplied, rather than those of the data user. The Act was the result of concerns about the use of computer data, concerns voiced in Parliament and in the reports of a number of representative official committees and widely held throughout Europe (hence the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data opened for signature on 28 January 1981 referred to in sections 37 and 41 of the Act).

52. In our view, in deciding whether the processing we have described is fair we must give the first paramount consideration to the interests of the applicant for credit – the ‘data subject’ in the Act's terms. We are not ignoring the consequences for the credit industry of a finding of unfairness, and we sympathise with their problems, but we believe that they will accept that they must carry on their activities in accordance with the Principles laid down in the Act of Parliament.

53. Having taken due account of the evidence we have heard and the considerations urged upon us we have come to the clear conclusion that it is unfair for a credit reference agency, requested by its customers to supply information by reference to a named individual, so to program the extraction of information as to search for information about all persons associated with a given address or addresses notwithstanding that those persons may have no links with the individual the subject of the enquiry or may have no financial relationship with that individual. We believe this to be so even if the customer has requested address-based information and notwithstanding what is said to be its predictive value. We reject the notion that an organisation like CCN, with its wide specialist knowledge of and experience in credit reference and credit scoring, is a mere 'conduit pipe'. We believe the sort of processing carried out in this case is the very sort of activity at which the Act is aimed. We think it right to say that we accept that CCN did not intend to process data unfairly, and did not believe itself to be acting unfairly. But it is necessary to determine the question of fairness objectively, and in our view the case of unfairness has been made out."

118. Having so concluded, the tribunal made it clear that in their view the vice of CCN's practice had been to extract third party information indiscriminately, but that they were not saying that every extraction of third party information was or would be unfair; and, after some further explanation, they varied the enforcement notice so as to permit only a narrower class of third party information based on address-based searches to be used (see paragraphs 66 to 69). It is not necessary to detail the variations so ordered.
119. Mr Howe also relied on the later decision in *Infolink Limited v. The Data Protection Registrar*, May 1991, unreported, the tribunal again being chaired by Mr Diamond. It raised a similar issue as to the supply by Infolink, a credit reference agency, to its customer of third party information, namely information about persons other than the applicant for credit. The tribunal came to a conclusion in line with that in the *CCN* case. Whilst they accepted that such information could have predictive value, they regarded it as irrelevant to the subject of the credit reference - irrelevant in the sense that it referred to a third party whose activities were not related to the creditworthiness of the applicant for credit.
120. I cannot extract any general principle from those decisions which might be regarded as of direct assistance in the present case. The *CCN* case was one in which the tribunal found that all the third party information derived from address-based searches was of predictive value to the grantor of credit, although some classes of such information was of more value than others. Nevertheless the tribunal found the extraction of certain classes of such information to be unfair to the applicant for credit and so imposed a restriction on the type of processing in which CCN might engage in future. The tribunal came to a like conclusion in the *Infolink* case. The cases turned on their facts and there are two basic differences between their circumstances and those of this case.
121. First, those cases concerned the extent to which it was fair for an applicant for credit to be affected by the processing of data relating to a third party, being one with whom he might have but the slenderest of geographical connections. The present case involves no comparable consideration. The data in question all relates to Mr Johnson and his complaint is not that the processing exercise involved an unfair consideration

of third party information, but that it did not involve a sufficient selection or investigation of the information that the MDU had relating to him, a point which comes back to his challenge to the fairness of the MDU's risk management policy. Secondly, the tribunal cases were conceptually different. They were cases where a credit reference agency had got hold of data only loosely relating to X and had used it either for its own purposes or for those of a third party, but in either case without any agreement from X. In this case, however, there was a contractual relationship between Mr Johnson and the MDU under which (as I have found) Mr Johnson agreed to the use of his personal data for risk management purposes, which is what the MDU did use it for. The latter type of situation is quite different from that considered in the tribunal cases, which cannot be regarded as providing any solid guidance to its disposition. I do not suggest that that distinction excuses me from having to consider whether, on the facts of the present case, the processing engaged in by the MDU was or was not fair for the purposes of the first data protection principle. But I do not regard the approach of the tribunal to the particular, very different, facts that were before it in the two cited cases as one which provides direct assistance on that issue.

122. Approaching the question of fairness head on, I have come to the conclusion that there is in principle nothing relevantly unfair about the MDU's risk assessment policy or about the way in which it processed information in applying that policy. Mr Johnson's big point is that he has a long and, from a claims viewpoint, blameless record. He says other doctors, in particular those specialising in orthopaedics, have had large claims brought against them yet remain MDU members. He has had no claims and yet his membership was terminated. He says that the scoring process applied by the policy is arbitrary and irrational and so capable of producing a like result. He says that the MDU fails to make proper distinctions between minor and major complaints, and that, at least in his case, it had regard to matters which, so he says, cannot rationally be regarded as genuinely predictive of future risk.
123. It is easy to see how he regards the decision in his case as unfair but it has to be remembered that the policy is directed at risk management – at preserving the MDU funds against a risk of claims, and the incurring of costs, *in the future*. The MDU experience is that a risk of that nature cannot be measured simply by awaiting the happening of a statistically significant number of occurrences that do in fact cause a drain on its funds. It is also that the risk of complaints is not a matter that is necessarily geared to the clinical competence of a doctor. The likelihood of complaints may well be based just as much on the way in which the doctor gets on with his colleagues and patients. A complaint, when made, may well be unfounded, but may also be expensive to defend. The objective of the risk management policy is to minimise the exposure of MDU funds to such expense. The policy that the MDU has developed is to assess risk by reference to whether the particular doctor attracts complaints. It is not assessed by an attempted investigation of whether there is anything in such complaints, an investigation which in practice could anyway not be carried out in any conclusive way. It would be possible to obtain the member's view of the complaint, but it is not part of the policy to do so because (a) it would only provide part of the picture and (b) it is a part which the policy does not regard as material to the assessment which the risk review is making. A wider investigation would usually be impracticable. In defending the MDU's risk assessment policy as fair, Mr Spearman emphasised that it has to be viewed against the background in which there is a contractual relationship between the MDU and its members and in

which the MDU has a positive duty, in the interests of all its members, to adopt a responsible risk assessment policy directed at preserving its assets. The fairness of the processing of a member's personal data has to be considered in that contractual context. Mr Spearman invoked the observation of the tribunal decision (under the 1984 Act) in *British Gas Trading Limited v. The Data Protection Registrar*, 24 March 1998 (chairman, Mr J.A.C. Spokes QC) [1997/98] Info TLR 393, at 409, that "Fairness, undefined in the Act, requires us to weigh up the interests of data subjects and data users." That appears to me to be an equally sound approach to the question of fairness under the DPA. Assessed against the background I have outlined, I can see nothing unfair in principle about the MDU's risk assessment policy or with the processing of members' personal data in line with that policy. Mr Howe's submission is, in effect, that the risk assessment policy should be dictated by reference to fairness considerations under the DPA. In my judgment, that puts the matter the wrong way round. In the contractual context applicable to this case, the MDU is entitled first to determine its policy. Having done so, it then has to ensure that any processing of members' data in line with that policy is carried out fairly.

124. I conclude, therefore, that it is not open to this court to hold that the MDU's risk assessment policy was unfair; and that (save with regard to the non-lead files) its operation involved (at any rate in principle: see my further points below) no unfair processing for the purposes of the first data protection principle.
125. I add that Mr Spearman also submitted that Mr Johnson would have no arguable claim if the MDU had not established the computerised system that it did but had simply opened unstructured manual files relating to him, had gathered them together, considered them and then concluded in its discretion that his membership should be terminated. It could not, in those circumstances, have been argued by Mr Johnson that the MDU was not entitled in its discretion to terminate his membership. Mr Spearman said that it is intuitively wrong that a different result should be arrived at simply because it arrived at the same decision by the particular process that it did, being one which in part involved the processing of Mr Johnson's personal data.
126. I regard that last point as of little weight. No doubt the MDU could have organised its filing system differently and have adopted a risk assessment procedure based exclusively on a consideration of manual files; and had it done so, it may well be that, in relation to Mr Johnson, these proceedings would never have been started, since there would have been no relevant processing about which he might have complained. But it did not. It adopted a different system, one which is said to have brought to bear the obligation to apply the first data protection principle, and it is no answer to the alleged breaches of that principle that the MDU could have, but did not, carry on its business in a different way which would not have involved any consideration of that principle at all. One might as well say that a motorist should not have to pay London's congestion charge because he could instead have used a bicycle.

Was there any unfairness in Dr Roberts's summaries of the four computerised files?

127. I have concluded that (save for the non-lead files) there is in principle no basis for any challenge to the fairness of the MDU's approach to, and execution of, the risk assessment review in relation to Mr Johnson. That does not exclude the possibility that there might have been an element of unfairness in the way that Dr Roberts actually processed the data in the files. If she had, for example, materially misstated

the nature of an allegation or complaint against Mr Johnson, that might go to the fairness of the processing in which she was engaged; and a consequential question might arise as to whether, but for such misstatement, the RAG would or might have made a different recommendation. I will therefore consider each of the summarised files.

File 0010691

128. This file (an “assistance” file) was opened when Mr Johnson wrote to the MDU on 12 December 2000 enclosing copies of correspondence from the GMC about a complaint from a patient, whom I will call “Mr X”. The essence of it was that Mr Johnson had allegedly not completed an operation he had contracted to do and had twice fobbed Mr X off. There was also a note in the RAR form that Mr X had disputed Mr Johnson’s fees. I find that the RAR form accurately summarised Mr X’s complaint.
129. Mr Johnson denied there had been any dispute about fees because they were in fact paid by Mr X’s insurer: therefore, he said, the RAR form should not have said that the fees had been disputed. He is right that his fees were paid but wrong to assert that the RAR form wrongly noted that they had been disputed. Mr X sent Mr Johnson an email on 23 April 1999 disputing his £50 invoice No. 6162 for a follow-up consultation, one at which Mr X alleged that Mr Johnson was unable to locate the case notes. Mr X wrote further on 1 June 2000, still complaining about the £50 charge and also about the original invoice No. 5117, which he claimed had overcharged him by £242.20. Mr Johnson’s explanation for his point that there had been no dispute about his fees was that Mr X had agreed them in advance and therefore had an obligation to pay them although he had passed them on to his insurers for payment, and who in fact paid them. Therefore there was no dispute about his fees.
130. That is an indefensible stance. It is commonplace – as Mr Johnson accepted – for patients to agree fees in advance and complain about them afterwards when they are dissatisfied with the work done. That is similar to what happened here. Mr X may well have agreed the fees in advance, but there came a time when he was disputing them. The recording of that in the RAR form was accurate and it makes no difference that the insurer paid them in full.
131. Mr Johnson then complains that the RAR form conveys implicitly that there was substance in the rest of Mr X’s complaints. I disagree. The MDU policy was not to make judgments of this sort, but merely to record the allegation and everyone at the MDU concerned with risk assessment understood that. The complaint that Mr X had made, in his letter of 2 October 2000, was as follows:

“It is nearly two years since you performed a Therapeutic arthroscopic operation to my left knee, (29/01/98). After a visit to you, plus a letter of dissatisfaction you did not show me the same confidence that you portrayed before the operation, so that is why I did not take you up on the verbal suggestion that you did the operation again (06/11/98). I have since had another MRI scan on my Knee which a copy is attached, so can you please tell me why, why is my Knee in such a poor state after an operation that you performed?, as far as I was concerned it should of felt a lot better than it did, in fact the knee feels worse than it did before, surely the MRI scan should of shown you the same picture two years ago as it does today, please could you explain.”

132. Mr Johnson's response to that, in a letter he wrote to the GMC on 9 January 2001, did not specifically address Mr X's complaint at all. He set out his own summary of the history of his case but did not answer the relevant question. The GMC's view, in its letter of 2 April 2001, was nevertheless that, having considered the complaint, it did not propose to take formal action against Mr Johnson, and it so informed Mr X. But it added – perhaps in part inspired by Mr Johnson's omission to answer the specific complaint against him - that:

“The members noted, however, that your communication with [Mr X] may have fallen below the levels a patient would expect to receive. They felt that you could possibly have explained more fully the limitations of the procedure that you were proposing before [Mr X's] first arthroscopy. The members also felt that you could have cautioned [Mr X] afterwards about the extent that his knee was damaged and advised a limit on the physical activity that he should undertake. For information, I enclose a copy of our booklet ‘Good Medical Practice’ and would refer you in particular to the contents of paragraph 12 headed ‘Maintaining Trust’ which highlights the importance of effective relationships between doctors and patients.”

133. Mr Johnson said in cross-examination that he was told that this was a routine GMC response, which is always trying to improve doctors' standards. There is no supporting evidence that he was told any such thing and I regard his comment as unreliable. The quoted paragraph cannot have been a “standard” response. It was obviously tailored to the particular complaint. The GMC made no like statement in its letter screening out the complaint the subject of file No. 0010574.
134. An unfairness complaint in respect of Dr Roberts's summary of this file is that she recorded the GMC as having criticised Mr Johnson's communication with the patient. In my judgment, it is obvious that the GMC did criticise him. The paragraph is admittedly written in terms which are less than positive – “may” and “possibly” – which is an unsatisfactory feature in a letter of this sort: if criticism is thought to be justified, it should be expressed in positive terms so that no-one is in any doubt about it. If there is a doubt as to whether positive terms are appropriate, there must also be a doubt as to whether the criticism is justified. Having said that, I nevertheless interpret the sense of the paragraph as being that the GMC had concluded that there were grounds for the criticism it was apparently expressing; and Mr Johnson agreed in cross-examination that there was at least an implied criticism of him. Moreover, he obviously thought so at the time, because on 12 April 2001 he wrote to the MDU complaining that the GMC's conclusion to this effect was unsatisfactory. He then drafted a long letter to the GMC about the point (the third paragraph of which appears to misdescribe the nature of Mr X's complaint), and which then proceeded to explain how Mr Johnson claimed to have given Mr X “a full and complete explanation of the pros and cons of surgery prior to undertaking surgery and following surgery whilst as an in-patient and during follow up.” That letter was not sent, and nor was the toned-down form of letter that the MDU drafted for Mr Johnson to send (that draft did not include the misdescription contained in Mr Johnson's own draft letter).
135. In my judgment, there is nothing in the point that the RAR form wrongly recorded that the GMC had criticised Mr Johnson's communication with Mr X. The GMC had done just that. A further complaint is made that the RAR form did not include Mr Johnson's explanation of the basis on which he rejected that criticism. It is correct that

it did not do so, but it was not the policy of the risk assessment process to include such material. It would in any event only have been one side of a possibly contentious story.

136. It is further said that the RAG should have been told the period between the events giving rise to this complaint and that giving rise to the earlier complaint the subject of file 0010574. It is said that the clustering together of complaints in the score sheet by reference to the period within which they are notified produces arbitrary unfairness. That is not a complaint about the fairness of the processing. It is about the fairness of the MDU's risk assessment procedure.

File 0010574

137. This assistance file arose out of instructions to Mr Johnson by a solicitor to prepare a medico-legal report in relation to a patient's claim in respect of an injury he had sustained. Mr Johnson was the second expert to be consulted, and he says the first expert had concluded that the patient was not disclosing the proper details of his injury. Mr Johnson's evidence is that during his consultation with the patient, the patient refused to answer relevant questions about his accident and how the injuries had been sustained and so he terminated the consultation and declined to act further. On 28 August 2000, the patient complained to the GMC about him. The patient's account is different from Mr Johnson's and includes a detailed, critical account of the manner in which Mr Johnson conducted the matter.
138. I have already mentioned that there was a mistake in Dr Roberts's summary of this complaint (one to the GMC), namely that she recorded that its outcome was awaited, whereas by November 2001 the complaint had been screened out as groundless, an outcome (contained in a GMC letter of 20 March 2001) which was only recorded on another file (No. 0010691). It was so recorded because on 12 April 2001 Mr Johnson wrote to the MDU about both matters, although the instructions relating to file 0010574 should also have been included in that file. This error may not correctly be characterised as an element of "unfairness", because Dr Roberts's summary of file 0010574 represented a faithful selection by her of the material actually in the file, and there is no suggestion that she was in fact aware of the outcome of the complaint. But the MDU's answer to the point is that anyway, under the risk assessment policy, it is the making of the complaint, not its outcome, that is all important; and the evidence was that a favourable outcome (if known by the RAG) would not, or would at least be unlikely to, make any material difference to their decision, although an unfavourable outcome might make the case worse. In addition, the evidence was that GMC complaints were rare, and in Mr Johnson's case he had been the subject not just of this complaint, but also of the GMC complaint the subject of file 0010691. The summary of the RAG's decision shows that it was plainly influenced by the fact that Mr Johnson had had two GMC complaints within the previous 15 months.
139. It is said that, in relation to this complaint, it should have been pointed out that this was not a patient-related complaint. It arose out of Mr Johnson's performance as an expert witness, in which he owed duties to the court. That is, however, apparent from the RAR form.
140. It is also said that it was unfair for the summary not to record that the MDU agreed with Mr Johnson's stance on this matter. It was not unfair for that not to be recorded

because there is no evidence on the file that the MDU did agree with Mr Johnson: all it did was to agree to assist him in responding to the complaint. It is obvious that the MDU was in no position to “agree” with Mr Johnson’s account, there being clear factual differences between his account and the patient’s. Mr Johnson sought to counter that with an imprecise recollection of telephone conversations when the matter was discussed, but there is no supporting evidence of any such conversations, let alone as to what was said in them, and I do not accept that evidence.

141. It is again said that it was unfair that Mr Johnson was not asked for his account of the summary in the RAR form. That would have taken the matter nowhere: it would simply have provided one side of a contentious story and the RAG is anyway concerned with allegations, not to judge merits. In my judgment, there was nothing unfair in the summary in the RAR form.

File 0007509

142. Dr Roberts’s summary of this advice file was brief. It was opened following a question raised by Mr Johnson as to the ownership of MDU assets in so far as affected by the insurance arrangements with Zurich. His claimed concern was that “the assets owned by the members had been disinvested in any way.” (The MDU’s assets were not, of course, owned by its members at all: they were owned by the MDU, so the premise of Mr Johnson’s concern was anyway wrong). The alleged unfairness is said to have been the inclusion of this file in the RAR form. It was, however, merely an advice file and involved no score against Mr Johnson in the score sheet. It was included because it is the MDU’s practice to review the files over a ten-year prior period. There was no unfairness in including it.

File 007466

143. This assistance file arose out of surgery by Mr Johnson on a female patient in 1999. The patient returned to him in September 2000. Mr Johnson believed that the outcome had been satisfactory; but the patient’s husband did not, had expressed the view that it could have been better and had failed to settle Mr Johnson’s outstanding fees. Mr Johnson says he sought to reassure him but said that, if he remained dissatisfied, then his wife’s GP could arrange for a second opinion. No complaint to a third party (for example, the GMC) was made by the patient or husband but Mr Johnson sought the MDU’s advice as to whether he had done the right thing. He says the MDU reassured him by letter that he had acted appropriately.
144. Mr Johnson’s letter to the MDU of 8 September 2000 explaining the matter enclosed a copy of his letter to the patient’s GP, which in turn recorded that the husband had accused Mr Johnson of incompetence, unethical conduct and gross professional negligence. The husband was, apparently, himself formerly a GP. His comments were defamatory of Mr Johnson.
145. Mr Johnson’s complaint about the fairness of the summary of this file in the RAR form is that it was unfair to describe the advice asked of the MDU as relating, inter alia, to “defamation re alleged erroneous prognosis.” It is correct to note that Mr Johnson did not himself accuse the husband of defamation, but he clearly regarded the husband’s comments about him as of significance in the context of the problem that had arisen. I see nothing unfair in that description in the day one summary, which

accurately recorded one aspect of the nature of the matter upon which the MDU's advice had been sought. Dr Roberts's summary in the RAR form was, overall, an accurate summary of the nature of the complaint, and does not suggest that Mr Johnson was making allegations of defamation. Once again, the RAR form was not making a judgment on the rights or wrongs of the matter, it was merely recording that critical – and defamatory – comments had been made about Mr Johnson. Mr Johnson said the summary was unfair, because it was only the husband's account and there was no evidence to support it. But, again, the RAR form was not looking to make a judgment on the matter: it was recording the allegation. In my judgment, the summary of this file was fair having regard to the policy underlying the MDU's risk assessment procedure.

146. A further complaint is made that the RAR form unfairly failed to record that the MDU fully supported Mr Johnson. There was no unfairness in that respect, because the MDU did not so support him, at any rate if the suggestion is that they accepted his account of the factual differences that the complaint had raised. The MDU was in no position to form a judgment on that and could not and did not do so. What it did do was to write to Mr Johnson on 13 September 2000 telling him that it considered that he was “absolutely right to face the situation head-on and offer other orthopaedic surgeons to the couple, or [himself] if they feel happy to continue taking [his] advice. [He was] absolutely right also to keep the GP fully informed.” Again, Mr Johnson said that their initial advice came by telephone – of which again there is no written record – but I again decline to accept that in any such call the MDU could have conveyed that they accepted the correctness of Mr Johnson's account of the facts: the suggestion is absurd. I did not understand Mr Johnson ultimately to be suggesting otherwise. I have some sympathy with Mr Johnson's point that it would have been fairer if the RAR form had recorded that the MDU had advised Mr Johnson that it considered he had handled the problem in the right way, but Dr Roberts's evidence was that the MDU does not usually summarise its advice in RAR forms. I do not accept that the omission to refer to such advice in this case made this part of the processing exercise unfair.
147. Finally, Mr Johnson said that the RAR form unfairly suggested that there was substance in the complaints. I disagree. It records the essence of the complaints and that he had responded to them. It does not purport to form a judgment on the merits either expressly or impliedly. It would have been understood by the RAG to be doing no more than recording that the complaints had been made.

File 0001331

148. This assistance file was opened following the suspension of Mr Johnson's inpatient and outpatient admitting rights at the BUPA Hospital, Bristol. The background was that Mr Johnson says that in about April 1999 (other evidence suggests it was 11 March 1999) he wanted to ascertain the dates of certain of his patients' out-patient appointments. He says this was part of a “clinical audit” of his patients. He says he asked the hospital manager for help, who gave him an office terminal and codes to access the computer system. He said in cross-examination that he had a handwritten list of about 15 patients and that he obtained information from the database as to who they were insured with in order to complete his own records. He said he was logged on to the computer for about four hours, although was only accessing it intermittently because he had to be called away to do ward rounds in between conducting his

inquiry. He later said that he would also have had to do other tasks: “Normal routine patient administration, my secretarial dictation; other matters; numerous telephone calls, letter writing, reports” although his evidence was obscure as to whether he was suggesting that all this sort of activity was also fitted in during the four hours he was logged on to the computer. He estimated he was actually at the terminal for only about 90 minutes. Mr Johnson said that the hospital later raised the issue of his access to the database, adding in his witness statement that “Whilst any unauthorised or improper access was denied, it was agreed that I would not use the log-in codes I had been provided with again.” He said in cross-examination that he was surprised by the hospital’s reaction, as (so he claims) it was the hospital’s suggestion that he should access to the computer.

149. The incident was taken very seriously by the hospital. Its solicitors, DJ Freeman, wrote to Mr Johnson’s solicitors, Peter Carter-Ruck & Partners, on 16 March 1999 complaining about it (although this was not a letter that the MDU saw). The response, on 17 March 1999, from Mr Johnson’s solicitors was that on 11 March 1999 he had had a “free afternoon until his ward round towards the end of the day”, which perhaps does not fully square with Mr Johnson’s evidence, but the solicitors may have misunderstood his instructions as to his commitments that day: although they did add that he was not at the computer for four hours, but took “several breaks, which included attending an out-patient meeting and commencing his ward round.”. They said he wanted to check “the insurance details of a number of his patients before writing to them concerning outstanding fees.” They said that if Mr Johnson’s request to be logged on to the computer system involved a breach of hospital regulations, he was unaware of it.
150. This correspondence was, as it happens, exchanged in the lead up to the trial of a libel action that Mr Johnson had commenced against BUPA on 1 May 1998 for publishing a letter to various doctors that had suggested he had been charging his patients more than the amount paid by BUPA for the particular investigation or treatment they underwent; and that BUPA regarded him as overcharging (although the letter also said that BUPA had no issue with Mr Johnson’s clinical judgment or professional expertise). Following a further letter of 7 April 1999, Mr Johnson’s solicitors wrote a letter to DJ Freeman on 27 April 1999, which included the following:

“Our client has reiterated that he did not access any patient information not referring to his own patients, nor did he access or have sight of any information relating to other consultants. We are instructed that our client did not knowingly print any documents and did not remove or have sight of any printed documents. Since the account of Mr Johnson’s use of the computer given by BUPA staff seems to differ from our client’s recollection of events, and since we understand that different staff were present at different times during the afternoon, it would assist if our client knew which members of staff provided the different pieces of information which form the basis of your letter.

Our client has confirmed that he has not personally sought or been given access to the computer system on any day other than 11 March. Neither he nor his secretary will use the log-ins provided to him on 11 March to access the system in the future and will only seek to obtain similar details, as set out above, for the clinical management of his patients, under the supervision of BUPA staff.”

151. Mr Johnson accepted in his oral evidence that, when he gave that undertaking, he recognised that he should not have logged on to the system, although I understood him to maintain that he had acted innocently in doing so. He said he had no problem in agreeing that it was something he would not do again. I interpret the undertaking as having two limbs to it: (i) not to use the log-ins provided to him; and (ii) only to seek “to obtain similar details, as set out above, for the clinical management of his patients, under the supervision of BUPA staff.” The only “details” referred to “above” were the insurance details of his patients, but I regard it as unrealistic to interpret the reference to “similar details” as being confined to like insurance inquiries, so leaving Mr Johnson free to make unsupervised computer investigations into other matters relating to the clinical management of his patients: if that were so, there would have been little point in the first undertaking. I understood Mr Johnson to accept in cross-examination that his second undertaking did not have the narrow sense that one interpretation of the chosen language might suggest.
152. There was another computer access incident in February 2000 (or perhaps, depending on the true facts, two incidents). Mr Johnson says he asked the hospital receptionist on duty on a particular day for the time that a particular patient would be attending a consultation that afternoon. The receptionist did not know where to obtain the information and Mr Johnson told him that the receptionists usually obtained it from the computer screen in front of them. The receptionist’s response was that he did not know how to log on to the system and so Mr Johnson says he went to the out-patient department where he obtained the information about the time of the appointment. One might have thought that that was about as innocent an event as they come and that nothing more would be heard of it. Not so.
153. Mr Johnson says he was amazed to receive, a week later, a letter dated 18 February 2000 from the hospital manager making what he says were unfounded allegations, including that he had forced employees to log him on to the system. The manager suspended Mr Johnson’s admission privileges. She alleged that he had made approaches to *two* members of staff (a porter and a receptionist) demanding that they log him on. Both had reported that, had they known how, they would have done so. She wrote that Mr Johnson knew full well that he should have addressed his request for the information to the Bookings Department; and that “You are also aware that none of us would have agreed to allow you to log on directly to the hospital’s computer system nor to try to access the insurance database.” She wrote:

“You are well aware that such a request is in breach of this hospital’s regulations and, if you had not been so earlier, you have certainly been aware since March 1999 when BUPA’s lawyers engaged in an exchange of correspondence with yours concerning an incident on 11 March 1999 when you went into the Bookings Department of this hospital and asked to be logged on to the computer for a total of around four hours. It was pointed out to you at the time that you could have accessed confidential patient and insurance information. It was made clear to you that the member of staff in question had done so in breach of regulations. You said via your solicitors at the time that you had not been aware that this was a breach of hospital regulations.

In a letter from your solicitors of 27 April 1999, you said that you had not personally sought or been given access to the computer system on any day other than 11 March and you agreed not to use the logins provided to you on that date

to access the system in future and said that you would only seek to obtain similar details of the clinical management of your patients under the supervision of appropriate BUPA staff.

If the allegations made to me yesterday by the two new members of staff are true, then you have been in serious breach of this hospital's regulations, have sought to induce junior members to breach the regulations and are in breach of your undertaking given in March 1999 on this matter.

This hospital takes its duties of patient confidentiality and its statutory duties under the Data Protection Act extremely seriously. Had you been logged on as requested, the hospital would have been in breach of both those duties. I wish to convene a special hearing of the Medical Advisory Committee of this hospital so that you may make your own submissions on this matter, and I would suggest that this is done as soon as possible, if possible next week. Perhaps you could contact me to arrange a suitable date.

In the meantime, I feel that I have no alternative but, with immediate effect to suspend your inpatient and outpatient admitting rights at this hospital pending a hearing to ascertain the full facts of this matter.

In the circumstances I also feel I have no option other than to insist that you no longer enter any part of the hospital's property."

154. Mr Johnson wrote, in response, to the Chairman of the Medical Advisory Committee ("the MAC") of the hospital on 19 February, with a copy to the MDU. He complained about his suspension, which he said was exceptional, disproportionate, injurious to patients' interests and damaging to his reputation. He asked for particulars of the allegations against him. He said:

"Whilst I understand and assume it is accepted that clinicians can freely ask hospital staff about the clinical management of their patients. In this regard it would be reasonable of myself or any clinician to request follow up details of their patients from staff sitting at, and undertaking reception duties. It is usual that the hospital staff seeks to answer such inquires [sic] by reference to their computer screens and then inform the inquirer as to the answer if appropriate. Please identify so that I can understand the case to answer, how what is described differed from this. Certainly I have not ever to my knowledge or recollection made any other type of request.

I note that the letter does not accuse me of sitting at, using, attempting to use, logging on to or accessing any computer information whether restricted or not. In this regard please inform me of, and provide, the hospital regulations which I am accused of breaching. I have previously reassured the hospital that I have never and would never log onto or personally use the hospital computer system so as to obtain computer data using the provided codes without permission and or supervision. The letter does not identify any breach of this undertaking."

155. That was an extraordinary letter. The letter to which he was replying had nowhere suggested that all that he had claimed to have done was to make an innocent request of a receptionist about the timing of a single appointment. Nor did he say anywhere in

his own letter that that is all he had done, although he still felt able to say in cross-examination that it leapt from the first quoted paragraph that that is what he was referring to. That answer reflected an insight by him into his chosen language which I am unable to share. No-one reading that letter would know what Mr Johnson's case was. Nor did he express any surprise in it that he had apparently been accused by *two* individuals of having been asked to log him on to the computer incident. His case is that all he did was to ask *one* receptionist the time of the appointment. He simply did not attempt to meet the case being put against him with the very different, and very simple, explanation that he has advanced in his evidence. Nor did his solicitors explain it in the letter they wrote to DJ Freeman on 21 February 2000 (not a letter the MDU saw).

156. Mr Johnson wrote to the MDU asking for assistance, providing copies of the correspondence. The response was that the matter did not relate to patient care and so assistance was outside the benefits of membership, but the MDU still opened up file no. 0001331. The hospital manager wrote to Mr Johnson on 23 February 2000 proposing a meeting on 28 February to inquire into the matter and enclosing the statements of the two staff members who had made the allegations against Mr Johnson: their statements made it clear that there had been two alleged incidents, on 2 and 11 February 2000, on each of which Mr Johnson had allegedly asked to be logged on to the computer system. On 24 February 2000, Mr Johnson wrote to the MAC Chairman saying that "Any request I have made to the hospital staff is to a receptionist and is entirely a request for clinical information from a member of hospital staff in the routine day to day management of my clinical practice and patients. As I recollect this concerned the outpatient appointment of a patient of mine. This is no different from that which we all do on a daily basis." He made a request for information as to the hospital's position in relation to the matter. The meeting proposed for 28 February does not appear to have taken place. On 29 February, the hospital manager wrote to the BMA about the incident.
157. I do not propose to rehearse the detail of the rest of the story, which is from any viewpoint a remarkable one. The difference that Mr Johnson asserts between his and the hospital's accounts has never been resolved. Mr Johnson said in cross-examination that he believed that the withdrawal of his admission rights was associated with his forthcoming libel trial against BUPA, but he did not explain the basis of the alleged association. His libel claim was settled on 2 May 2000, but still Mr Johnson did nothing to have the suspension issue resolved. By March 2001, he was considering mounting a legal challenge to the suspension. He sought support for that from the MDU but was refused it, the MDU again explaining to him (on 23 May 2001) that assistance in a matter of this nature was outside the benefits of his membership. Following his request for reasons, on 26 June 2001 the MDU sent him a copy of its Memorandum and Articles of Association, explaining that they showed that the MDU's decisions regarding assistance or otherwise were within its absolute discretion. He never brought any such proceedings and to this day he remains suspended and has suffered a consequential loss of income: all because, so he claims, he asked a receptionist the time of an appointment.
158. Where the truth lies is unknown: I can make no finding as to that, nor am I required to. I have heard only Mr Johnson's account and not the accounts of anyone else involved in the alleged incidents. From the evidence I have heard and the material I

have seen, it is difficult to conclude other than that either (i) the alleged incidents were more sinister than Mr Johnson is prepared to admit to, or (ii) having become embroiled in a difference with the hospital over his, let it be assumed, wholly innocent request, the matter has escalated to the extreme position that it has because of his intransigence.

159. As to whether there was any unfairness in the way Dr Roberts summarised the file 0001331 allegations in the RAR form, I consider there was not. She was seeking merely to record the essence of the allegations, which she did with accuracy and fairness. A point was made that she unfairly recorded Mr Johnson as recognising his own error. I disagree. It was a statement made in reference to Mr Johnson's undertaking through his solicitors not to repeat what he had been criticised for doing earlier. Assuming in Mr Johnson's favour that he did not appreciate at the time that his alleged request to log into the hospital computer was in breach of regulations, his giving of the undertaking not to do so again was implicit recognition of the fact that he had been in error, as I understood him to accept in his oral evidence. I find that there was no unfairness in this part of the file summary.
160. The further point is made that the RAR form should have included Mr Johnson's account of the matter: in particular that, according to his account, the request for computer access related solely to data about his own patients. It is unclear to me that Mr Johnson ever made it unambiguously clear to the MDU that that was his case: his letter of 19 February 2000, which the MDU had, failed to spell out with any specificity what he claims to have been doing: he preferred to express himself in imprecise generalities. But I anyway see no unfairness in this. The hospital's complaint against him was not that he had been accessing other patients' confidential information: it was that he had attempted to log on to the computer system in breach of regulations and of his earlier undertaking, being breaches which the hospital regarded it as potentially putting itself in breach of its own DPA obligations and its duty of confidentiality to patients. Dr Roberts was here concerned not to record Mr Johnson's exculpatory explanations (which might or might not be true) but merely the nature of the allegations against him (which might also not be true, but the possibility of that is something that is recognised by the risk assessment procedure).
161. Finally, if Mr Johnson had been asked by Dr Roberts to give his account of the suspension incident for inclusion in the RAR form, I consider it would have been likely to have made his case worse, not better. It would have revealed that a surgeon who claimed to have been permanently suspended for asking a receptionist the time of an outpatient appointment had done nothing to have the factual dispute resolved and his name cleared. The RAG would be likely to have regarded that as surprising, and would be unlikely to have drawn any inferences from it favourable to Mr Johnson. In my judgment, there was nothing unfair about Dr Roberts's summary of this file.
162. It may perhaps be said that Mr Johnson was unlucky to score a total of 40 points from this file: 10 for a "suspension problem", 10 for "Fraud/criminal/allegations/dishonesty" (Dr Roberts concluding that the second allegation carried an implicit allegation of dishonesty against Mr Johnson) and 20 for "Failure to change behaviour" (that is, failing to honour the undertaking). But the RAG knew that the allegations were no more than allegations and I find that it would not have proceeded on the false basis that they were true. There is anyway no criticism of the way in which the RAG exercised its discretion in making the recommendation it did.

File 9910222

163. This is one of the two non-lead files. It related to Mr Johnson's defamation claim against BUPA. The claim was settled in Mr Johnson's favour in May 2000, but that was a future event when the file was opened in 1999. The file records that a third party, apparently another MDU member, had been asked by Mr Johnson to make a statement in his support in that claim. Mr Johnson accepted that he had done so. The file records no more than that.
164. Mr Johnson questioned whether the day one summary fairly summarised his claim. In my view, it did. The claim was indisputably a defamation claim, and it also raised an issue as to non-payment of fees - or at least as to potential such non-payment - to the extent that part of the complaint against BUPA was that it warned doctors as to Mr Johnson's charging levels because it might be that they would not be covered under the patient's insurance. That was said to have been disparaging of Mr Johnson, by suggesting he had been less than candid with his patients about fee levels.
165. Mr Johnson also complains that he was not asked for his account of the matter the subject of this file. He says that it conveyed that he had been rightly defamed. It does not: it merely records that he had brought a defamation claim. If he had been asked in 1999 for his comments on this file, he could only have added that he had a pending claim for defamation against BUPA, essentially as summarised in the day one summary. His account of the issues, if he had provided it, would not have enabled the MDU to form a view on the rights or wrongs of the claim. If he had been asked for his comments in 2001 on the entry in the RAR form, he could have told the MDU that the claim had been settled. But I see no material unfairness in the inclusion of this file in the RAR form. It did not pass judgment on Mr Johnson, it would not have been interpreted as doing so and it carried no score.

File 9810073

166. This arose out of a request of Mr Johnson by Lyons Davidson, solicitors, to attend court as a witness. Mr Johnson had provided a medical report in the case. The case was, however, an old one and in the meantime Mr Johnson claimed that Lyons Davidson had failed to pay his fees in relation to another court appearance, the requirement for which had been cancelled at the last moment. On 11 November 1998, Mr Johnson sought advice from the MDU as to what he should do.
167. The MDU's advice to him on 19 November 1998 was that "if the witness summons is properly served then you will be obliged to appear in response to it." Mr Johnson accepted that that response reflected that he had told them that a witness summons had been served on him. There is nothing on the file to suggest that he did not accept that advice.
168. In my view, Dr Roberts's summary of this file, and of the MDU's advice in the letter of 11 November 1998 (which I have not summarised comprehensively), was accurate. I did not understand Mr Johnson to disagree with that. His unfairness point in relation to this file is that, had he known it would have been used in material deployed for the purpose of expelling him from the MDU, he would not have consulted the MDU in the first place. That goes to a criticism of the MDU's risk assessment policy, not to

the fairness of the processing of the material in this file in accordance with that policy, which I regard as having been fair.

File 9710810

169. This is the other non-lead file. Mr Johnson says that doctors were encouraged by the GMC to provide information to patients as to their training, experience and scope of practice and he produced a leaflet about himself of which he had about 1,000 copies printed. He believed his chosen wording to be within the GMC's published guidance. The file was opened following observations about the leaflet from another MDU member. The RAR form summarises their nature. Mr Johnson asserted (but did not know) that it was a Bristol colleague and competitor of his, Mr A, who had referred the matter to the MDU. He disputed that the leaflet in any way deserved the criticism that it suggested superiority over other practitioners. He said that Mr A had also written about his leaflet to the British Orthopaedic Association and had discussed it with the GMC.
170. Mr Johnson complained that this file contained a record by the MDU that the leaflet did in fact characterise him as superior to other practitioners. I disagree. The file, as summarised in the RAR form, did no more than suggest that another MDU member had suggested this as a possible criticism. The RAR form does not suggest that the MDU has made a finding on the point: it merely records that the point had been made. In so far as the day one summary reflects the reporting member's "concern", the inference is that the reporting member considered that Mr Johnson may have sought by his leaflet to obtain an unfair advantage over other practitioners. That is likely: why else would the member have reported the matter? The RAG would not, however, I find, have interpreted this entry on the RAR form as reflecting the making of a judgment on the merits of the criticism of the leaflet. I regard as also probable that this part of the RAR form played the most minor part in the RAG's considerations.

File 9608165

171. This arose out of circumstances in which Mr Johnson was acting as an expert instructed by Zurich Insurance. Mr M was the expert instructed by the other party. Mr Johnson's first criticism of this entry is that it suggests that there had been alleged defamation of him by Mr M in the latter's expert report when there had not.
172. Mr Johnson reported this matter to the MDU on 23 August 1996, when he asked whether it agreed that the last three paragraphs of Mr M's report "appears to be denigrating in writing my clinical skills, clinical exposure to knees, intelligence and background reading." Mr Johnson had written to Zurich Insurance on 22 August 1996 saying that he had also sent a copy of the report to the GMC. In cross-examination, however, he suggested that he may not in fact have sent it at all (a recollection made over nine years after what he wrote to Zurich Insurance at the time).
173. The MDU's response to Mr Johnson on 20 September 1996 was that it appreciated "your disquiet about some of the comments raised in the report"; and its advice was to await the outcome of the GMC's views. The MDU also enclosed a copy of an MDU article regarding defamation, which the writer hoped Mr Johnson would find of interest. The writer plainly regarded Mr Johnson's complaint against Mr M as one of alleged defamation. Mr Johnson did not go back to the MDU and say that he had not

in fact referred the matter to the GMC, which tends to support the inference that he had.

174. I see nothing unfair about the RAR form summary of this file. It is clear that Mr Johnson was complaining about alleged defamation by Mr M, I find that he did refer the matter to the GMC and that Dr Roberts's summary of the file is accurate. The summary was not suggesting that the MDU accepted that Mr M's allegedly defamatory comments were justified, nor that it had found they were not. It was forming no judgment on the merits and it would not have been interpreted otherwise by the RAG.

File 9510999

175. I do not propose to devote much time to this file. As Dr Roberts's summary of it records, she did not review it and recorded only its day one summary and that it was an advice file. Her evidence was that she did not even have the file. She suggested that it had not been available at MDUSL's off-site storage in order for her to be able to review it, otherwise she would have reviewed it. She was thereby saved from a potentially miserable task. The file comprises 194 pages shuffled together in no sort of logical (or any) order (structured it most certainly is not), making its comprehension a challenge that few would willingly undertake. The opening part, which reflects the matter provoking its creation, shows that on 23 November 1995 Mr Johnson sought the MDU's advice about a leaked internal memo generated by the BUPA Hospital, Bristol, which raised criticisms about his admitting rights to the hospital, which concerned him and to which he took exception. The MDU's advice to him on 5 December 1995 was that the complaint was not within its remit – it only deals with matters arising out of patient care - and that Mr Johnson would be better advised to seek help from the British Medical Association. Mr Johnson's recorded response was that he had paid his MDU subscription and the MDU should therefore deal with it. There was further correspondence and on 13 February 1996 Dr B of the MDU advised Mr Johnson that the memo was defamatory of him but that the question of whether it was actionable, or whether legal action would be an appropriate course, was another matter; and that anyway such a course would be inappropriate and against Mr Johnson's interests. Dr B's letter records that Mr Johnson had provided the MDU with a bundle of further correspondence, which I understand resulted in the bulk of the creation of the rest of this file and which relates to other matters. To attempt to summarise them with coherence would involve a considerable extension to an already overlong judgment.
176. Mr Johnson's complaint is that the unfairness of the processing in relation to this file lay in the fact that (a) it was referred to without prior consideration of it by the MDU, and (b) he was not asked for his account about it. In my judgment, a fuller account of that file in the RAR form would not have resulted in any benefit to Mr Johnson in the eyes of the RAG. Had it been reviewed comprehensively, any such review might well have resulted in the RAR form also recording that the file reflected (amongst other things) (i) that Mr Johnson was regarded as "a very difficult member" of the MDU, who was not averse to litigation; (ii) that he was perceived by some of having an inability to work harmoniously with colleagues (apparently one of the reasons why there was a proposal to refuse him admitting rights at the Glen Hospital in 1991); (iii) that in January 1997 he was the subject of adverse criticism by the mother of a 12-year old patient of his, who accused him of having caused anxiety and distress to the

boy, the boy himself having allegedly expressed the view that Mr Johnson was “a nasty man and that he much preferred the other people whom he had seen”; and (iv) that by May 1997, and because of alleged problems over Mr Johnson’s charging practices, BUPA was apparently threatening to withdraw recognition of him as a BUPA consultant. All that could only have counted against Mr Johnson in the RAG’s assessment. As it was, Dr Roberts spared him from that. I see nothing unfair from his viewpoint in Dr Roberts’s terse summary of the file, which can be regarded as having done him a service. I recognise that the day one summary recorded only one of the issues raised in this file, but it did so accurately. Its failure to refer also to the other issues reflected in the file may justify a criticism that it was less than comprehensively accurate, but I can see no unfairness to Mr Johnson in the omission to refer to the other matters. I accept that, had Mr Johnson been given the opportunity to answer the allegations in this file, he would have provided lengthy explanations, as with all the other files. But they would not have been regarded as providing a conclusive answer to the complaints reflected in the file. The file did not carry a separate score on the score sheet, although it is fair to note that it was, by inference, part of the inspiration for Dr Robert’s third observation at the end of the RAR form, namely that “A selection of advice files have been reviewed as four relate to perceived defamation. [Mr Johnson] does not appear to take criticism well. Claim brought by mbr against BUPA.” Dr Roberts’s comment about Mr Johnson’s alleged response to criticism was, in my judgment, justified, although it can also be said to have reflected an element of judgment-making on her part which I do not understand to be wholly within the spirit of the review in which she was engaging.

File 9500242

177. This is another advice file. On 6 January 1995, Mr Johnson wrote to the MDU asking for advice on a letter dated 22 November 1994 he had received from the Western Provident Association (“the WPA”). It was written by the WPA’s new medical adviser, who had read “the extensive correspondence that you have had with WPA since April 1992.” It pointed out that recognition by the WPA was discretionary. It concluded by saying that:

“It is not in the interests of WPA to recognise individuals who over-charge our subscribers as this causes them embarrassment and inconvenience. Neither is it in the interests of WPA to continue voluminous correspondence with individual practitioners.”

178. Mr Johnson regarded the letter as containing “various undertones and veiled threats which potentially would restrict my practice solely because I am not employed by the [NHS].” He asked the MDU for their “considered comments and an overview of the legal implications in regard to restricting practice and European legislation in this situation.” That did not suggest that Mr Johnson was regarding this as a routine letter from the WPA directed merely at restricting costs, but that appeared to be his immediate response to the letter when he was asked about it in cross-examination. He also said that, in his role as MAC adviser and as a member of various committees, the letter concerned him and his colleagues, although there was no suggestion in his letter to the MDU that he writing otherwise than in his own personal capacity, and he agreed that he was in fact so writing.

179. The MDU's response was by a letter of 31 January 1995. It pointed out that medical insurers had the right to (or not to) recognise whomsoever they chose. The MDU could not comment on the implications of the WPA's letter, since it had not seen the correspondence Mr Johnson had with the WPA to which the latter had referred. It suggested that Mr Johnson might want to explore the matter further with the BMA: the BMA's expertise in employment and contractual issues would put them "in a better position to advise you of any recourse you may have to UK law or eventually European law."
180. Dr Roberts's summary of that file in the RAR form appears to me to have been accurate. Mr Johnson disagreed. He said, first, that there had been no correspondence with the WPA since 1992. He had, however, as he agreed, made no such suggestion to the MDU when writing to them about the WPA's letter to him, and Dr Roberts was, in my judgment, properly entitled to record the nature of the WPA observations that had given rise to Mr Johnson's request to the MDU for advice. He also said that the MDU was wrong to characterise the matter in their letter to him of 31 January 1995 as raising an "employment/contractual" issue which merited an inquiry of the BMA, a characterisation which was also reflected in the RAR form. Mr Johnson did not take that point up with the MDU at the time and I anyway do not regard the MDU's characterisation of the point as materially wrong. Mr Johnson's case is that the nature of his (and others') discussion with the WPA was whether WPA and other insurers could fix the practitioner's charges or whether the practitioner could charge what was fair, usual and customary. Whilst an issue of that sort might not, in the context, fairly be regarded as an "employment" issue, I do not regard it as wrong to describe it as a "contractual" issue. In any event, the day one summary accurately summarised the essence of the issue giving rise to the advice inquiry and I do not regard Dr Roberts's brief elaboration in the RAR form as operating to distort that summary. I do not regard this file as having been unfairly summarised.

File 9410740

181. All that the RAR form recorded in relation to this, and the remaining five files, was the day one summary. It related to a letter dated 16 September 1994 from PPP Intermediary Division regarding their reimbursement of a patient in respect of Mr Johnson's fees. The problem was that PPP had reimbursed the patient for the charges that it regarded as reasonable but that had left a further £56 of fees which it was not prepared to pay. The letter asserted that Mr Johnson had not told the patient that PPP was unlikely to reimburse her in respect of his full fees.
182. Mr Johnson described the PPP letter as having the purpose of beating him down on fees, a tactic he said that insurers commonly employed. On 3 October 1994, he sought the MDU's advice as to how he should respond, explaining also that he was a member of the BMA.
183. The MDU's response, on 11 October 1994, was that this was primarily a contractual problem about fees, which fell outside the services of the MDU and was more appropriately referred to the BMA. The letter went on to give what was, on any view, general advice about the type of problem that had arisen, which I need not summarise because Mr Johnson accepted in cross-examination that it did amount to advice.

184. There is nothing inaccurate or unfair about the day one summary in relation to this file.

File 9404163

185. Again, the RAR form merely set out the day one summary “Amorous patient.” This file was opened following Mr Johnson’s letter to the MDU on 13 April 1994 that a woman upon whose knees he had operated was writing to him on a weekly basis. He said he had not replied “to any of the contents.” He enclosed the copy letters. They included, by way of a typical example of the woman’s sentiments towards Mr Johnson, a proposal to drop some brandy snaps into the hospital for him. He asked the MDU to reply on his behalf “stating the obvious reasons why I am unable to reply to such correspondence, even if that were my wish. Perhaps a similar explanation to the [GP] may also be helpful.”
186. Mr Johnson’s complaint about the day one summary in the RAR form is that it did not reflect his account of the matter. He did not criticise it for describing the patient as “amorous” (he described her in the same way in his witness statement). I do not see what more he could have said than he did in his letter of 13 April 1994. There is no suggestion in the day one summary that this was other than a case in which a patient had made an unwelcome approach, or approaches, to Mr Johnson. There is no suggestion that they had been reciprocated or that Mr Johnson had in any respect behaved improperly or unprofessionally. There was no basis for drawing from the summary any adverse inference against him. Mr Johnson said that he was here being impliedly criticised for having a grateful patient. I agree that the inference from the day one summary was that he had such a patient. I do not regard the summary as being impliedly critical of him for that.

File 9302572

187. This file was also summarised merely by reference to the day one summary. Mr Johnson wrote to the MDU on 27 February 2003 asking for advice. The post of Consultant Senior Lecturer in Orthopaedic Surgery at Bristol University had been advertised in the British Medical Journal in June 1992. Mr Johnson applied and was given an interview date but that was later cancelled and he was told the post was to be re-advertised. It was re-advertised and Mr Johnson said he heard nothing further and that the post was later withdrawn. Put shortly, he asserted that the appointment was blocked because of political or racial bias and said he had been advised that “there is a prima-facie case in Industrial Tribunal law. Could you advise me accordingly.”
188. The MDU’s response on 9 March 1993, after expressing sympathy, was that the MDU did not have any expertise in the field of discrimination in employment law. It advised him that, if he was a member of the BMA, he might refer the question to them. It added that, before doing so, Mr Johnson might wish to pursue the Vice-Chancellor of Bristol University for a response to his letter of 13 October 1992 and to discuss the matter further with two particular people whom the MDU named.
189. Mr Johnson complains that the MDU simply washed their hands of this matter and did not ask him for his account before compiling the RAR form. That is not completely fair, because it did at least give him the limited positive advice I have summarised. Had he been asked for his account before the RAR form was completed, it is difficult

to see how he could have added anything material. In my judgment, the day one summary accurately and fairly summarised the subject matter of the file. Mr Johnson made it clear in cross-examination that his real complaint, as with most of the files, was that the MDU had used this file at all as part of a risk review assessment in relation to him.

File 9208720

190. Again, the RAR form merely recorded the day one summary. I can see nothing unfair in that summary of the file.

File 9205597

191. Again, all that the RAR form included was the day one summary. Unfortunately, that summary, as reproduced by Dr Roberts, contained an error. The correct day one summary was "*Advice re members advertising in Yellow Pages*". Dr Roberts erroneously substituted "*publicising*" for "*advertising*". If, which I doubt, that amounted to anything in the nature of unfairness, it was unfairness of an immaterial nature.
192. The story is that on 7 April 1992 Mr Johnson wrote to the MDU for confirmation that his proposed entry in the Yellow Pages was acceptable. It described him as "Mr David P. Johnson MB. ChB. FRCS. FRCS(Orth).MD. Department of Orthopaedic Surgery. The Glen Hospital, Durdham Down. Bristol. BS6 7JJ. 0272 7352562." On 30 April 1992, the MDU advised him that his entry complied with GMC recommendations and could not, in the MDU's view, be criticised.
193. Mr Johnson's unfairness complaint is that he should have been asked for his account before this was included in the RAR form and anyway it should not have been included at all. In my judgment, the day one summary was entirely fair, and Mr Johnson's account could have added nothing. The file summary suggests nothing adverse about Mr Johnson and the RAG cannot have read it and inferred otherwise.
194. A point arose at the trial as to whether Dr Roberts's seventh point under her heading "Observations" on the RAR form ("Potential concerns in the past re the way in which DPJ has advertised") might have drawn the RAG's eyes to this particular file and have encouraged them to draw an adverse inference from it. I was for some time attracted by that suggestion, but I consider that the observation would be interpreted as referring more naturally, and exclusively, to file 9710810 (a non-lead file), which in terms refers in the day one summary to "*Concern re circulation of publicity leaflet to GPs by colleague (member) following request for private second opinion for knee pain*". No like concern is recorded in relation to file 9205597 and there is no basis for regarding it as also reflecting any cause for concern. Dr Roberts was present at the RAG meeting and so if the RAG had jumped to any wrong conclusions about what underlay file 9205597 she could have put it right.

File 9107652

195. Dr Roberts merely set out the day one summary for this file. Mr Johnson's unfairness complaint here was that this was a very old file and that, in the event, he was granted

admission rights. I can see no unfairness in the recording by the RAR form of the nature of the reason why this file came to be opened.

The fairness of the summary of the files

196. For reasons earlier given, I have held that the processing of the two non-lead files is to be treated as having been unfair, although I do not regard Dr Roberts's summary of those two files as having been unfair when measured against the dictates of the MDU's risk assessment policy.
197. As regards Dr Roberts's processing of the other files, I find that in no case did her summary, again measured by reference to the MDU risk assessment policy, reflect any unfairness, or at any rate any material unfairness.

Causation

198. I have found that the processing of the non-lead files is to be treated as having been unfair, because Mr Johnson was not informed of the existence of his personal data in them, the purpose for which it was being processed or of his right to access to, and to rectify, it. I have otherwise found that there was no unfairness, or at any rate no material unfairness, in the processing of his personal data. The first question is whether the unfair processing in relation to the two non-lead files can be said to have amounted to a contravention of the requirements of the DPA that caused the ultimate decision that Mr Johnson's MDU membership should not be renewed.
199. I find that it did not. Neither of the non-lead files carried any score and each was fairly summarised in line with the MDU risk assessment policy. Had Mr Johnson been given the opportunity to comment on these files, or make proposals for their rectification, I have no doubt that he would have taken it up. I do not accept, however, that his representations in relation to them would be likely to have made any difference to the ultimate decision to terminate his membership. I regard it as probable that these two files played only an immaterial part in the making of the ultimate decision to terminate Mr Johnson's membership. I find, on the probabilities, that the decision would have been the same even if there had been no unfair processing of the data in the two non-lead files. I find, therefore, that the unfair processing of that data did not cause any damage to Mr Johnson.
200. Secondly, I have to consider the wider question which would arise if I am wrong in my conclusion that there was no unfair processing in relation to the lead files. This depends on the nature of the unfairness. If, as I understand Mr Johnson to claim, the heart of his complaint is based on the point that Dr Roberts's summary in the RAR form did not incorporate his side of each filed incident or allegation, or include his comments in response to the RAR form, then (if the complaint is right) that raises a more difficult question. But if, as I consider probable, the RAG would in those circumstances still have approached Mr Johnson's case by applying the MDU's established risk assessment policy, I similarly come to the conclusion that it is improbable that the inclusion before it of such further material would have made any difference. That is because, in short, Mr Johnson's exculpatory explanations would not have been regarded as material to the exercise the RAG was carrying out.

201. The final hypothesis I have to consider is the possibility that, contrary to my view, the requirements of fair processing under the DPA required the MDU to tear up its established risk assessment policy and operate the quite different type of policy that Mr Johnson urged would have been fairer. That was one which required the abandoning of the score sheet, with its alleged potential for arbitrariness and irrationality; which required the RAG to assess so far as possible the merits of a particular incident or allegation, at any rate by taking account of the subject member's representations on it; and which required the RAG to engage in a more sensitive analysis of which incidents and allegations were of real potential seriousness and which were not.
202. For reasons given, I reject the suggestion that Mr Johnson was entitled to have his data processed and case considered by reference to his own inexpert assertions as to the risk assessment policy that the MDU should apply. I consider he had to take the MDU's policy as it was and is. If, however, I am wrong on that and Mr Johnson is right that his data should have been processed, and his case considered, in the way I have just summarised, then I find that it is probable that the MDU would have come to a different decision about the termination of his membership.

The Fourth Data Protection Principle

203. Although an assertion is made that the MDU has also breached this principle, it is not suggested that any such breaches were causative of the RAG's recommendation or of the decision not to renew Mr Johnson's membership. I have explained that it was agreed that further consideration of this part of Mr Johnson's claim (upon which he bases a right to relief under section 14 of the 1998 Act) is to be deferred until after delivery of this judgment.

The Fifth Data Protection Principle

204. Mr Johnson also alleges a breach of this principle, one by which "Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes." Again, it is not suggested that the alleged breach contributed as a matter of causation to the non-renewal of Mr Johnson's membership or otherwise caused him any damage.
205. Dr Tomkins explained in her witness statement that it is the practice of the MDU to retain information held about members for a long time. This is in part because the MDU provides assistance to its members on the occurrence basis. Claims or complaints can be made many years after the relevant event. This is particularly so in the case of complaints made in relation to incidents affecting claimants who were minors at the time of the occurrence or made by those suffering under a mental disability, but the point applies across the general board of complaints. Dr Tomkins gives an example of a claim brought in 2001 against a deceased's member's estate in respect of a 1986 occurrence. The MDU had retained a note of its 1986 advice to the member, which assisted in the successful defence of the claim. She explains that the MDU also retains data for risk management purposes in the direct interests of the members: whilst retaining confidentiality in respect of the particular information, the MDU is able to use it by way of guidance to the profession as to how avoid particular problems with patients. She made the point that matters of a particular nature may not arise very often, and so the information from files that do touch on them may be a

useful resource. The MDU uses data to provide “letters of good standing for members”. It also retains information for wider policy reasons. During the Shipman inquiry, the MDU was asked to provide information under various heads, including information going back to 1975, which it was able to do whilst maintaining confidentiality and legal professional privilege. The MDU was similarly asked for information over the period from 1980 to 1998 for the purposes of the Ritchie inquiry.

206. Dr Tomkins was not challenged about any of this evidence in cross-examination and in my judgment there is nothing in this head of complaint. I am satisfied that the MDU has good reasons for retaining the information about its members for as long as it does. It does so with the interests of the members as a whole in mind, and in part for wider reasons of a nature that can be regarded as being reasons in the public interest. I reject the claim that the MDU has in any manner breached the fifth data protection principle.

Compensation

207. Since I have found against Mr Johnson’s claim that any unfair processing caused the non-renewal of his MDU membership, his claim for compensation fails. But in case others take a different view, and as I had a full argument on his claim for compensation, I will make my findings on it on the assumption, contrary to my finding, that Mr Johnson had established liability.
208. Mr Johnson’s claim for compensation falls under three heads. He asserts that his “expulsion” from the MDU caused him: (i) a small amount of liquidated pecuniary damage (quantified at £347 shortly before the trial); (ii) distress and (iii) the damaging imputation that he is a risk to his patients, resulting in a loss of professional reputation. The major heads of claim are heads (ii) and (iii), primarily the latter. Mr Johnson does not suggest, or attempt to prove, that his alleged loss of reputation has caused him any financial loss: in addition to his claim for compensation for distress, he is under that head simply claiming general compensation for alleged general harm to reputation, the amount of which is at large.
209. The MDU’s response to this is: (i) that the claim for pecuniary damage fails on the facts, so that Mr Johnson is not entitled to recover a penny of such claimed compensation; (ii) as he is unable to prove any pecuniary loss, his claim for compensation for distress also fails, since proof of pecuniary loss is the pre-condition of a claim for compensation for distress; and (iii) his claim for general compensation for alleged harm to his reputation is misconceived in principle: the only procedure under which such compensation is recoverable is by way of a defamation claim, which this is not. Whilst pecuniary damage proved to flow from a wrong causing an injury to reputation may be recoverable as part of a claim for damages in contract or tort (including a claim for breach of statutory duty), general damages for harm to reputation are not.
210. The legal debate centred on section 13 of the DPA, earlier quoted. The function of section 13 is to give effect under national law to the provisions in the Directive directed at enabling the recovery of compensation for unlawful processing. Recital (55) of the Directive provides, so far as material:

“(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated by the controller, ...”

211. Article 23, headed “Liability”, provides, so far as material:

“1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of an act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.”

212. Mr Spearman accepted that section 13 of the DPA has to be construed purposively in accordance with article 23. Article 23 provides for any person who has suffered “damage” as there mentioned to be provided with a right to compensation under national law. Mr Howe’s submission was that “damage” in article 23 was an autonomous Community concept and that it was capable of including pecuniary and general loss, including damage in the nature of injury to personal reputation.

213. If Mr Howe is right, it is difficult to see how section 13 of the DPA has translated that into the national law. Section 13(1) entitles any individual who has suffered “damage” by reason of a contravention of the DPA to “compensation” for that damage. Section 13(2)(a) then provides that an individual who suffers “damage by reason of the contravention” is also entitled to compensation for any “distress” that such contravention may have caused him. The reference to “damage” in section 13(2)(a) must, in my judgment, be a reference back to “damage” within the meaning of section 13(1). Proof of section 13(1) damage is thus the gateway to the recovery of additional compensation for any “distress” caused by the relevant contravention. “Distress” is a head of damage that does not, however, give rise to pecuniary loss; it is compensated by a general award of compensation or damages. It is apparent, therefore, that section 13(1) and (2)(a) are drawing a distinction between *pecuniary* damage (embracing financial and/or physical damage, being the only type of damage contemplated by section 13(1)); and one particular head of *general* damage (namely, for distress), the only type of general damage contemplated by section 13(2)(a). If it were otherwise, and “damage” in section 13(1) included general damage as well as pecuniary loss, there would be no role for section 13(2)(a): compensation for distress could be recovered as part of the compensation for the section 13(1) “damage”. (Of course, if the case is brought within the alternative terms of section 13(2)(b), there is no need for the claimant to prove, as a gateway to the recovery of compensation for distress, a separate head of pecuniary damage within section 13(1): but section 13(2)(b) is not in point in this case: see section 3 for the meaning of “the special purposes”).

214. There was, therefore, some debate as to whether section 13 gives full effect to article 23. Mr Spearman’s submission was to the effect that the answer to that question turns on what is meant by “damage” in article 23. If it means, and means only, pecuniary loss, then section 13(1) does give full effect to it. Section 13(2)(a) then provides that compensation for “distress” can be recovered in addition to such damage; section 13(2)(b) provides that, in its own special circumstances, it can be recovered regardless of whether such damage has also been suffered. As regards these two sub-sections, it is, however, open to the national law to go beyond the Directive, and Mr Spearman’s submission is that, by including its provisions for the recovery of compensation for

general (non-pecuniary) damage in the nature of distress, section 13 has done just that. But the national law has also provided, as it is entitled to, that the precondition of the recovery of compensation for distress under section 13(1)(a) is proof of pecuniary damage. He submitted that it is apparent that the draftsman of section 13 did not interpret “damage” in article 23 as extending beyond pecuniary damage, or at any rate as extending to non-pecuniary damage for distress. He said, correctly, that article 23 does not specify the type or quantum of compensation that it is referring to. He pointed out that the member states have not adopted a uniform practice in giving effect to article 23. I was referred, in English translations, to material showing how certain other member states had given effect to it (Lithuania, for example, apparently enables the recovery of compensation for both pecuniary and non-pecuniary damage, but the position in other member states is less clear).

215. I do not regard that material as shedding any helpful additional light on the width of the concept of “damage” in article 23. Mr Spearman also submitted that there may anyway be no exhaustive definition of “damage” in article 23. He rightly said that “damage” can potentially comprise a wide range of heads, certain of which might be recognised in some member states but not in others. This was a submission to the effect that it was therefore for each member state to legislate as to what heads of damage should be recoverable under its national law for contravention of its law relating to the processing of data.
216. I have not found this an easy point, but I accept that submission. Article 23 is expressed only in general terms and it must be recalled that article 249 (formerly 189) of the EC Treaty leaves it to each member state to determine “the choice of form and methods” by which it gives national effect to a directive. I conclude that section 13 is the form and method that the DPA has adopted with regard to the recovery of compensation for contraventions of its provisions; and that I should and need look no further than section 13 in order to determine the heads of compensation that are in principle recoverable for such contraventions.
217. Mr Spearman further submitted that it follows there is no basis at all for the recovery by Mr Johnson of general compensation for alleged general harm to his reputation. Only pecuniary loss is recoverable under section 13(1) and, if such loss is proved, general compensation for distress may then also be recoverable under section 13(2)(a). But there is no scope in the scheme of section 13 for the recovery of general compensation for general harm to reputation. Compensation for distress may form a material element of the damages recoverable in a defamation claim, at any rate in a claim by an individual (the three basic elements of defamation compensation being for hurt to feelings; for harm to reputation; and by way of vindication – to “nail the lie”; and Mr Spearman submitted the first element is typically the largest element of defamation damages). But the present claim is not a defamation claim and Mr Spearman’s submission was that general compensation for the alleged injury to Mr Johnson’s reputation is simply irrecoverable.
218. In my judgment, Mr Spearman is correct in his submissions as to the limits of the heads of compensation recoverable under section 13. I regard the limits of the potential heads of recovery as clear. For reasons given, I read section 13(1) as entitling a claimant who proves a contravention of the DPA to be compensated for, and only for, any pecuniary damage that he can prove. If he can prove such damage, section 13(2) also entitles him to general compensation for general damage in the

nature of distress that he may have suffered. Nothing in section 13, however, permits the recovery of compensation for general damage in the nature of loss of reputation, or for any other general head of alleged loss. If compensation of that nature is to be claimed, it can only be recovered in a defamation action, which this is not. This is not to say that Mr Johnson would not be entitled to claim (under section 13(1)) for any pecuniary damage which he could prove had flowed from any damage to his reputation. The authorities show that compensation for loss of that nature is recoverable at least in breach of contract claims: see, for example, *Aerial Advertising Co. v. Batchelors Peas Ltd (Manchester)* [1938] 2 All E.R. 788; *Foaminol Laboratories Ltd. British Artid Plastics Ltd.* [1941] 2 All E.R. 393; and *Malik v. Bank of Credit and Commerce International SA* [1998] AC 20 (in particular, at pages 40 to 41, per Lord Nicholls of Birkenhead; and at pages 51 and 52, per Lord Steyn, the observations on page 52 making it clear that it is only financial loss flowing from the injury to reputation which is recoverable as damages in breach of contract). I see no reason to believe that any more restrictive measure of damages applies in claims in tort or (as in the present case) for a breach of statutory duty. Equally, I see no reason to believe or accept that damages for general loss of reputation are recoverable in such claims. Claims for damages under this head must be the subject of a defamation action.

219. In my judgment, therefore, (and had he established liability) Mr Johnson could at most recover (i) compensation for pecuniary loss occasioned by a contravention of the DPA; and (ii) subject to proving any such loss, compensation for any distress caused by such contravention. He has no claim for alleged general harm to his reputation. I now consider the facts relating to his claims for compensation (including, despite this conclusion, his claim for damage to his reputation).

Special damage in the nature of pecuniary loss

220. Mr Johnson's original pleaded case on this was hopeless. It was in paragraph 27(b) of his particulars of claim, consisting of two sub-paragraphs, one of which Mr Howe abandoned. The other is said to be the expense and time Mr Johnson has devoted to "pursuing and investigating" the present claim against the MDU. That was nothing other than a claim to recover his (or part of his) costs of this claim as damages, which he cannot do and Mr Howe did not submit otherwise.
221. In the event, even though no formal amendment to the pleading was sought or made, evidence was led (and Mr Johnson was cross-examined) on the basis that, following the non-renewal of his MDU membership in April 2002, he incurred consequential expense in obtaining alternative membership of the MPS, being expense which constituted pecuniary damage which, if proved, would open the gateway to a claim for compensation for any proved distress under section 13(2)(a). During his closing address, however, Mr Spearman formally also took the point that it was not open to Mr Johnson to make good that case, because he had not pleaded it.
222. Mr Spearman did not press that submission, in my view rightly. Although Mr Johnson's pleading did not formally allege any recoverable special damage, the MDU had (for reasons obscure to me) nevertheless sought particulars of any liquidated damage that he was claiming. They got what they asked for, by particulars supplied by a letter of 27 September 2005. That asserted a total claim of £347, made up of 180 miles by car at £0.40 per mile (£72), accommodation (£120), secretarial time (£100),

telephone calls (£5), and subsistence (£50). The figures were admitted to be estimates and no supporting documentation was provided, Mr Johnson promising to disclose “such documentation as he has as soon as he is able to locate it”, adding that he believed it was with his accountants.

223. Evidence was given by Mr Johnson in relation to this head of claim in his witness statement later made on 10 October 2005, and Mr Spearman cross-examined him on it. In those circumstances, it appeared to me to be unreal for the MDU to fall back on the point that the claim for the (somewhat loosely) particularised special damage had not been formally pleaded in the original particulars of claim, and therefore could not be claimed at all. If that was going to be the MDU’s stance, it should have been made clear by (at the latest) the beginning of the trial. Mr Spearman recognised that, in the circumstances, his pleading point should not be pressed. I put to Mr Howe, and he agreed, that paragraph 27 of the particulars of claim ought to be formally amended to incorporate the case made in the particulars.
224. Turning to the evidence, Mr Johnson dealt with this in paragraph 100 of his witness statement, where he did no more than repeat the points earlier made in the letter of 27 September 2005. In cross-examination, he explained that the travelling, accommodation and subsistence costs all related to a journey to and from Stratford-upon-Avon, which he believed was in February or March 2002, to meet the MPS at its request. He said he stayed either one or two nights at Stratford (he could not recall which) and that his meeting with the MPS representative was at 8.00 am in the morning. He said he had a full-time secretary at the time, and the £100 related to her time spent copying, collating and making telephone calls in respect of the MPS application, although he also claimed an extra £5 separately for telephone calls. He could not recall whether he paid the secretary an extra £100 for this work, but said he had sometimes paid her extra. He produced no documentation supporting the making of any such payment or supporting the £5 for telephone calls. The cost for the car was his estimate of the cost per mile. There was no evidence from the secretary.
225. At the time of his cross-examination, the only supporting documentation that Mr Johnson had produced was a redacted credit card statement showing that on an unidentified day or days in March he had spent the following sums in Stratford: £32.90 at Starbucks; £70 at the Thai Kingdom restaurant; and £233.12 at the Falcon Hotel. He was not, I understand, claiming that the whole of this expenditure was the consequence of his exclusion from the MDU, but was claiming that at least some unspecified part of it was so referable.
226. After the conclusion of the oral evidence, and shortly before Mr Spearman commenced his closing speech, Mr Johnson disclosed further documents. These included a receipt dated 21 March from the Thai Kingdom (£70) and the bill for the Falcon Hotel giving the breakdown of the £233.12. The bill shows that Mr Johnson stayed at the Falcon Hotel for two nights, on 21 and 22 March 2002 (a Thursday and Friday). The entry against each date reads “CONFERENCE, Dinner, Bed & Breakfast Rate”. The charges for the two nights were £82 and £130 respectively. As he also spent £70 on dinner at the Thai Kingdom on 21 March, it may be that the £82 reflects that he dined out, although if so it is odd that it was described as a rate including dinner. The bill also shows a breakfast supplement of £5 and an extra breakfast for £10.50. That last item could be referable to breakfast for the MPS representative, but there was no evidence about that or any other points arising on the bill, particularly

the “CONFERENCE” references. Mr Spearman did not ask for Mr Johnson to be recalled in order to cross-examine him about this bill, and Mr Howe did not suggest he should be recalled. The evidence was by then closed.

227. It is obvious that the further material should have been disclosed earlier, and at the latest by the time that Mr Johnson was cross-examined. On its face, the hotel bill raises unanswered questions as to Mr Johnson’s evidence about the Stratford expense and casts unanswered doubts on its reliability. The main point is that an inference from the bill is that Mr Johnson did not go to Stratford just to meet the MPS representative, but went there for the purposes of attending a two-day (presumably medical) conference. Even if he took the opportunity also to meet the MPS representative, a further possible inference is that all the costs he claims of and in relation to the Stratford adventure would have been incurred anyway and none of it (apart perhaps from the £10.50 cost of what appears to be a second breakfast on 22 March 2002) can be laid at the MDU’s door as consequential upon the non-renewal of his membership.
228. I cannot make a finding as to whether inferences along these lines are justified or not. The MDU is entitled to say that the late production of the hotel bill raises an unanswered question as to whether Mr Johnson was going to Stratford anyway (for a conference), or whether he made a special trip there just to see the MPS representative. The only person in court who could have answered that is Mr Johnson, but because of his late production of the hotel bill he prevented his case from being fairly tested and he provided no explanation on the point. He had no right to return to the witness box at that stage to explain his late disclosures and neither counsel suggested that he should.
229. In these circumstances, I have come to the conclusion that Mr Johnson, with one exception, has failed to prove that any of the expenditure of and associated with the Stratford trip was caused by the non-renewal of his MDU membership. His own, unexplained, documents suggest that either all, or at least the bulk, of that expenditure may not have been so caused and I am unable to find otherwise on the probabilities. I also find that he has not proved that he made any extra payment of £100 to his secretary. He could not recall that he had, and he produced no document to support the suggestion that he might have done.
230. On the other hand, I am prepared to find, on the probabilities, that the £10.50 for the extra breakfast was referable to the meeting with the MPS representative. I have no reason not to accept Mr Johnson’s evidence that such a meeting took place. For reasons given, that is the only head of Stratford expenditure that I am satisfied, on the probabilities, was caused by the non-renewal of the MDU membership. Mr Johnson also has a modest claim that he incurred £5 on making telephone contact with the MPS. He said the calls were probably made on a land-line by either himself or his secretary. He adduced no evidence to show they were made on a land-line for which he pays and did not produce any documents supporting the £5 figure, which he admitted was an estimate. In my judgment, Mr Johnson failed to prove this head of claim as well. I find, therefore, that the only head of special, or pecuniary damage, that Mr Johnson has proved is £10.50 in respect of the MPS representative’s breakfast.

Compensation for distress

231. If Mr Johnson were otherwise entitled to succeed in this claim, it follows that the price of that breakfast represents his gateway to a right to recover compensation for distress under section 13(2)(a): His case in that respect was set out in paragraphs 101 to 103 of his witness statement. He there said that the decision not to renew his membership came as a complete surprise, leaving him feeling devastated, confused, agitated, anxious and depressed. He said he had suffered feelings of professional and personal rejection at a time in his career when he should have been at the pinnacle of his profession. He said this was exacerbated by the subsequent press coverage of these proceedings (in 2003 and 2004, to which I shall come in dealing with his claim for harm to reputation).
232. Mr Johnson said he had suffered a specific anxiety relating to insurance cover and hospital admission rights. He said that:
- “... By convention, on taking up indemnity insurance with one of the few other providers offering such a facility, a report is sent from one insurer to the other. The MPS may not, in my case, have obtained such a report from the MDU. Had they done so, however, it might have prejudiced my obtaining any insurance with the MPS, which would have had a devastating impact on my ability to work.
- It is my understanding that there are no alternative insurers for consultant orthopaedic surgeons. It has been suggested that this is available on the open Lloyds market. This may be true, but the costs for an individual of obtaining insurance in this way would be prohibitive. It would not be economically feasible for an individual to go on to the open market for insurance. It was my understanding that my career would be at an end had MPS not stepped in. This apprehension has caused me considerable distress, and continues to cause me considerable concern. The realization and my recent experiences have a continuing effect on my relationship with my current insurer: should I continue to seek advice from MPS in the same way that I did of MDU?”
233. Mr Spearman submitted, with some force, that the real cause for Mr Johnson’s distress was his realisation that his MDU membership was not for life, whereas of course the MDU had a discretion to terminate his membership at any point. He submitted further that Mr Johnson was probably overstating his concern over the insurance position. The only alternative medical protection society to whom he applied for membership and insurance protection was the MPS. He applied to them on 22 January 2002 and he obtained membership with effect from 1 April 2002. He did not seek insurance cover from any other quarter. Mr Spearman made the point that Mr Johnson’s claimed distress was not so serious that he felt compelled to see a doctor about it. He said that the correct inference is that such distress as Mr Johnson suffered came to an end when he obtained his membership of the MPS.
234. Mr Spearman accepted that Mr Johnson’s insurance cover under the policy provided via MDUSL terminated on 1 April 2002, so that in respect of occurrences before that date giving rise to claims afterwards, he is now covered under the MDU discretionary cover (provided on an “occurrence basis”) rather than under the “claims based” contractual cover of the insurance policy. In that respect his position can, it seems to me, be regarded as having worsened and might perhaps be regarded as a cause of continuing distress. As regards recourse to assistance from the MDU in respect of complaints about incidents prior to 1 April 2002, his position remains the same as it

was when he was an MDU member. In respect of incidents subsequent to 31 March 2002, he must look for such assistance and cover to the MPS. Mr Spearman submitted, however, that as regards his theoretically worsened insurance position, there is no reason to believe that in practice the MDU would not indemnify him against claims arising out of pre-1 April 2002 occurrences. The further inference is that he does not apparently regard indemnity cover under a policy such as that provided via MDUSL as something which it was essential for him to have. He never had such cover during the period prior to July 2000. He does not have such cover under the MPS in relation to occurrences post-dating 31 March 2002. He admitted in cross-examination that he has not sought insurance cover from anyone else and his general assertion that cover from Lloyds would be “prohibitive” is not borne out by any evidence that he has adduced. There is no suggestion that he has made any serious inquiries about obtaining such cover. It can, therefore, be said that the loss of benefit of the MDUSL insurance policy has not apparently caused him much in the way of distress, because he has made no attempt to replace with it an alternative policy.

235. In addition, I have earlier recorded Mr Johnson’s evidence that his (inaccurate) belief was that for all practical purposes the MDU had no discretion not to meet claims against members. During his evidence in cross-examination, he confirmed that he believed that he had continuing cover from the MDU for all claims arising out or pre-31 March 2002 occurrences and that, as from that date, he had like cover from the MPS for all claims arising out of future occurrences. He agreed that there was never a point in the course of his professional career when he did not understand himself to have professional indemnity cover. I have explained that his understanding of the nature of the cover being provided by the MDU and the MPS was strictly inaccurate. But his evidence about this goes to the extent of the distress he may have felt in consequence of what might be regarded as the purely insurance consequences of the decision not to renew his MDU membership.
236. Coming to my conclusion on this part of the claim, I consider that – had Mr Johnson established liability against the MDU – he would be entitled to compensation for distress in addition to pecuniary compensation of £10.50. I also consider, however, that any compensation under that head must be exclusively in respect of any distress associated with the damage for which recovery is in principle recoverable under section 13(1). In particular, having concluded that Mr Johnson is not entitled to recover general compensation under section 13(1) for his claimed loss of professional reputation, I would regard it as inconsistent to permit the recovery under section 13(2)(a) of compensation in respect of the distress claimed to be suffered by reason of Mr Johnson’s perception that the non-renewal of his membership had damaged his reputation.
237. So approaching the matter, I consider that, had he established liability, it would have been open to Mr Johnson to claim that the non-renewal of his MDU membership had wrongfully resulted in the termination of his professional indemnity cover and had (as I find it did) caused him some degree of distress and worry as to whether he would be able to find alternative cover and continue in practice. In the event, he was able to do both those things without any interruption, and I find that his worry in that respect was over by 1 April 2002. Even though it can be said, for reasons given, that the alternative cover he then found was perhaps not as good as that which he had enjoyed whilst with the MDU, I also find that he suffered no continuing distress and do not

accept his assertions otherwise. I do not accept, for example, that he harboured any continuing concern about any lessening in the quality of his professional indemnity cover. If he had, he could have been expected to look for the possibility of obtaining better cover elsewhere, but he did not.

238. That being so, I consider that Mr Johnson would at most have been entitled to compensation for insurance related distress during the period 17 January to 31 March 2002. That is a relatively short period, although I accept that it was one during which he did suffer real anxiety about his immediate professional future. As to the appropriate award of compensation, I consider that £5,000 would amount to fair compensation. Had Mr Johnson established liability, I would have awarded him that sum by way of compensation for distress.

Damage to reputation

239. The main head of compensation for which Mr Johnson claims is for alleged general damage to his reputation. He disclaims any suggestion that he has been financially prejudiced as a result of the termination of his membership of the MDU: there is no evidence that the demand for his services as a surgeon has lessened or that his income has suffered. For reasons given, he has therefore no claim that this head of claim has caused him any financial loss which might be recoverable under section 13(1). But he still advances the general point that the termination of his MDU membership imputed that he is too much of a liability for the MDU to bear, thus implying that he is a risky surgeon; and he claims compensation for what he says is the general harm to his reputation. For reasons given, I have held that this claim is misconceived in principle.
240. As to the facts, Mr Johnson says he is compelled to disclose the severance of his MDU membership to would-be insurers and to employers. As for insurance cover, he has only sought alternative cover from the MPS, which he obtained promptly and easily with effect from 1 April 2002. There is no evidence that the MPS has ever thought any the less of him. The MPS sought information from the MDU as to his claims history, and obtained it, but was not given any assessment by the MDU of what it thought of him.
241. As for employers, and would-be employers, Mr Johnson asserts that he has been compelled to disclose the termination of his MDU membership in four instances. First, in April 2002, to the Bristol Nuffield Hospital Manager and the office of the Chief Executive of the Nuffield Hospital Group. He relied on paragraph 3.6 of the Nuffield Hospitals Practice Privileges Policy as requiring him to make that disclosure. Paragraph 3.6 imposes a requirement to “notify the General Manager of any health matters likely to affect the ability to practice or the health and safety of patients and staff.” I do not agree with Mr Johnson that the non-renewal of his MDU membership was a “health matter” within that paragraph or, therefore, that it required him to make the disclosure he did. It seems to me, though, that paragraph 3.10, upon which he did not rely, probably would have required him to make the disclosure; if so, that would have been enough to justify what he claims was a compulsory disclosure.
242. I will not, however, consider that point further since I cannot see the relevance of that particular Policy, which was a September 2004 one, whereas Mr Johnson is referring to a disclosure he felt compelled to make in 2002, more than two years before it came

into force. The then applicable Policy was an October 2001 Practice Privileges Handbook, with (as it seems to me) the relevant paragraph being 2.2, which provides:

“Practice privileges will in all cases be subject to periodic review (see section 3 below) and be subject to the practitioner providing documentary evidence to verify that, amongst other things, they are appropriately qualified, have membership with a medical indemnity organisation, and are registered with the General Medical Council.”

243. Although reliance was not placed on that paragraph, I consider that a responsible practitioner would reasonably and properly conclude from it that, once his cover had been switched from the MDU to the MPS in the circumstances in which Mr Johnson’s came to be so switched, he had a duty to notify the Hospital Manager of that fact and produce evidence of his MPS membership; and that if at any point he was not covered by any such membership, he would have a duty to disclose that too. In my judgment, even though Mr Johnson may not have appreciated why, he was right to make the disclosure he did to the Nuffield; or it at least cannot be said that he was wrong to do so. It did not, however, apparently have any obvious impact on the Nuffield’s view of him as a surgeon: he was kept on there with all his admission privileges. There is no evidence that the Nuffield regards him as a lesser surgeon than it did before. I record that although Mr Johnson had felt obliged to inform the Nuffield about his problem with the MDU, he did not tell the Nuffield about his suspension from the BUPA Hospital, Bristol, which has continued to this day, which he admitted was damaging to his reputation. This was despite the fact that paragraph 31 of GMC guidelines on good medical practice required the making of such a disclosure. He did, however, explain in cross-examination that the Nuffield had learnt of it from other sources.
244. Mr Johnson further asserts that he was also compelled to make disclosures of what had happened when making various applications in 2004 for: (i) positions of Professor of Orthopaedic Surgery at the Royal National Orthopaedic Hospital, Stanmore; (ii) the position of Professor at The Hammersmith Hospital and Imperial College, London; and (iii) a consultant position at The Hammersmith. He disclosed no documentation relating to those applications, or any material showing that he was required to inform those hospitals of the non-renewal of his MDU membership in early 2002. Absent such evidence, I am not prepared to find that he was obliged to make the disclosure to any of these hospitals that he claims he did. Nor is there any evidence that he was turned down for any of these jobs because of his MDU problem: he did not seek any feedback as to the reason why. Although Mr Johnson did not refer to it, he also made an application in February 2003 for a position as a consultant orthopaedic surgeon at the Royal National Orthopaedic Hospital, Stanmore. I have a copy of his letter of application, but whether, as part of the application package, he had to disclose the non-renewal of his MDU membership does not appear and he did not say.
245. A further point Mr Johnson makes is that he was dissuaded, by reason of the need to make such disclosures, from applying for admission rights at the Wellington Hospital, London and the Cromwell Hospital, London. He says that the application form required him to make the disclosure. With regard to the Wellington Hospital, Mr Johnson produced the application form he would have had to complete. I agree that it would have required disclosure of the non-renewal of his MDU membership: Question 2 in section 5, the professional liability insurance section, asks the applicant “Have you ever been denied professional liability insurance, or has your coverage

ever been cancelled ... ? If yes, please provide details on a separate sheet.” But I do not see where this takes Mr Johnson. Since he did not apply to the Wellington, he did not have to (nor did he) make any disclosure to them of the severance of his MDU membership. The Wellington cannot, therefore, have thought any the less of him because of that fact.

246. The other limb of this part of Mr Johnson’s case is the damage to his reputation which he says has flowed from the publicity, in particular press reports, which this claim has generated. On 5 April 2003, there was a press report in the Bristol Evening Post following its commencement. The article explained its essence. It described Mr Johnson as “considered to be an international authority on orthopaedic surgery and a specialist in reconstructive knee surgery”. It explained he had been with the MDU for over 25 years and that his membership was terminated following three complaints, none of which was upheld, and a complaint about “computer security”. It said he had asserted that the MDU used other “false” information in terminating his contract and that its action was a “slur on his professional abilities.” The article is, in my view, a fair summary of Mr Johnson’s case.
247. The next press article is dated 18 February 2004, a report of the then part heard section 7 proceedings before Laddie J. It described Mr Johnson as a “Top Bristol surgeon”, made much the same points as had the earlier article as to the nature of his complaint and referred to an alleged difficulty he had had in finding alternative insurance cover. It quoted Mr Roughton (his counsel) as saying that:

“Nobody can say that Mr Johnson is other than a competent and able surgeon. Further, there is no suggestion anywhere that he has any stain on his character. Mr Johnson believes that this expulsion took place as a result of the fact that unfair and improper proceedings were adopted by the MDU in assessing his future membership prospects, which, in turn, involved the unfair and improper processing of data about him.”

It continued by explaining that the purpose of the application was to obtain the disclosure of documents under the DPA which would tell Mr Johnson more about the MDU’s decision. It recorded Miss Reid’s submission for the MDU (ultimately upheld by Laddie J) that Mr Johnson had already been given all the material he was entitled to.

248. The next article summarised Mr Johnson’s claim in much the same way and recorded that Laddie J had reserved judgment. Then, on 21 February 2004, the press reported that the “Top Bristol surgeon” had failed to achieve the disclosure he had sought. It described the case (inaccurately, in my view) as a “test case” (it managed to abstain from describing it as a “landmark” one) and again summarised its nature, making clear that Mr Johnson intended to sue the MDU for damages for distress and damage to reputation (the writer appeared not to understand that he had already so sued them: that is his claim in these proceedings, in which Laddie J was hearing a preliminary issue). The article re-quoted the first two (above-quoted) sentences of Mr Roughton’s observations. It reported that Laddie J had rejected Mr Roughton’s submission to the effect that there had been a conspiracy against Mr Johnson; and that Laddie J said that the MDU was only required to deal with Mr Johnson’s disclosure request according to the circumstances prevailing at the time.

249. Mr Spearman's submission was that those were perfectly fair reports of the nature of Mr Johnson's claim, making clear that he believed he had a grievance, and that there was nothing defamatory about any of them. The reasonable reader would not, as a result, think any the less of him. He might perhaps wonder to himself whether there was indeed something serious underlying the alleged "expulsion" but the articles would leave him no wiser one way or the other on that. He emphasised that in the law of libel, certainly where justification is raised, it is a clear principle that there is a single meaning to the alleged libel, which has to be decided by the jury or the judge. He said that, were I to be tempted down the route of treating these articles as allegedly defamatory, I would first have to decide what the ordinary, fair-minded reader - who is, among other things, not avid for scandals but who can read between the lines - would get out of them. He said that the essence of what such a reader would derive from them was no more than that Mr Johnson apparently had a legitimate complaint which he was trying to have redressed, and that there was nothing defamatory in them. He submitted further that, if they were in any sense defamatory, they were generated as a direct result of Mr Johnson's decision to bring this claim and that their consequences cannot fairly be laid at the MDU's door.
250. A further piece of evidence upon which Mr Johnson relied in this context – which is related to the press articles – and which is the only evidence he produced that his problem with the MDU had actually lowered his estimation in the eyes of third parties related to the expressed views of Mr A, a consultant orthopaedic surgeon who is one of Mr Johnson's competitors, whom Mr Johnson said in cross-examination had, to some degree, been critical of him in the past (I have referred to him in relation to file No. 9710810). Following the 5 April 2003 press article, Mr A appears to have jumped to conclusions about Mr Johnson, which were alluded to by Dr C (a consultant anaesthetist) in a letter to Mr Johnson of 14 April 2003 listing issues for a forthcoming practice meeting. The letter has been materially redacted but part reads:
- “You should be aware that [Mr A] asked me last Friday if your professional cover had been withdrawn by the MDU, as that was the interpretation that he had put on the article. He also stated that he had communicated with the MDU previously urging them to restrict the membership of practitioners that have drained the Union's resources. The implication seemed clear that he considered you would be in that category. [Redacted part] The article has clearly had the capacity to mislead colleagues and denigrate your professional standing.”
251. Even before receiving the letter of 14 April 2003, Mr Johnson had heard that Mr A had uttered remarks to staff to the effect that, as Mr Johnson summarised in his own letter to Mr A of 11 April 2003, “it was about time that the Medical Indemnity Company [sic] started to get rid of clinicians who cost them a lot of money in defending claims.” Mr Johnson wrote that Mr A's comments “may be a reasonable interpretation” of the press article, and that his claim was in part that the non-renewal of his “Medical Indemnity Cover” had damaged his reputation. He went on to point out that no claim had ever been made against him. In view of that, he said it was “interesting to consider as to why the MDU felt they had to take this action. It appears to be connected with some information they may have been provided with by BUPA but as yet refuse to disclose the data on my file or the data upon which they made their decision, hence the claim.”

252. Mr Spearman submitted that Mr A's reaction to the press article showed that he was a less than fair-minded reader of it. He had inferred from it a hostile message from the MDU about Mr Johnson. He pointed out that other evidence showed that Mr A and Mr Johnson were anyway not best friends.
253. The final piece of evidence upon which Mr Johnson relied in this context is that he said that some GPs and patients had asked him about his indemnity status. In cross-examination, he said that people had asked what his situation with the MDU was and had said to him, jokingly he said, "Well, you must be an expensive doctor."
254. I was given little guidance from counsel as to the quantum of compensation for harm to reputation that I might award were I satisfied that Mr Johnson had made out his case for such compensation. Mr Spearman said that I should be considering how widespread the alleged defamation was, how serious it is, and that I should bear in mind that the ceiling for general damages for individuals in defamation claims is around £200,000. The MDU has published no defamatory statement about Mr Johnson and, apart from the evidence as to Mr A's reaction to the press articles, there is no reliable evidence that anyone has thought any the less of Mr Johnson as a result of the non-renewal of his MDU membership. Whilst Mr A appears to have inferred the worst about Mr Johnson from the press articles, I am not satisfied that any of the articles would suggest to the fair-minded reader that Mr Johnson had so conducted (or misconducted) himself as to deserve the reputation of being a surgeon who represented a risk to patients. The fair-minded reader would not know what the true position was, save that Mr Johnson was claiming (perhaps with complete justification) that he had been unfairly wronged by the MDU and was complaining about it. Overall, the evidence does not satisfy me that the non-renewal of Mr Johnson's MDU membership has caused anything but the smallest of dents to his reputation.
255. In all the circumstances, if (contrary to my earlier conclusions) it were open to Mr Johnson to claim general compensation for damage to his reputation as a result of the termination of his MDU membership, I would conclude that he has adduced only minimal evidence of any such damage. I find that Mr A has drawn some adverse inferences about Mr Johnson from the incident, although it is apparent that he and Mr Johnson were anyway never best friends. Mr A apart, there is in my view no satisfactory evidence that anyone else has thought less of him as a result of the termination of his MDU membership. Were he entitled to recover compensation for it, I would award him £1,000.

Result

256. I dismiss Mr Johnson's (abandoned) claim under section 10 of the DPA. I dismiss his claim for compensation under section 13. I dismiss his claim that the MDU committed a breach of the fifth data protection principle. I will hear counsel as to the form of the order I should make and as to what is to happen to Mr Johnson's claim under section 14 (the Schedule II claim).