Case No: HQ10X00777
Appeal No: QB/2010/0728

Neutral Citation Number: [2011] EWHC 825 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 April 2011

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

DR KATHARINE WHITE **Appellant**

- and -

(1) SOUTHAMPTON UNIVERSITY HOSPITALS NHS TRUST
(2) PROFESSOR WILLIAM ROCHE **Respondents**

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- -

The Appellant in person
Jane Phillips (instructed by **Beachcroft LLP**) for the **Respondents**

Hearing date: 21 March 2011

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Judgment

Mr Justice Eady :

1. In these proceedings Dr Katharine White sues Southampton University Hospitals NHS Trust and Professor William Roche for libel. The claim arises from the publication of a letter by the Defendants to the Fitness to Practise Directorate of the General Medical Council dated 3 March 2009. She also wishes to rely upon a letter dated 23 February 2009 from Professor Roche to Dr Juanita Pascual, who is the Medical Director of the Lymington New Forest Hospital. Although this was referred to in her claim form, it was not actually relied upon in the original particulars of claim. It has subsequently emerged that Dr White would wish to seek permission to amend that pleading in order to rely on the earlier letter as an additional cause of action. I shall refer to the two documents in question as "the GMC letter" and "the Lymington reference" respectively.

2. On 21 March 2011 I heard an appeal from an order of Master Roberts dated 12 November 2010, whereby he directed that Dr White's claim be struck out and summary judgment entered against her. He also ordered, pursuant to CPR 31.22(2), that she be prohibited from using the Lymington reference in these proceedings. This was on the basis that she had originally obtained it by way of disclosure in the course of employment tribunal proceedings which she had brought against the First Defendant.

3. The Master's reasoning was set out in a careful reserved judgment dated 16 October 2010. Permission to appeal was refused by the Master and also, on paper, by Edwards-Stuart J. Permission was given at a renewed oral application on 25 January 2011 by Supperstone J.

4. In accordance with CPR 52.11, the appeal is by way of review. It is not a rehearing. Ms Phillips, appearing for the Defendants, has reminded me of the Court of Appeal decision in *Tanfern Ltd v Cameron Macdonald* [2000] 1 WLR 1311 at [30], where it was made clear shortly after the CPR came into effect that such an appeal should only be allowed where the decision of the lower court was "wrong" or where it was unjust because of a serious procedural or other irregularity in the proceedings. The issues which arise before me are whether the Master was wrong, as a matter of law, in ruling that the GMC letter was protected by absolute privilege and/or immunity from suit and, secondly, whether he erred in the exercise of his discretion in refusing her permission to rely on the Lymington reference. I shall address these points in turn.

5. The Master ruled that the GMC letter was the subject of absolute privilege and referred *inter alia* to *Gatley on Libel and Slander* (11th edn) at para 13.23:

> "The Disciplinary Committee constituted under the Solicitors Act is a judicial tribunal within the meaning of the rule, as is the Office for the Supervision of Solicitors, and the Fitness to Practise Panel (formerly the Professional Conduct Committee) of the General Medical Council, and accordingly an absolute privilege attaches to statements made before such bodies when holding an inquiry as to the professional conduct of those over whom they have jurisdiction, and also to statements contained in any petition, information or letter of complaint by which

> such bodies are set in motion, or in any statutory declaration made in support or in answer."

The learned editors cite in support of this passage well known cases such as *Lilley v Roney* (1892) 61 LJQB 727, *Lincoln v Daniels* [1962] QB 237, CA and *Hung v Gardiner* [2003] BCCA 257; 227 DLR (4th) 282, which was a decision of the Court of Appeal in British Columbia. In the first supplement they also refer to a recent decision of Sir Charles Gray in *Vaidya v GMC* [2010] EWHC 984 (QB). In that case, the judge was also concerned with a claim brought upon a letter to the GMC. He concluded:

> "It appears to me to be clear beyond argument that this letter is protected by absolute privilege since it was written to an official of an investigatory body (the GMC) in order to complain about the conduct of Dr Vaidya."

On 23 July last year, not only was Dr Vaidya refused permission to appeal, but it was also held by Sir Richard Buxton that his application was totally without merit.

6. In reaching his conclusion, Sir Charles referred not only to passages in *Gatley* but also to *Duncan & Neill on Defamation* (3rd edn) at paras 15.29–15.33. He further considered the recent decision of the Court of Appeal in *Westcott v Westcott* [2009] QB 407, in which the public policy underlying this form of absolute privilege or immunity from suit was generally analysed. That case concerned a complaint of criminal conduct to the police, rather than a document initiating an investigation by a professional body with quasi-judicial powers, but as Master Roberts expressly found in his judgment in this case, the court's reasoning would apply with equal force.

7. The public policy objective is to enable people to speak freely, without inhibition and without fear of being sued, whether making a complaint of criminal conduct to the police or drawing material to the attention of a professional body such as the GMC or the Law Society for the purpose of investigation. It is important that the person in question must be able to know at the time he makes the relevant communication whether or not the immunity will attach; that is to say, the policy would be undermined if, in order to obtain the benefit of the immunity, he was obliged to undergo the stress and expense of resisting a plea of malice: see the remarks of Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 214.

8. It has long been recognised that one of the consequences of according immunity to such communications is that sometimes it can operate to protect a malicious informant. As was observed by Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 233:

> " … the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as of one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public interest lies in generally respecting it."

9. In this case, Professor Roche in his witness statement of 9 April 2010 explained something of the background and why he thought it necessary to communicate with the GMC through the letter complained of.

10. He is Professor of Pathology at the University of Southampton and between August 2006 and March 2009 had been seconded from his employment to take up the role of Medical Director with the First Defendant. He drew attention to the Trust's *Policy for the Handling of Concerns and Disciplinary Procedures Relating to the Conduct and Performance of Doctors and Dentists* (the "Policy"). It was based on a national policy entitled *Maintaining High Professional Standards in the Modern NHS*. He considered himself to be under a duty to inform other organisations, in accordance with the Policy, wherever a doctor had been excluded from work and to provide a summary of the reasons for the exclusion in circumstances where the doctor represented a risk to patients. He continued:

> "As Medical Director, I had a particular duty to report a doctor to the GMC if I had serious concerns that a doctor's conduct, judgment or ability was a potential threat to patient safety. This duty arose as a result of the Policy, my role as Medical Director within the Trust and my professional duty as a doctor under the GMC's principles as set out below.
>
> The GMC registers doctors to practise medicine in the United Kingdom and is the independent regulator for doctors. The GMC's purpose is to ensure proper standards in the practice of medicine to protect the health and safety of the public. Its core guidance is set out in *Good Medical Practice ('GMP')*, which explains the principles and values on which good medical practice is founded. All doctors are required to comply with the standards in *GMP*.
>
> *GMP* contains clear guidance about a doctor's duty to protect patients from any risk of harm posed by another doctor's conduct performance or health …
>
> *GMP* is supplemented by a guide entitled *A Health Professional's Guide – How to Refer a Doctor to the GMC* (pages 30 to 32), which explains:
>
> > *Doctors have a duty to protect patients. If you believe that a doctor's behaviour poses a risk to patients, you should tell us as soon as possible.*
> >
> > *If your concerns are less serious, you should follow your employer's procedures, or tell an appropriate person locally – for example, the medical director, chief executive or an officer of the local medical committee.*
> >
> > *It is, of course, open to them to refer the matter on to us, if their enquiries identify evidence that the doctor's fitness to practise is impaired* (page 31).

> Any concerns about a doctor's fitness to practise should be reported to the GMC's Fitness to Practise Directorate. The GMC assesses all reported concerns to identify whether they are sufficiently serious to merit a GMC investigation, or whether a local investigation by the doctor's employer would be more appropriate in the first instance. A GMC investigation can include obtaining further documentary evidence, witness statements, expert reports or assessing a doctor's performance or health."

11. It was against this background that Professor Roche sent his letter to the GMC on 3 March 2009 in these terms:

> "Dr White is an F[oundation] Y[ear] 2 Doctor on the Wessex Deanery rotation, currently employed at Southampton University Hospitals NHS Trust.
>
> I am writing to you as Medical Director of Southampton University Hospitals NHS Trust to bring to your attention concerns about the probity and conduct of Dr Katharine White. Dr White has been excluded from clinical practice in the Trust from the 11th day of November 2008. The National Clinical Assessment Service have been informed of this exclusion which is currently being maintained while there are further investigations into Dr White's conduct relating to her non-engagement with the Occupational Health Service.
>
> **Issue Number 1 – Attempt to sell Trust property namely car parking exit ticket**
>
> The Trust was informed by the NHS Counterfraud Agency that Trust property had been advertised on an internet site. It is acknowledged by the Trust that the initial investigation of this matter was not conducted appropriately due to the application of inappropriate HR procedure. Dr White has received an apology for this. A subsequent investigation was conducted in accordance with local procedures, which reflect 'Maintaining High Professional Standards in the Modern NHS'. A copy of the Case Manager's report is enclosed (Document 1). This matter was considered at a Disciplinary Hearing on the 14th day of January 2009 and Dr White was issued with a verbal warning.
>
> **Issue Number 2 – Allegation against Foundation Year Tutor**
>
> As part of the support of Dr White during investigation into the issue related to the car parking ticket above, she was asked to see the Foundation Year 2 Tutor. Dr White subsequently made an allegation that the tutor touched her inappropriately and behaved in 'an immoral, improper and corrupt manner'.

These allegations were taken very seriously by the Trust and were investigated by a team independent to all other investigations related to Dr White. The conclusion of that investigation was that the allegations were without foundation. In view of this, the Trust conducted a further investigation into Dr White's conduct and probity (Document 2). Dr White attended a Disciplinary Hearing on the 26th day of February 2009 where it was found that she had made a false and malicious allegation against the Foundation Year 2 Tutor. A final written warning was issued on the basis of this and of the next item below on the 26th day of February 2009.

Issue Number 3 – Breach of exclusion order

While subject to an immediate temporary exclusion notice from clinical areas in the Trust, Dr Katharine White entered a clinical area on 24th day of November 2008. She attended a ward round and then reviewed an individual patient prior to being requested to leave the premises. This was investigated and a report is enclosed (Document 3). This contributed to the original written warning issued to Dr White on the 26th day of February 2009.

Issue Number 4 – Allegations against the former Acting Director of Human Resources

Dr White shared the enclosed letter addressed to the General Medical Council with me and with the Chief Executive of the Trust (Document 4). This includes an allegation against the former Acting Director of Human Resources, identified through his wife, Mr Denis Gibson. It was pointed out to Dr White that Mr Gibson had nothing to do with her as he left the Trust in September 2008. An email correspondence between Mr Gibson and Dr White is enclosed (Document 5). Email correspondence between myself and Dr White, confirming that I counselled her to be sure that anything that she wrote to the General Medical Council was truthful is enclosed (Document 6). Despite this, Dr White has written to the current Director of Human Resources identifying some influence on Mr Gibson in her department (Document 7). I regard these allegations as being somewhat bizarre and I have not dignified them with a formal investigation. They have however, contributed to my concerns that Dr White participate in a proper Occupational Health assessment.

Issue Number 5 – Health Issues

I have referred Dr White to Occupational Health and despite her initial resistance, she has finally met with the Occupational Health Consultant, Dr Smedley. However, Dr Smedley is of the opinion that she needs the assistance of a Specialist

> Assessment in order to complete a proper Occupational Health assessment of Dr White. Dr White has not participated in this process despite being made aware on several occasions that I require her to participate in a proper Occupational Health assessment (Document 8 and Document 9). In view of this, I am unable to give you any view from our Occupational Health Department on Dr White's health. The issue of non-engagement with the Occupational Health assessment is currently being dealt with as a disciplinary matter and there is an ongoing investigation.
>
> In summary, I have grave concerns about Dr White's fitness to practise arising from her attitude, probity, behaviour and, potentially, health. The Wessex Postgraduate Deanery has been informed and updated on these issues.
>
> I am not aware of any other complaints concerning Dr White and there are no audit or other findings related to her practice. There are no prescribing data to indicate poor practice.
>
> Should you have any queries, please do not hesitate to contact me.
>
> Yours sincerely
>
> (signed)
>
> Professor William R Roche
>
> Medical Director"

12. It is clear that the letter contains nothing extraneous; that is to say, anything which is not germane to the legitimate purposes for which the law, for reasons of public policy, affords the protection of privilege.

13. Dr White argues that there is no reason why the privilege should be absolute; that there is no public policy that requires immunity from suit, as opposed to qualified privilege that would be defeasible by malice. She was unable to cite any authority directly in point. That is not surprising, since the immunity has been long recognised in relation to proceedings before tribunals recognised by law: see e.g. *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263 and *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 446-55.

14. Usually nowadays tribunals to which such immunity attaches will be statutory, as is indeed the case with the GMC, but by no means always so. In *Lincoln v Daniels*, cited above, at p.254, Devlin LJ commented that there was nothing to show that the absolute privilege accorded to the court of inquiry in the *Dawkins* case depended entirely on the fact that the articles or regulations under which it was constituted had statutory force. As he pointed out, such privilege attaches to the regular courts of justice going back to mediaeval times, which were originally set up, not by Act of Parliament at all, but under the royal prerogative. What matters is simply that the

court or tribunal in question is recognised by law – unlike, for example, domestic tribunals which derive their authority purely from agreement or consent.

15. The rationale for the distinction between domestic tribunals and those recognised by law was, again, explained in *Lincoln v Daniels*, at p.255, by Devlin LJ:

> "A private institution, such as a club, may set up a body to determine questions of admission and expulsion and it may be composed entirely of lawyers and may follow with exactitude the procedure of a court of law. But absolute privilege is granted only as a matter of public policy and must therefore on principle be confined to matters in which the public is interested and where therefore it is of importance that the whole truth should be elicited even at the risk that an injury inflicted maliciously may go unredressed. The public is not interested in the membership of a private club. The significance of … the … requirement … that the Court or tribunal should be recognised by law ... is that it shows that the public is interested in the matter to be determined by the court. Parliament would not, for example, regulate the disciplining of solicitors if there were not a public interest in the sort of men who practise as solicitors. The same consideration applies to the Bar."

16. Exactly the same reasoning applies to the medical profession. In a decision of the Employment Appeal Tribunal dated 1 April 2008, *Ahari v Birmingham Heartlands and Solihull Hospitals NHS Trust* (referred to in this context by the learned editors of *Gatley*), the court addressed the question of whether the Fitness to Practise Panel ("FPP") was to be classified as a quasi-judicial body according to the criteria identified by Lord Diplock in *Trapp v Mackie* [1979] 1 WLR 377. First, of course, it is recognised by law. Its powers and procedures are governed by the Medical Act 1983 and by the General Medical Council (Fitness to Practise) Rules (S.I. 2004/2608). The court also concluded that the nature of the issue (i.e. whether or not the doctor concerned was fit to practise) was akin to a civil issue between adversarial parties before the courts; that its rules embodied a procedure similar to that applying in a court of law; and, finally, that its findings will generally provide a binding determination of the parties' rights. Accordingly, all the *Trapp v Mackie* criteria were fulfilled. It was thus held to be a quasi-judicial body. The court (His Honour Judge Peter Clark) went on to hold "without hesitation" that its proceedings were also protected by absolute immunity.

17. Thus it is no answer, as Dr White suggested, that there is no express reference in any of the relevant medical legislation to an absolute privilege or immunity attaching to the Fitness to Practise Directorate or to its predecessor the Professional Conduct Committee. There would be no need to make express reference, since the legislature will over the years have been fully aware that the common law has long recognised such immunity for reasons of policy.

18. Dr White has sought to overcome these formidable difficulties by relying, both on appeal and before the Master, on the case of *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435.

19. I found this argument difficult to follow. At the risk of over-simplification, the case may be said to stand for the proposition that the "core immunity" attaching to a police officer's role as a witness in court proceedings does not extend to the distinct activity of falsifying the whole or part of the evidence before proceedings have commenced. That is not a surprising conclusion, since the public policy justifying the immunity is not thereby engaged. As Lord Hutton explained at p.469F-H:

> "There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect. In practice the distinction may appear to be a fine one as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made. But I consider that the distinction is a real one and that the first example comes within the proper ambit of the immunity and the other does not."

20. Here the claim is based on what is alleged to be a libel contained in a letter covered by the immunity. There is nothing in their Lordships' decision in *Darker* which detracts from that fundamental principle. Just as evidence by a police officer in the course of legal proceedings will be privileged, so too the initiating letter sent to the GMC by Professor Roche will attract the immunity and, correspondingly, the defence of absolute privilege. What was recognised in *Darker*, however, was that a person sued in tort in respect of matters extraneous to court proceedings, such as a conspiracy to pervert the course of justice or misfeasance in public office, would not, for any good policy reason, enjoy protection by way of immunity. That has nothing to do with the facts of this case. There is no claim against Professor Roche for conspiracy, or any other tort than libel, and I have not the slightest reason to suppose that there could be any basis for such a claim.

21. For all these reasons, I see no possible way in which Dr White could overcome Professor Roche's immunity from suit in respect of the GMC letter. He is bound to succeed and is entitled to summary judgment on the issue.

22. I turn now to the Lymington reference of 23 February 2009 which, it is accepted, came into Dr White's possession through the process of disclosure in her employment tribunal proceedings. She argues, on the other hand, that it might in other circumstances have come into her possession by a different route. Whether that is so or not, the fact remains that the issue falls to be considered in the light of CPR 31.22:

> " (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where–

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

… "

23. Dr White says that passing reference was made to the existence of the Lymington reference in the course of a hearing to which there was public access: I will assume that to be the case. Even in such circumstances, however, it is clear that the court has a discretion to restrict or prohibit the use of such a document. Since the Master was exercising a discretion in this context, it is pertinent to have in mind the well known principle enunciated by Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, where he made the following observations in relation to the appropriate limits of the appellate jurisdiction:

> " … the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might have or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

It would thus not be appropriate for me to interfere with the Master's exercise of discretion, for example, merely on the basis that I might have arrived at a different solution if I were addressing the matter afresh. (Dr White submitted that *G v G* is distinguishable because it was a decision in the family law context. That is, of course, neither here nor there since Lord Fraser was expounding a principle applicable to the function of appellate courts in general.)

24. It is clear that where a judge is called upon to apply the provisions of CPR 31.22(2) the jurisdiction will need to be exercised against the background of competing rights under the European Convention of Human Rights and Fundamental Freedoms. In such circumstances, it is now well established that it is for the court to carry out a balancing exercise in the light of an "intense focus" on the facts of the particular case: see e.g. *Re S (A Child)* [2005] 1 AC 593. There are thus no hard and fast rules and one must be cautious as to the extent to which it is appropriate to look for guidance in earlier decided cases which turned, inevitably, on different facts. Nonetheless, Ms Phillips appearing on the Defendants' behalf made reference to the case of *McBride v The Body Shop International Plc* [2007] EWHC 1658 (QB) in order to illustrate some of the factors which a court would be likely to take into account in this context.

25. Following the decision of the House of Lords in *Harman v Secretary of State for the Home Department* [1983] AC 280, the European Court of Human Rights concluded that the domestic rules then operative in relation to the implied undertaking in the context of discovery were not consistent with Article 10 of the Convention. Our law was therefore changed so that the implied undertaking was no longer to apply in circumstances where a document had been referred to in open court *unless* the court otherwise ordered for "special reasons" (on the application of a party or of the person to whom the document belonged): see the former RSC Ord 24, r14A. It is no longer necessary to find "special reasons", however, as the relevant wording of CPR 31.22, set out above, makes clear.

26. When exercising its discretion, or carrying out the balancing exercise between competing Convention rights, the court will naturally wish to have regard *inter alia* to the public policy considerations which underlay the traditional implied undertaking. It is thus necessary to bear in mind that the compulsory disclosure of documents in accordance with CPR Part 31 will almost always involve a *prima facie* infringement of privacy and, alongside this consideration, that public policy requires that full disclosure of relevant documents should be encouraged. In that context, it is clearly appropriate to take account of any threat of collateral litigation against a party who discloses any particular document or class of documents.

27. It is recognised in *Re S (A Child)* and in many subsequent cases that the court, when carrying out such a balancing exercise with regard to Convention rights, should not accord automatic priority to any one such right over another. Ms Phillips relied upon a passage in the *McBride* case in which it was said:

> "It is a question of balancing the competing interests, both private and public, without the inhibition of any presumption either way."

An important factor here, as in *McBride* itself, is that the publication in question (the Lymington reference) was not only very limited in scope but, more importantly, was plainly the subject of qualified privilege. In these circumstances, were she permitted to sue upon it, Dr White would have the burden of producing evidence that was not merely equivocal but which was more consistent with the presence of malice than with its absence: see e.g. *Somerville v Hawkins* (1851) 10 CB 583, 590; *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [32]-[33]; and *Telnikoff v Matusevich* [1991] 1 QB 102, 120.

28. It is well recognised that it would not be sufficient for a claimant to make a bare assertion of malice in order for her claim to survive. She must set out a case which raises a probability (rather than a mere possibility) of malice. There must be something from which a jury could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant: see e.g. *Duncan & Neill on Defamation* (3rd edn) at para 18.21. Here, there is not the slightest evidence of malice on Professor Roche's part – in particular, there is no prospect of showing that he knew that anything he wrote was untrue.

29. The Lymington reference, addressed to Dr Juanita Pascual, who was the Medical Director of the Lymington New Forest Hospital, contained the following information:

> "Dr White has been excluded from clinical areas in this Trust since 11th November 2009. There are ongoing procedures related to concerns about Dr White's conduct and probity. Dr White has been free to participate in educational activities during this time but she has not been allowed to conduct clinical activity.
>
> Prior to these issues, there were no concerns expressed to me that Dr White's clinical abilities (*sic*).
>
> I am unable to comment on Dr White's health as Occupational Health have not been able to complete an assessment."

It is significant that the only sentence of which Dr White wishes to complain in this reference is the last. It is difficult to see how its content could be demonstrated to be untrue or how Professor Roche could be shown, in this respect, to have published something which he knew to be false.

30. The Master took these factors into consideration in the exercise of his discretion and observed, quite correctly, that findings of malice are very rare.

31. Furthermore, it is necessary always to bear in mind that the ultimate purpose of any libel litigation is for the claimant to achieve vindication in respect of his or her character. Since she is not complaining of any of the other passages in the reference, it is not easy to see how a libel action in respect of this letter could ever achieve anything by way of vindication. Accordingly, it seems to me, as in effect it also did to the Master, that any rights on the part of Dr White under Article 6 or Article 8 of the Convention are outweighed by the rights of the Defendants under Article 10 and, specifically, their right not to be vexed with unmeritorious and futile litigation over a confidential document disclosed under compulsion of law.

32. Dr White seeks to sidestep the discretionary balancing exercise contemplated by CPR 31.22 by suggesting that she could have obtained the Lymington reference by other means and, in particular, by making a request under the Data Protection Act 1998 for it to be disclosed by the Hampshire Community Healthcare Trust. This argument may to an extent be flawed by reason of the fact that personal data are exempt from subject access rights if they consist of a reference given in confidence: see e.g. s.7(4) and (5) of the Act and Schedule 7, paragraph 1. Leaving that aside, however, the fact remains that the Lymington reference *was* obtained through the process of disclosure and the provisions of CPR 31.22 were therefore engaged.

33. I cannot possibly conclude in these circumstances that the Master was "wrong" in the exercise of his discretion or that he reached a conclusion which was outside the range of reasonable options open to him. Indeed I consider his judgment to be entirely correct.

34. I have come to the conclusion that this appeal fails in both respects; that is to say, the letter to the GMC dated 3 March 2009 was the subject of immunity and/or absolute privilege. Accordingly, the particulars of claim should be struck out. Moreover, since the Master's exercise of discretion was entirely appropriate, in respect of the Lymington reference, Dr White should not have permission to amend her particulars

of claim to include it as a separate cause of action. The Defendants are thus entitled to summary judgment and the appeal is dismissed.