IN THE EMPLOYMENT TRIBUNAL **CASE NO: 2300819/2019**

(LONDON SOUTH)

B E T W E E N:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

WITNESS STATEMENT OF BEN MICHAEL COOPER QC

I, **Ben Michael Cooper QC**, of Old Square Chambers, 10-11 Bedford Row, London WC1R 4BU WILL SAY AS FOLLOWS:

Introduction

1. I am a barrister at Old Square Chambers. I was called to the bar in 2000 and appointed as Queen's Counsel in 2017. My principal area of practice is employment law.

2. I was instructed by Capsticks Solicitors LLP ("Capsticks"), with Nadia Motraghi as my junior, to represent Lewisham and Greenwich NHS Trust ("the Trust"), which was the First Respondent to Employment Tribunal proceedings brought by Dr Day (claim numbers 2302023/2014 & 2301466/2015) ("the Claims"). Health Education England ("HEE") was the Second Respondent. The Claims were for detriment on the ground that Dr Day had made protected disclosures. They arose from events that occurred during and in relation to Dr Day's placement by HEE as a trainee in Emergency Medicine at the Trust's Queen Elizabeth Hospital Woolwich in 2013-14. The Tribunal will be aware of the details of those claims (so far as relevant) from other sources and so I will not attempt to summarise them.

3. For the purpose of preparing this statement, I have refreshed my memory about the Claims and Dr Day's evidence by reviewing my original preparation notes (which are privileged) and Capsticks' notes of the final hearing of the Claims, as well as some of the pleadings and documents from the bundle for that hearing. I have also had my attention drawn to relevant documents in the bundle for this hearing. References in this statement in the form **[page xx]** are to pages in that bundle. I prepared the majority of this statement in early 2021, and completed it early 2022 after considering additional documents disclosed by Dr Day.

4. The facts and matters set out in this statement are within my own knowledge (having refreshed my memory in the way that I have described) save where I expressly indicate otherwise, and are true to the best of my knowledge and belief.

5. It has been confirmed to me that the Trust does not waive privilege in respect of any communications that are protected by legal privilege. The Tribunal will therefore understand that I cannot give evidence about any advice that I may or may not have given to the Trust (including as to whether I did or did not give advice on any particular matter), whether in connection with the Claims or their settlement, or in connection with any subsequent and/or related communications or statements. Similarly, any instructions, discussions or communications passing between me, Capsticks and/or the Trust are privileged, save to the extent that they do no more than record the substance of non-privileged communications. This statement is therefore confined to facts and matters that are not privileged and, necessarily, my oral evidence will be similarly confined.

The final hearing of the Claims and Dr Day's evidence

6. The final hearing of the Claims was listed for 20 days, from 1 October 2018 to 30 October 2018 inclusive, with some non-sitting days during that period.

7. In the event, the first two days of the listed hearing, Monday 1 October 2018 and Tuesday 2 October 2018, were used by the Tribunal as reading days and the parties and their representatives did not attend on those days.

8. The hearing proper began on Wednesday 3 October 2018. Dr Day was represented by Chris Milsom of counsel. I and Ms Motraghi represented the Trust. HEE was represented by Angus Moon QC. I had met Mr Milsom before at talks and social events organised, for example, by the Employment Law Bar Association and Industrial Law Society. I knew him to be an experienced employment law practitioner, but I did not know him well. (Since the events to which this claim relates, Mr Milsom has been elected to the Employment Law Bar Association committee, of which I am also a member, and so I now know him somewhat better.) To the best of my recollection, I had not met Mr Moon before, though I had had email and telephone contact with both

him and Mr Milsom in the run-up to the hearing in relation to such matters as the preparation of a chronology, cast list, glossary and timetable.

9. At the start of the hearing on 3 October 2018, the Tribunal heard an application by Dr Day to amend the Claims and dealt with some general housekeeping. Dealing with those matters took until around midday. After that, Dr Day began giving his evidence. After taking the oath, he confirmed that the contents of his witness statement were true and that he had no amendments to make to it. I then began cross-examining him.

10. I will describe some of my key relevant impressions of Dr Day's evidence shortly, but one feature which quickly became clear was his apparent inability to answer questions directly or succinctly. This meant that his cross-examination took much longer than it ought to have done – a total of more than 5 days overall. My cross-examination of Dr Day lasted for the rest of Wednesday 3 October and all of Thursday 4 October 2018. The Tribunal did not sit on Friday 5 October 2018. I then continued cross-examining Dr Day for the whole of Monday 8 October and until about 1pm Tuesday 9 October. Mr Moon then cross-examined Dr Day on behalf of HEE for the remainder Tuesday 9 October and all of Wednesday 10 October. On Thursday 11 October other witnesses for Dr Day were interposed first thing, and Mr Moon then continued his cross-examination of Dr Day from around 11.30am. His evidence ultimately concluded at the end of that day. During the course of his cross-examination, Dr Day withdrew 5 of the specific allegations of detriment against the Trust.

11. It is relevant to describe some of my impressions of Dr Day's evidence because his performance as a witness is an important part of the context against which settlement discussions took place. These are, of course, my own impressions, but I believe (and believed at the time) that they are features which came across so strongly that any objective person hearing Dr Day's evidence would have formed a similar impression. They are therefore relevant to understanding the settlement discussions because the dreadful impression that Dr Day created as a witness was the implicit starting point for the conversations that I had with Mr Milsom about settlement and costs – certainly, it was my starting point and therefore helps to explain both my approach and the inferences which I drew as to Mr Milsom's position.

12. Dr Day appeared to me to have developed an obsessive belief in his own victimhood, which had become the prism through which he viewed all of the events to which the Claims related. This had resulted in what appeared to me to be a progressively more elaborate re-writing of history by him to fit his narrative, which was however contradicted by the contemporaneous documents and even some of his own previous statements. This had reached the point that, in my view, he was even prepared to be dishonest and underhand in pursuit of what he saw as the virtue of his cause. There were a number of instances in which his evidence to the Tribunal was, in my opinion, manifestly inconsistent and untruthful.

13. It would unduly extend an already long statement to describe every example of these features of Dr Day's evidence and so I will confine myself to a small selection in order to give a flavour of the points. One event which was central to the Claims was the night of 10-11 January 2014, during which Dr Day alleged (in his pleadings and in his witness statement) that he had been approached by the Duty Site Manager and told that two doctors who would normally look after the wards had not turned up, that he telephoned the Senior Manager On Call to raise concerns about this, that he was given false information about the staffing levels that night, and that the On Call manager then falsely represented to his supervisor that he seemed unduly anxious and may be having difficulty coping. However, the contemporaneous documents showed that Dr Day had not been given false information about staffing levels that night and could not have been told by the Site Manager that two doctors had not turned up because, at the time of his conversation with her, only one doctor had not turned up. When taken to the documents which showed this in cross-examination, he was forced to accept these points. He also accepted that, before escalating his concerns, he had not gone back to speak to the Site Manager again or asked what action she was taking to cover the shortfall (that being her responsibility) and that if he had, he would have been given an explanation of the steps she had taken to ensure ward cover.

14. However, during an investigation meeting in relation to his internal grievance, Dr Day had alleged:

    a. that he knew *'full well'* that the site management team had *'probably decided to skimp on locums'*, which he accepted in cross-examination was simply his own invention and that he had no basis for saying it;

    b. that he *had* had a further conversation with the Site Manager, which was not an allegation that appeared in any other document or account by him and was contrary to both his witness statement for the Tribunal and his acceptance in cross-examination that he had not had a further conversation with the Site Manager – and when taken to that passage of his grievance interview later during cross-examination he sought to explain the discrepancy by claiming an incomplete recollection (a caveat that had not featured in his, generally emphatic, evidence up to that point); and

    c. that in that further conversation, the Site Manager had sought to discourage him from calling the On Call manager about the staffing issue out of concern about *'where it would end'*, a detail which was plainly intended to imply concern about some form of retribution and to bolster Dr Day's whistleblowing case (which by the time of the grievance interview he was seeking to advance) – again, when taken to that passage during cross-examination he was unable to explain why it was not something that appeared in any other account by him other than by asserting a *'hazy recollection'* that the Site Manager might have

been counselling him about a later email that he sent to the On Call manager (which was yet a further new, and inconsistent, account). All of this evidence about a further conversation with the Site Manager was inconsistent with the account Dr Day himself had given in an email to the On Call manager 3 days after the event.

15. Very late in the proceedings, Dr Day had disclosed the existence of covert recordings that he had made of a number of important meetings and conversations, along with transcripts of those recordings. He accepted that he had behaved in an *'underhand'* way in the manner he had gone about making these recordings, but when I cross-examined him about the failure to disclose them earlier, he sought to explain this on the basis that, in essence, he had been focusing on the preliminary issue concerning his employment status vis-à-vis HEE (which had taken a number of years to litigate in the Tribunal and on appeal) and *'almost forgot'* about the underlying substantive case. However, when cross-examined by Mr Moon on this subject, his further explanations were inconsistent and his answers increased the impression that he was willing to be deliberately deceitful and untruthful. Dr Day suggested to Mr Moon that his decision to record one of the meetings had been impulsive, but then in response to further questions said that he had borrowed the device he used to record the meeting a few days before for that purpose. Mr Moon then took Dr Day through a sequence of correspondence in which he had been contesting the notes or minutes of some of the meetings. It was apparent from that correspondence that he had been deliberately concealing the existence of the recordings and misrepresenting the source of his records. Though he quibbled with Mr Moon's characterisation of this as *'deceitful'*, he repeated that his actions had been *'underhand'* and did say that he was unsure even whether they had been lawful (i.e. even on his own account he had been prepared to act in a way that he knew to be underhand and, he believed, possibly even unlawful) and he was constrained to recognise that it was *'not something I'm proud of'*. Indeed, Mr Moon took Dr Day through material which showed that the contents of one of the meetings he had covertly recorded had been in dispute in relation to the preliminary employment status issue, yet Dr Day had failed to mention the recordings in the witness statements he had prepared in relation to that issue. Although he did not adequately explain his own failure to refer to the recordings in that context – a point which also undermined the explanation he had given to me that the preliminary issue had been a distraction from the issues to which the recordings related – Dr Day did at this point say that he had given them to his solicitors at the start of 2015 (and I will return to this later, as it is the point which gave rise to a potential issue as to wasted costs against Dr Day's solicitors).

16. These are just a small selection of many examples of the features of Dr Day's evidence that I have described, but I believe that they give a fair and representative flavour of the serious overall problems with his evidence. I accept of course that because the Claims settled no findings were made about Dr Day's evidence. Equally, I am obviously

not suggesting that findings should be made about it now. I mention these points to record my clear impression of Dr Day as a witness; to explain why I formed that impression; and to confirm that I believed at the time (and still believe) that it was likely that the tribunal and any other objective observer would have formed a comparable impression. As I have said, that is the context in which settlement discussions took place.

Without prejudice discussions on 5 October 2018 initiated by Mr Milsom

17. The features of Dr Day's evidence that I have described were already apparent by the end of Thursday 4 October 2018, by which point I had been cross-examining Dr Day for around a day and a half. As I have already mentioned, Friday 5 October 2018 was then a non-sitting day.

18. At 12.59pm on Friday 5 October 2018, I received an email from Mr Milsom with the subject, *'You around for a chat this afternoon?'* **[page 943]**. The message itself was blank (other than Mr Milsom's standard email 'signature'). I replied at 1.05pm to say that I was available to speak until 3pm, after which I would be doing the school pick-up **[page 945]**. We had some further exchanges in which I gave Mr Milsom my mobile number. I did not know why Mr Milsom wished to speak to me at that point.

19. Mr Milsom called me on my mobile at 1.13pm. My handwritten note of that conversation is at **[page 947]** (with a typed version at **[page 948]**). To the best of my recollection, the headings and first three bullet points are notes that I made during the call itself, and the final two bullet points are notes that I completed immediately after the call ended. An email that I then sent to Capsticks setting out the substance of the conversation is at **[page 949]**. As can be seen from the time of this email (1.38pm) I drafted it immediately after completing my handwritten note, whilst the conversation was still fresh in my mind. Together, my note and that email reflect my recollection of the call.

20. I can see that in an email to Dr Day on 6 December 2018 at 11.20pm, which has been drawn to my attention, Mr Milsom stated that he made the call to me because he wanted to discuss matters of trial preparation **[pages 1201-1202]**. I do not remember discussing any such matters, although it is possible that some such issue was mentioned towards the end of the call which I have forgotten. I certainly remember that Mr Milsom began by saying words to the effect that he wanted to speak, without instructions, on a without prejudice basis and he asked whether I would agree to speak on that basis. I understood from this that the purpose of his call was to explore the possibility of settlement (this was implied by his reference to speaking without prejudice), but that he had no specific instructions from Dr Day about settlement, and he was therefore asking me to agree that I would not seek to rely on our conversation against him or his client if nothing came of it. This was the first I became aware of the

purpose of his call and such a discussion had certainly not been prompted or invited by me.

21. I replied to the effect that, whilst I would of course be obliged to share anything we discussed with my instructing solicitors and client, I was content to proceed on the basis Mr Milsom had indicated. This is reflected in the first paragraph of my subsequent email to Capsticks **[page 949]** and in the heading of my note (I believe I wrote all of the underlined parts at the top of the page during this first part of the conversation).

22. Mr Milsom then said something like, *'We are all going along like a freight train with this 20-day hearing without anyone pausing to think, "Where's this all going?"'* To the best of my recollection, I said nothing at this point and waited for him to expand. He went on to say that he imagined that any monetary settlement would be difficult in light of the need for Treasury approval, and perhaps more so in light of the evidence heard so far. I understood Mr Milsom's reference to Treasury approval to be to the fact that, as is generally well-known by practitioners in this field, in order for an NHS Trust such as the Trust in this case to settle an employment tribunal claim on terms which include a payment of money, approval by the Treasury is required, applying various criteria. As to Mr Milsom's further comment to the effect that monetary settlement might be even more difficult given the evidence heard so far, this could only have been a reference to Dr Day's evidence in cross-examination as that was the only evidence that had been heard at that stage. I understood this comment to carry an implicit acknowledgment that Dr Day's evidence up to that point had been bad for his case and that this was likely to have further reduced the prospects of any monetary settlement.

23. I replied that I imagined that to be the case as well, by which I meant – and expected that Mr Milsom would understand – that I agreed with Mr Milsom's expectation that it was unlikely to be worthwhile attempting to explore any settlement involving a payment of money to Dr Day, including his implication that Dr Day's evidence so far had been bad for his case.

24. Mr Milsom then said that he wondered whether a *'soft landing'* might nevertheless be a possibility. This was not a phrase I had heard before in this sort of context, so I asked him what he meant. He said that he had in mind something like *'drop hands with an agreed joint position statement'*. By *'drop hands'*, I understood Mr Milsom to mean a settlement in which Dr Day would withdraw his claims and neither side would pay any of the other's costs. The reference to a joint position statement is self-explanatory.

25. In my experience, a settlement along those lines would generally be canvassed in an employment tribunal on behalf of a claimant where there is a risk not only of losing but also of a costs award against the claimant: otherwise there would be no real incentive for a claimant to agree simply to withdraw the claim (other than to avoid incurring further costs himself). I knew that Mr Milsom would be well aware that costs in employment tribunals do not follow the event but are generally only awarded where a

party (or their representative) has behaved unreasonably. Therefore, I again understood it to be implicit in Mr Milsom's suggestion that it may be worth exploring settlement along those lines not only that Dr Day's claim was unlikely to succeed, but that he risked a finding that could result in an adverse costs award, such as a finding that he had lied in his evidence. This was consistent with my own impression of Dr Day's evidence as explained above, and so I was not surprised that Mr Milsom also appeared to recognise that possibility or that he thought it might be in Dr Day's best interests to explore a settlement along the lines he had outlined. I formed the impression that Mr Milsom had a realistic view of Dr Day's performance as a witness which probably coincided with mine, though I should make clear that he did not expressly say anything to that effect: that was my inference, which I drew for the reasons I have given.

26. Before responding to Mr Milsom's suggestion of exploring a settlement along those lines, I made clear that, like him, I did not have instructions to give any firm indication about settlement (I believe that this is when I added the words *'on each side'* in parenthesis at the top right of my handwritten note **[page 947/948]**). I therefore consider that it was clear that anything further I said during that conversation should not be taken as reflecting the Trust's position on instructions but was – as with Mr Milsom's own comments up to that point – said for the purpose of testing the water with Mr Milsom about the possible parameters of any settlement.

27. I went on to say that, as long as any 'position statement' did not involve any kind of admission of liability by the Trust, then something along the lines Mr Milsom had outlined might be a realistic possibility. I indicated that I had in any event anticipated approaching Mr Milsom at the end of Dr Day's evidence in order to say that there was clearly a real risk that he would not only lose his claims but may have findings made that he had been untruthful in his evidence; that if he were to withdraw at that stage the Trust would not pursue him for costs; but that if he ploughed on and that were the outcome (i.e. if he were to lose with findings that he had been untruthful) then the Trust would make a costs application.

28. I can see that in emails to Dr Day on 17 November 2018 at 8.53am **[page 1098]** and on 13 January 2019 at 7.51pm **[page 1338]**, to which my attention has been drawn, Mr Milsom said that I was clear with him that *'if the case proceeded and [Dr Day] lost the Trust would look to pursue costs'* and that I *'did not link matters to the truthfulness of [Dr Day's] evidence'*. That is not my recollection, which is that (as noted in my email to Capsticks immediately following the call **[page 949]**) I <u>did</u> link the possibility of a costs application to a potential finding that Dr Day had been untruthful in his evidence (whilst making it clear that I was at that point speaking without instructions). My attention has also been drawn to a letter dated 27 July 2021 by Womble Bond Dickinson, written on behalf of Mr Milsom in response to a Letter of Claim alleging professional negligence against him, from which (at paragraph 4.19 **[page 1576]**) it

appears that Mr Milsom now accepts he was mistaken in his earlier statements and that I did link the possibility of a costs application to the prospect of a finding that Dr Day had been untruthful in his evidence.

29. The possibility of seeking instructions on whether to make an approach to make a 'drop hands' offer was already in my mind because of the impression I had formed of Dr Day's evidence. However, I would not usually seek firm instructions on such matters or make such an approach until a claimant's evidence had finished because they would be unable to discuss the issues with their counsel until then. Moreover, the conclusion of Dr Day's evidence was clearly still some way off. That is the sequence that I was anticipating in this case and it was only Mr Milsom's initiation of this discussion on 5 October 2018 that prompted me to address the issues at an earlier stage than I would usually have done.

30. I also made clear to Mr Milsom that, if I did make such an approach, we would not want any discussions that he might then need to have with Dr Day to take time out of the hearing. I said that for two reasons. First, it was already clear that Dr Day's evidence was taking longer than expected and we were therefore going to be pressed to conclude the hearing within the scheduled time in any event. Second, the impression which I had already formed of Dr Day's obsessive sense of grievance and his inability to let go made me sceptical that he would follow any advice from Mr Milsom to the effect that it was in his best interests to agree to a 'drop hands' settlement. Therefore, if hearing time were taken up with Mr Milsom advising Dr Day but settlement not ultimately achieved, we risked running out of time to finish within the listing.

31. Mr Milsom agreed that it would be sensible not to take up hearing time for those reasons. He then said it would help him to broach the issues we had discussed with Dr Day if I would still make the approach I had outlined at the end of Dr Day's evidence. I therefore understood Mr Milsom to be indicating that it would be helpful to him, in broaching the issues with Dr Day, if I could make an approach along the lines I had outlined – i.e. at the end of Dr Day's evidence, to set out what the Trust's position on costs would be if Dr Day lost with findings that he had been untruthful in his evidence and any offer of a 'drop hands' settlement. I note from paragraph 4.40.3 of the letter by Womble Bond Dickinson **[page 1580]** that Mr Milsom agrees that he gave this indication. I made clear that I would of course need the Trust's instructions for any such approach, but that subject to such instructions I would approach Mr Milsom at the end of Dr Day's evidence to set out the Trust's position on those matters.

32. We concluded the conversation at that point. At paragraph 2.10 of the letter by Womble Bond Dickinson **[page 1563]**, it is asserted that Mr Milsom recalls asking me, during our conversation on 5 October 2018, about the amount of the Trust's costs; that he did so in response to a statement by me that costs would be *'at large'* if the case were not settled; and that I informed him of the amount of my brief fee and refreshers. I do not

remember those matters being discussed during my call with Mr Milsom on 5 October 2018. Given the passage of time, I cannot be certain about precisely when different topics were discussed, but I believe I would have recorded those matters in my notes and/or my email to Capsticks on 5 October if they had been discussed then and my recollection is that, to the extent that they were addressed at all, that was during subsequent discussions on 11-12 October 2018, as I describe in paragraph 62 below. In any event, paragraph 62 sets out my memory of the discussion in relation to those matters, whenever it may have happened.

33. As things stood at the end of my call with Mr Milsom on 5 October 2018, I still did not anticipate obtaining firm instructions or approaching Mr Milsom to set out the Trust's position or make any offer until the end of Dr Day's evidence.

34. However, at 1.48pm, I received a text message from Mr Milsom **[page 952]**, which read as follows:

> 'Hi Ben, Chris here. It would be handy for him to have the weekend as thinking time: would you object to me speaking to my client along the lines we discussed? I would understand if you did but it would be handy to make use of the hiatus'

35. I was a little surprised to receive this message because it is unusual for counsel to ask to speak to a claimant in the middle of their evidence about such matters: as the Tribunal will be fully aware, the general rule is that whilst a party or witness is giving evidence they are prohibited from speaking to anyone about the case or their evidence, in order to ensure that their evidence is their own and is not influenced by other people. I appreciated Mr Milsom's suggestion that it might be helpful for Dr Day to have time, during a natural break from the intensity of cross-examination, to reflect on any advice that Mr Milsom might give him in relation to the points we had discussed. However, I also perceived a potential difficulty about how Mr Milsom would in practice be able to advise his client about the points we had discussed without touching on aspects of Dr Day's evidence so far, which could risk influencing his remaining cross-examination.

36. In order to respond to Mr Milsom, I needed instructions. In the circumstances, it also seemed to me that it would be helpful at that stage, if possible, to obtain instructions on the Trust's position, as I had discussed with Mr Milsom.

37. I emailed Capsticks at 1.58pm to pass on the message that I had received from Mr Milsom **[page 951]**. I also gave some advice (which is privileged and therefore redacted).

38. Once I had obtained instructions, I replied to Mr Milsom by text message at 4.14pm **[pages 952-953]**, as follows:

> 'Hi Chris – I can confirm that I now have instructions to offer a drop hands if your client agrees to it before we start our evidence, but if he continues and loses with adverse

findings as to his truthfulness then there would be an issue as to costs. We are also content for you to speak to your client about this so he can reflect over the weekend, but on the basis that you don't discuss any specific aspect of his evidence and that you stick to (i) conveying the drop hands offer; and (ii) giving your advice, in general terms only, as to the overall risk that he may lose and have adverse credibility findings, and consequently on the merits of drop hands at this stage. Finally I haven't been in touch with Angus today but assume you will also get his consent before discussing anything with your client. Best wishes, Ben.'

39. In light of the issues which Dr Day has raised in these proceedings, there are three points I wish to highlight about that message, which set out the Trust's formal position. First, the possibility of costs being awarded against Dr Day was expressly linked to the possibility of adverse findings about his truthfulness.. This reflected the discussion I had had with Mr Milsom.

40. Second, this message did not say or imply that the Trust would definitely make an application for costs either in general or in any particular circumstances. Notwithstanding the means of transmission, this was a message between counsel acting for opposing parties in litigation, setting out the Trust's formal position. It was clearly drafted in formal terms. The language used was precise and specific. In particular, in stating that the Trust's position was that, if Dr Day were to continue with his claims and lose with adverse findings as to his truthfulness, *'then there would be an issue as to costs'*, the message was saying no more than that in those circumstances costs would be a live issue. In reality, this was no more than a statement of the obvious: I knew (and certainly believed) that Mr Milsom would be well aware that in such circumstances it is likely that there would be grounds for a costs award against Dr Day, and that as an NHS Trust responsible for public money, the Trust would be obliged to consider making an such an application. However, the merits of any such application would obviously depend on the precise findings made and the other relevant circumstances, and so I could not, and did not, say on behalf of the Trust that it would definitely make any application in those or any other circumstances. All that this message made clear was that, in those circumstances, there would be an issue as to costs which had the potential ultimately to result in an application and a costs award in the Trust's favour. It was for Mr Milsom to assess the extent of the risk and to advise Dr Day about it.

41. Third, the terms on which the Trust agreed that Mr Milsom could advise Dr Day about these matters needed to strike a fair balance between allowing him to speak to Dr Day (and give appropriate advice) and the need to limit the extent to which this might influence Dr Day's further evidence in cross-examination. They did so by allowing Mr Milsom to provide his advice in general terms, without discussing specific aspects of the case or Dr Day's evidence.

42. A short while later, I sent a further text message to make clear that these communications were all on the basis that they were without prejudice save as to costs, which I thought was in any event implicit. Mr Milsom replied confirming that this was also his understanding **[page 954]**.

43. Mr Milsom also sent a message asking whether I could liaise with Mr Moon about these matters **[page 954]**. I understood this to be a reference to the need, which I had highlighted in my message, for Mr Milsom also to obtain agreement from HEE, via Mr Moon, before he could speak to Dr Day. I agreed to contact Mr Moon.

44. I spoke to Mr Moon by telephone a short while later. That discussion is privileged and I understand that the Trust has not waived privilege in respect of it and I do not therefore disclose the content of that discussion.

45. After my conversation with Mr Moon, I texted Mr Milsom to say that he (Mr Moon) was going to try to get instructions and would get in touch with Mr Milsom directly if and when he had done so **[page 954]**. I also emailed Capsticks at 5.07pm to confirm that I had spoken with Mr Moon and brought him up to speed, and that he was going to take instructions **[page 963]**.

46. At 5.40pm, Mr Moon copied me into an email he sent to Mr Milsom **[page 967]**, from which it was apparent that the two of them had spoken, that Mr Moon was still awaiting instructions and that, in the meantime, the rule that Mr Milsom should not speak to Dr Day about the case or his evidence continued to apply. Mr Moon also called me at or around the same time and told me much the same, which I confirmed to Capsticks by email at 5.51pm **[page 966]**.

47. Eventually, at 7.29pm, Mr Moon copied me into a further email to Mr Milsom, indicating that he had just spoken to Mr Milsom, on instructions, and agreed that Mr Milsom could talk to Dr Day on the issues of risk for the purpose of negotiations, but not about any particular aspects of his evidence **[page 968]**.

<u>Further without prejudice negotiations and settlement, 8-15 October 2018</u>

48. For reasons which I explain further below, I will first set out the chronology of the further without prejudice negotiations and settlement before explaining my recollection of what was discussed during those negotiations.

Chronology of negotiations and settlement, 8-15 October 2018

49. On the following Monday morning, 8 October 2018, I remember Mr Milsom speaking to me at the Tribunal before the hearing resumed to indicate that Dr Day had decided to continue with his evidence at that stage and to reflect further once his evidence was complete. I recall indicating in response that the Trust's offer, as set out in my text message of the previous Friday, would remain open until the first witness for the Trust

was called, but at that point would lapse. I did not make any note of this conversation as it was brief and essentially reiterated the position already established.

50. As far as I remember, I did not have any further discussions about settlement or costs with Mr Milsom until Thursday 11 October 2018. I remember that at some point on that day Mr Milsom came into the Respondents' waiting room in order to get confirmation of the Respondents' respective positions for the purpose of informing the advice that he would need to give Dr Day after his evidence finished. I do not remember the exact time of that conversation, and it is possible that there was more than one on that day. I understood that Mr Milsom then intended to have a conference with Dr Day on the evening of 11 October in order to advise him and obtain his instructions on settlement.

51. At 8.07pm in the evening of 11 October 2018, Mr Milsom emailed me, Mr Moon and Ms Motraghi in the following terms **[page 980]**:

> 'Dear all,
>
> I am instructed to offer as follows:-
>
> 1. Withdrawal of all claims
>
> 2. Forbearance from any side pursuing costs (both ordinary and wasted)
>
> 3. Confidentiality as to terms
>
> 4. Mutual non-derog clauses. We would wish this to encompass any disclosure of the circumstances of settlement/withdrawal of the claim
>
> 5. Agreement that no referrals shall be made to the GMC as regards any individual in relation to the circumstances of the claim and/or litigation
>
> 6. A written understanding that there is no known basis on which Cs application for a return to training on an open competition basis would be precluded. Any matters relating to the facts of this claim or its conduct shall not be regarded as an impediment to training
>
> I appreciate that finalising ts and cs may take time tomorrow. We will be coming tomorrow in negotiating rather than litigation mode so cannot envisage any need for witnesses to be present: this includes Dr Brooke
>
> Best,
>
> Chris'

52. Mr Milsom left me a voicemail at 8.09pm to let me know that he had sent the email, and he followed that up with a text message to similar effect **[pages 954-955]**. I did not see those messages immediately because I was otherwise engaged. When I picked them up later that evening, I called Mr Milsom and we had a brief conversation,

in which I indicated that I would seek instructions on his offer but immediately foresaw a difficulty with the proposal that the terms of settlement would be confidential.

53. Further without prejudice conversations took place on Friday 12 October 2018, which occupied the whole day. Ultimately, we provisionally agreed the terms of a Settlement Agreement **[pages 990-996]** subject to final approval by the Trust's Board at a meeting on Sunday 14 October 2018. Capsticks informed me after the Board's meeting that it had approved the terms. Accordingly, I emailed Mr Milsom and Mr Moon to inform them of this at 7.14pm on the Sunday evening, and asked Mr Milsom to confirm that there had been no change in Dr Day's position **[page 1927]**. I also texted Mr Milsom **[page 956]**. He replied by email at 7.39pm to confirm that Dr Day's position had not changed **[page 1927]**.

54. On 15 October 2018, Mr Milsom, Mr Moon and I signed the Settlement Agreement on behalf of our respective clients **[page 994]**. In accordance with the terms of the Settlement Agreement, the Tribunal then dismissed the Claims upon withdrawal and I read the agreed position statement **[page 996]** in open Tribunal.

What was discussed on 11-12 October 2018

55. As will be apparent from the chronology I have outlined above, the substantive without prejudice discussions were those which took place on 11 and 12 October 2018. I did not take notes of those conversations because, as is the nature of such discussions when they take place at the Tribunal during the course of a hearing, they were relatively free exchanges between different combinations of counsel, generally standing to one side of a waiting room or in a corridor. Drafts of the proposed joint position statement and terms were produced during the course of the afternoon of 12 October and were the subject of negotiation, but it was neither necessary nor practicable to minute all of the verbal exchanges. I doubt that any of us thought that there would be any occasion subsequently to attempt to reconstruct those exchanges – I certainly did not.

56. In the circumstances, whilst I have a reasonably good recollection of the main points that we covered in the course of the discussions on 11-12 October 2018, and certainly of the position which I and Ms Motraghi set out on behalf of the Trust on the key issues, I cannot be sure about the precise sequence of exchanges or of exactly when various different issues were discussed. Therefore, rather than attempt to reconstruct the exact sequence of conversations or to attribute discussion of particular topics to particular days or times, I will simply set out my recollection of the substance of what was said on the issues relevant to this claim in the course of the overall discussions that took place during those two days. I will also confine my evidence to what I and Ms Motraghi said on behalf of the Trust and (save to the extent necessary to put what we said on behalf of the Trust in context) will not comment on what may or may not have been said by Mr Moon on behalf of HEE, both because there were a significant number of bipartisan conversations between Mr Moon and Mr Milsom at which I was not present

and so my knowledge of what was said between them is necessarily incomplete, and because I was not in any case focusing on HEE's precise position and so do not have a clear recollection of what Mr Moon said even in the conversations to which both he and I were party.

57. Before I turn to my recollection of what was said on particular topics, a general point that I think it is relevant to note is that, as far as I recall, by far the greater part of the discussions on Friday 12 October 2018 were taken up with discussion of the proposed terms of settlement. By that stage, the Trust's central position had been clear for the best part of a week and it was clear from the offer that Mr Milsom had communicated on the evening of 11 October that Dr Day was in principle prepared to accept a 'drop hands' offer. Therefore, the focus on 12 October, certainly in my discussions with Mr Milsom, was very much on resolving the remaining differences in relation to the proposed terms and there was simply no need to keep rehearsing the Trust's underlying position. In short, my recollection is that a relatively small proportion of the overall discussions in which I was involved was taken up with the topics that have now become the focus of these proceedings.

58. Turning, then, to the particular issues, I will explain my recollection of what was discussed in relation to 3 topics in particular.

59. First, I am absolutely clear that the position which I set out on behalf of the Trust in relation to possible costs against Dr Day (as opposed to wasted costs against his solicitors, which I address separately below) always remained consistent with the position I had set out in my text message to Mr Milsom the previous Friday (quoted at paragraph 36 above). That is to say, (a) the only circumstances in which I ever indicated that there would be an issue as to costs for the Trust were if Dr Day were to lose with findings that he had been untruthful in his evidence; and (b) I did not at any stage go further than to say that, in such circumstances, there would be an issue as to costs that the Trust would need to consider.

60. In that regard, my attention has been drawn to an email from Mr Milsom to Dr Day dated 30 November 2018 at 6.55pm **[page 1123]**, in the fourth bullet point of which (aside from confusing me with Ben Collins QC) Mr Milsom says that

> '... counsel for both Respondents in a joint conversation on at least one occasion made reference to costs consequences of continuing... [T]his was a sophisticated discussion in that a two tier approach was mooted by them and in no way invited by me:
>
> (a) rejecting a drop hands offer and losing at trial without any adverse credibility findings would lead to an application in respect of ongoing costs of trial
>
> (b) as above but with adverse credibility findings: the Respondents expressly stated that costs of the entire litigation may be at large.'

61. I do not agree that I (or Ms Motraghi) ever set out a *'sophisticated... two tier'* approach of that kind on behalf of the Trust. As I have said, the position which I set out on behalf of the Trust remained consistent throughout and I am sure that I did not depart from it at any stage: I always linked costs being an issue to the contingency of findings that Dr Day had been untruthful in his evidence. I did not at any point say that merely rejecting the 'drop hands' offer and losing at trial would lead to an application by the Trust in respect of the remaining trial costs. Indeed, I did not at any stage say that the Trust 'would' make an application for costs in any circumstances: I consistently maintained the position that there would be an issue as to costs if Dr Day lost with findings that he had been untruthful in his evidence.

62. I do, however, remember having some discussion with Mr Milsom about which costs might be in issue in the circumstances I had identified, and Mr Milsom asking whether they would be limited to the remaining costs of the hearing. I remember saying that if there were findings that Dr Day had been untruthful in his evidence then there was no logical reason why costs would be limited to the remaining hearing costs. I therefore agree that I indicated that, in the circumstances in which I had said there would be an issue as to costs, those costs may be *'at large'* (though that is not my phrase), in the sense that there was no reason to think that they would be limited to any particular part of the litigation costs incurred by the Trust. I also recall some discussion, which I think (but cannot be sure) was part of the same conversation, about the total amount of costs incurred by the Trust up to that point, and its prospective future costs, and I remember making enquiries and providing some figures to Mr Milsom which included my fees (though I do not now recall what those figures were).

63. Equally, however, I did not say that any costs issue would definitely relate to all of those costs because, consistent with the position I always maintained on behalf of the Trust, that would all depend on the actual circumstances at the time any costs issue arose: I was not in a position to say, and did not say, that the Trust would apply for any particular amount of costs. It may be that Mr Milsom has mis-remembered or misconstrued this part of our discussions, or that he has conflated different positions taken by the Trust and HEE (I cannot specifically recall, if I ever knew, whether HEE's position was different on this issue). Whatever the explanation for Mr Milsom's mistake, I am sure that I did not say that the Trust had a *'two tier'* approach of the kind he has outlined in his email to Dr Day, or that, absent findings of untruthfulness, there would be any issue as to costs or any part of them.

64. Second, on the issue of wasted costs, whilst it is right that the possibility of an application for wasted costs against Dr Day's solicitors had been identified during the hearing and may have been touched on during the course of the without prejudice negotiations, it was not something that was raised by me (or Ms Motraghi) as a negotiating point. Indeed, it would have made no sense to raise it for that purpose,

since by definition it was an issue for Dr Day's solicitors not for him. The way in which I recall the issue arising is as follows.

65. As I have already explained, very late in the course of proceedings, Dr Day had disclosed the existence of covert recordings that he had made of a number of important meetings and conversations. In the course of his cross-examination by Mr Moon on the afternoon of Wednesday 10 October 2018, Dr Day said that he had in fact provided those recordings to his solicitors in early 2015. This therefore raised serious questions about the propriety of his solicitors' conduct in failing to disclose the recordings earlier. Again as I have already noted, HEE had a particular concern because the contents of one of the meetings that Dr Day had covertly recorded had been in issue at the preliminary hearing concerning Dr Day's employment status vis-à-vis HEE, and indeed HEE had had to prepare a supplementary witness statement in relation to the contents of that meeting. The late disclosure of the recordings therefore gave rise to a potential issue of wasted costs against Dr Day's solicitors.

66. My recollection (though I cannot be sure and have not found any reference to it in Capsticks' notes of the hearing) is that the possibility of such an application was canvassed in open tribunal by Mr Moon, but that before deciding whether to make any such application HEE sought further information. My recollection is that I did no more than align the Trust with that position – i.e. that there may be a potential issue, but further information was required before a firm position could be taken. I also recall (though my memory of this is not very clear) that in that context, Mr Moon and I had a discussion with Mr Milsom outside the hearing, which probably took place (though I cannot be sure) on Wednesday 10 October 2018 after Dr Day's evidence about when he had provided the recordings to his solicitors, during which we reiterated essentially the same position. I do not remember precisely who said what as between myself and Mr Moon during that conversation – though I think it likely that Mr Moon again took the lead, as it was a more significant issue for HEE, and that I simply aligned the Trust with HEE's position that there was a possible issue as to wasted costs, but further information was required first. This was not a without prejudice conversation in connection with settlement but was a counsel-to-counsel discussion on an open basis, to highlight the issues that had arisen in open proceedings. I certainly did not see these points as relevant to settlement because they would have no impact on Dr Day himself in any event.

67. I do not recall myself or Ms Motraghi making reference to wasted costs at all during the without prejudice conversations in relation to settlement on 11-12 October 2018. I note that the offer which Mr Milsom set out in his email on the evening of 11 October (quoted at paragraph 49 above) referred explicitly to both ordinary and wasted costs (no doubt because the issue had been flagged) and this may have prompted some passing reference to wasted costs in the course of discussions on Friday 12 October 2018. If so, then for my part that would only have been to confirm that, assuming other

terms of settlement could be agreed, the Trust would be content to agree not to apply for costs of any kind: including both ordinary and wasted costs in the settlement was not a point of controversy for the Trust in the negotiations.

68. Third, and finally, I note that paragraph 5 of the offer which Mr Milsom set out in his email on the evening of 11 October proposed a term to the effect that no referrals would be made to the GMC as regards any individual in relation to the Claims. I do not recall the possibility of a GMC referral being mentioned in the course of without prejudice discussions prior to that offer and I am sure that neither I nor Ms Motraghi ever said or implied that the Trust was considering making any such referral. My recollection is that, in the course of cross-examining Dr Day about his honesty, Mr Moon had explicitly referred to the fact that honesty is a requirement of the GMC's *Good Medical Practice* code and that a finding of dishonesty would be likely to result in a doctor being struck off. I can see from the third bullet point of Mr Milsom's email to Dr Day on 30 November 2018 **[page 1123]** that he has the same recollection. I infer (and I suspect I drew the same inference at the time though I cannot now be sure) that it is this which prompted the proposed term in the offer communicated by Mr Milsom on the evening of 11 October.

69. I note that in his email to Dr Day of 30 November 2018 **[page 1123]** Mr Milsom also refers to Ms Motraghi raising *'the prospect of a GMC referral/conduct which may warrant GMC interest'*. I believe that the conversation Mr Milsom is referring to took place after, and was prompted by, the offer made on the evening of 11 October. The reason I think that is because one of the points I recall being made by Ms Motraghi (whose practice encompasses regulatory proceedings before the GMC) was that the proposed term was not one to which the Trust could possibly agree because every medical practitioner has their own individual obligation to report misconduct by another practitioner and the Trust could not properly agree to a term which purported to restrict that obligation. The other point that I remember Ms Motraghi making during that conversation was that, regardless of any referral, the GMC engages in 'horizon scanning' for potential misconduct by registered practitioners. Therefore, she said, if Dr Day were to have findings made in a public employment tribunal judgment that he had lied, it was likely (particularly given the publicity which the Claims had attracted) that the GMC would become aware and take action in respect of that regardless of any referral. The point Ms Motraghi was making was that, even though the Trust could not agree to the term proposed in Dr Day's offer, it was still in his interests to settle the case to avoid the risk – which, from our perspective and for reasons I have explained, underpinned the whole of our discussions – of a finding that he had lied which could, by itself and without anyone specifically referring him to the GMC, trigger regulatory action against him. This point appears to be captured by Mr Milsom's reference to *'conduct which may warrant GMC interest'*.

70. In short, therefore, neither Ms Motraghi nor I said or implied that the Trust was contemplating referring Dr Day to the GMC, let alone that he should agree to settle in order to avoid a referral by the Trust. On the contrary, Ms Motraghi's point was that Dr Day risked regulatory proceedings by the GMC without anyone referring him if the employment tribunal were to find that he had lied, but that GMC referral was not in any event something that could properly be addressed in the settlement terms.

My subsequent involvement with matters relating to Dr Day

71. I continued to act for the Trust in respect of the Dr Day's application for reconsideration of the consent judgment in the Claims, and in his subsequent appeals against the decision to refuse that application. In that capacity, I drafted the 'brief statement' in response to Dr Day's application for permission to appeal to the Court of Appeal **[pages 356-358]**, the substance of which was essentially accepted by Simler LJ in her reasons for refusing that application, as set out in the Court of Appeal's Order dated 7 April 2020 **[pages 361-362]**.

72. I was also initially instructed on behalf of the Trust in these proceedings and appeared at the Preliminary Hearing for Case Management on 1 October 2019 **[pages 443-447]**. However, after that I ceased to act for the Trust in relation to this claim because of the likelihood that I would need to give evidence.

73. Aside from that involvement in Dr Day's legal proceedings, I have had other periodic correspondence with or relating to Dr Day regarding matters to which this claim relates.

74. On 13 November 2018, I received an email from Mr Milsom about contact that had been made with Dr Day by a journalist from the *Telegraph* **[page 1946]**. I replied to the effect that I was unable to assist and that this was a matter for our respective clients and instructing solicitors.

75. On 4 December 2018, Dr Day emailed me directly (along with others) attaching a letter which referred to public statements by the Trust and HEE and alleging that either those statements were not accurate or he had entered into the settlement agreement under mistake or misrepresentation **[pages 1184-1186]**. He asked for the recipients to respond directly and sent a further email asking for acknowledgements of receipt **[page 1189]**. For some reason, those emails were intercepted by my chambers' email system as 'spam' and I only became aware of them on 5 December 2018 when Rachel Luddem of Capsticks emailed me about them **[page 1187]**. Ms Luddem copied me into a reply to Dr Day, in which she explained that she would respond and there was no need for Dr Day to continue to email me directly **[page 1189]**.

76. On 19 November 2019, I received a subject access request from Dr Day seeking *'all material in emails, SMS text messages, WhatsApp messages or any other form of communication from Chris Milsom about my case'* **[pages 1602-1604]**. I

acknowledged receipt the following day **[page 1605]** and Dr Day replied to thank me for doing so and to further clarify his request **[page 1608]**. I responded substantively to Dr Day's request, enclosing a copy of the requested data, on 9 December 2019 **[pages 1611-1613]**. He replied on 10 December 2019 thanking me for my response but indicating that he had been unable to access the documents and asking whether my clerks could assist **[page 1965]**. I provided a copy of the bundle to my clerk, Jenny O'Grady, who was able to send it to Dr Day in a format that he could access later that day **[page 1966]**.

77. Dr Day emailed me again on 11 December 2019, asking me to *'ensure the DSAR is processed for Ms Nadia Motraghi'* and making some further points **[page 1969]**. I replied the same day to explain that, whilst I had forwarded his email to Ms Motraghi (who was at that time on maternity leave), since she and I are independent practitioners, I had no control over or responsibility for her response to his subject access request and he should contact her directly about that. I also explained that, given my role as counsel for the Trust, it would not be appropriate for me to respond to his further points and my non-response should not be taken as either agreeing or disagreeing with them **[page 1968]**.

78. The next correspondence I received in relation to Dr Day was a letter from the Bar Standards Board ("BSB"), dated 27 February 2020, enclosing a copy of a complaint made about me by Dr Day, dated 11 October 2019, together with the BSB's response, and informing me that the BSB had decided – without requiring a response from me – that the matter did not warrant further action **[pages 2188-2197]**. The complaints by Dr Day cover much of the same territory as this claim, albeit with a more personal slant. When I read this correspondence, it seemed to me that Dr Day's complaint against me exhibited his tendency to draw baseless inferences and willingness to make serious allegations based on nothing more than speculation: see in particular paragraphs (2), (5)-(7) and (8) of Dr Day's complaint **[pages 2192-2194]** and the BSB's decision in relation to those paragraphs **[pages 2199-2200]**.

79. It was also apparent to me that, after Dr Day had received my response to his subject access request in December 2019, he must have realised that that material directly contradicted parts of his complaint against me – for example, the documents which I supplied included the emails and text messages between me and Mr Milsom on 5 October 2018 **[pages 1854-1864]**, which demonstrated that the discussions were initiated by Mr Milsom, that the initiative for Mr Milsom speaking to Dr Day at that stage came from him and not from me, and that the Trust's position as to costs reflected in those communications explicitly linked the possibility of an issue as to costs with the prospect of a finding that Dr Day had been untruthful in his evidence. Indeed, it is now clear to me from Dr Day's disclosure in these proceedings that he did appreciate these points because he himself made them in an email to Mr Milsom on 18 December 2019 at 10.01am **[page 1455 - 1457]**, which has been drawn to my attention. Dr Day

therefore clearly understood that the material which I supplied to him in response to his subject access request directly contradicted parts of his complaint about me to the BSB, in particular paragraphs (1) and (2) **[page 2192]**, yet it appears that he had taken no steps to amend or withdraw any aspect of his complaint, or even to draw this further material to the BSB's attention, and was willing to allow the BSB to proceed with its consideration of allegations of serious professional misconduct on the basis of what he must have known at that stage was inaccurate, incomplete and misleading material. I think this is characteristic of the dishonest and underhand approach that was, in my view, apparent from his evidence in the Claims.

80. The Tribunal may also wish to note that the BSB did not consider that either (a) indicating that there would be an issue as to costs if Dr Day lost with findings that his evidence was untruthful, or (b) mentioning the possibility of wasted costs, amounted to a *'threat'*: see in particular the BSB's responses to paragraphs (1) and (3) of Dr Day's complaint **[pages 2198-2199]**.

81. I did not hear further from Dr Day until 11 January 2021, when I received an email from him asking whether I would be appearing as a witness in this case and also inviting me to comment on whether I considered that the Trust had been misled by two letters written by Capsticks, which he attached to his email **[pages 1540-1541, 1283, 1284-1285 and 1123]**. He emailed again a few hours later, in the early hours of 12 January 2021, attaching some further documents relating to this claim **[pages 1539]**. I replied later on 12 January 2021 to confirm that I would be appearing as witness for the Trust and that I therefore did not intend to correspond further about the issues with him **[page 1540]**. Dr Day replied thanking me for my quick response and stating, *'I do assert you have a responsibility to correct the Lewisham Board on anything in the Capsticks letters, attached to my last email, that you feel is misleading. I intend to refer to this email at the Tribunal'* **[page 1540]**. I did not reply further and for obvious reasons I cannot say what (if anything) has passed between me and/or Capsticks and/or the Trust in relation to the matters covered in those letters, because any such communications are privileged. However, I can say for the avoidance of doubt that, for reasons which will be apparent from what I have said elsewhere in this statement, I do not consider the letters from Capsticks attached to Dr Day's email to me of 11 January 2021 to be misleading.

I confirm that the content of this statement is true to the best of my knowledge information and belief.

Signed.................................... Dated....16 May 2022..........