OUTER HOUSE, COURT OF SESSION

[2024] CSOH 65

A204/21

OPINION OF LORD SANDISON

In the cause

GILLIAN COWIE

Minuter

against

VITALITY CORPORATE SERVICES LTD

Respondent

Minuter: O'Neill KC, Welsh; Balfour & Manson LLP
Respondent: McBrearty KC, R Mitchell; Burness Paull LLP

27 June 2024

Introduction

[1] In November 2015 Mr Mark Cowie applied for and obtained insurance over his own life in the sum of £500,000 from a South African-based insurance company trading in the UK as "Vitality". He died suddenly in October 2016, and his widow Mrs Gillian Cowie made a claim on the policy. In circumstances to be later examined in detail, Vitality obtained certain medical records pertaining to Mr Cowie and, on the basis of what they contained, declined the claim on the basis that he had not fully disclosed his medical history when he applied for the policy. Mrs Cowie has raised an action against Vitality seeking payment of the sum insured. A question has arisen as to whether the medical records obtained by Vitality may

be used as evidence in the proof which has been allowed in that action. Given the importance and complexity of the issue, it was thought appropriate to determine it separately from, and in advance of, the general proof by way of a Minute and Answers process. I heard a 4-day diet of proof in that process.

The proof

[2] At the commencement of the proof diet, senior counsel for Vitality stated that it had become apparent that the general practitioner who had provided Mr Cowie's medical records now considered that certain material (which was listed) ought not to have been provided to Vitality as it fell outwith the scope of the request for information which had been made to him. Counsel undertook on behalf of Vitality that that material would not be used for the purposes of the underlying action. A formal note recording the precise nature of that concession has been lodged in process.

[3] Senior counsel for Mrs Cowie objected to any reference being made in evidence to the medical records in issue and to opinions being stated on their relevance, and made various objections to the statement evidence of the principal witness for Vitality, Mr John Downes. A note setting out the bases of these objections was also lodged in process. In essence, they related to matters of law on which Mr Downes was said to opine, to his giving evidence as to standard practice in the insurance industry without being qualified as an expert witness in that regard, to his evidence about the proper import of various documents produced by others, and to his reliance on some of the medical records in issue. I did not consider it expedient to determine these objections on the first day of the proof, and allowed the evidence in question to be adduced under reservation of the objections.

The evidence

Minuter's case

[4] The Minuter, Gillian Cowie, relied on her own affidavit dated 2 April 2024, which was accepted by Joint Minute as representing her evidence for the purposes of this process. The terms of that affidavit may be summarised as follows:

[5] Following her husband's death she contacted Vitality and advised it of that fact. It sent her a letter dated 31 October 2016 advising her that in order to assist it in assessing the claim made under the insurance policy it required from her: (a) a completed medical authority certificate; (b) a completed claim form; (c) details of the bank account to which any payment should be made; (d) a copy of Mr Cowie's finalised death certificate; and (e) proof of her own identity. The letter went on to state that "A Targeted General Practitioner's Report will be requested on receipt of the Medical Authority Certificate". The *pro forma* medical authority certificate required from her stated that it authorised Vitality "to obtain details of the Life Assured's medical history from his/her medical practitioner". She identified Dr Alistair Mclennan of Carolside Medical Centre, Clarkston, Glasgow, as her late husband's general medical practitioner and signed the authorisation document as requested. She completed the claim form on 9 November 2016 and sent it to Vitality.

[6] By letter dated 27 February 2017, a representative of Vitality wrote to her stating that the information requested in support of the claim had been assessed and that it was apparent from the information received that Mr Cowie had not fully disclosed his medical history when he applied for the policy on 12 November 2015. It went on to say that, based on that medical information, received from Carolside Medical Centre, Vitality's underwriters had confirmed that had Mr Cowie correctly disclosed his medical history to

it, his application for cover would have been declined. The alleged non-disclosure was described as reckless in terms of the Code of Practice on Non-Disclosure and Treating Customers Fairly published by the Association of British Insurers, and it was claimed that the terms of the policy enabled Vitality to cancel it if the assured had made any untrue statements to Vitality or had failed to disclose any material facts relevant to the policy or to a claim. The letter went on to state that Vitality had applied the underwriting decision that would have been applicable if Mr Cowie had correctly disclosed his medical history on his application, and in consequence had cancelled the policy and declined the claim, with the premiums paid to be refunded. It finally stated that, due to the confidential nature of the medical information in question, Vitality was not able to disclose the full details to her, and suggested that she make an appointment with Dr Mclennan, so that Mr Cowie's medical history could be explained to her in person. That was said to be in order to ensure confidentiality and also to prevent any additional stress to her.

[7] At no point in the letter had Vitality identified the question or questions in its pre-contract proposal form, or the answer or answers by Mr Cowie, which it considered to be relevant "qualifying misrepresentations" within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.

[8] After she had signed and sent off the medical authority certificate to Vitality, she had had no interaction with Dr Mclennan before she received the letter of rejection of the claim. After she received that letter she made an appointment with Dr Mclennan to discuss its contents, and asked for copies of the medical records that had been sent to Vitality. In her meeting with Dr Mclennan, he had said that he could not disclose information to her without checking with the Medical Defence Union. Having done so, he had called her back to confirm that he could let her have a copy of the relevant medical records, and an envelope

containing them was left at the practice reception on 15 March 2017, which she duly collected. At no time had Dr Mclennan shown her any document that he had received from or on behalf of Vitality in relation to the issue of disclosure of medical records or information.

Respondent's case

[9] Alistair James Mclennan (52) adopted a statement dated 2 April 2024 in which he stated that he had graduated MB ChB in 1995 and had worked as a general medical practitioner since 2006, latterly at Carolside Medical Practice. Mr Cowie had been registered to that practice since July 2007. He had died in October 2016 and the death certificate had stated that the cause of death was an intracerebral haemorrhage, which was a bleed in the brain. Liver cirrhosis and coagulopathy (a condition in which the blood's ability to form clots was impaired) were listed as secondary causes. Each of the listed causes of death was relevant, but the intracerebral haemorrhage was what had actually caused Mr Cowie to die. The practice did not have any records relating to the intracerebral haemorrhage, as Mr Cowie had been treated for that by a hospital in England, from which no formal paperwork had been received. The relevant records the practice held were in relation to the liver cirrhosis. An inference might be that Mr Cowie had coagulopathy as a result of his liver cirrhosis.

[10] He had received a letter from a company acting for Vitality dated 28 November 2016, which requested all of Mr Cowie's medical records "relating to or contributing to the cause of death in the 5-year period from 12/11/2010 - 12/11/2015" and enclosed a signed mandate from Mrs Cowie appearing to authorise their production. He subsequently received two further letters from that company, on 6 and 19 January 2017 respectively, pressing for the

records or for a report. He provided it with the records, though he could not recall the exact date when that had been done. If he had been asked for a report, then that would have been written using the medical records. It would have contained the same information, just in a different format. Although he could not remember what had actually happened when the letter requesting the records was received, the normal practice would have been that his secretary would have checked to see if it was an appropriate request, then would have printed what had been requested and passed it to him for checking and redaction of any references to third parties. He did not have a copy of what had actually been sent, only a note that records had been sent out on 19 December 2016 and 23 January 2017. The letter requesting the records was vague in its reference to conditions relating to or contributing to death. When someone had liver cirrhosis, consideration had to be given to including any records relating to alcohol, given the relevancy of alcohol consumption to that condition. He remained of the view that most of the records which had been provided were relevant to the causes of death given that they were linked to liver function and cirrhosis, but accepted in hindsight that certain material, principally relating to back, shoulder and neck pain, perhaps ought not to have been provided, being irrelevant to the causes of death.

[11] In a further statement dated 26 April 2024, Dr Mclennan noted that he had by then been provided with copies of the medical records lodged by Vitality in the action. Having reviewed them, he had appreciated that they contained entries relating to Mr Cowie which fell outwith the period set out in the mandate which had been provided to him. He could not explain why the records outwith the mandate period had been provided, nor could he think of any obvious administrative error which could have led to them being provided. It had not been done intentionally. He identified various records which should not have been

provided, as falling outwith the identified timeframe, and some further documents which had been provided but which did not relate to the causes of death.

[12] In cross-examination, Dr Mclennan stated that responding to the request made of him in relation to Mr Cowie's information had been a matter of routine at the time. He was doing his best to carry out what had been asked of him. Contemporaneous documentation would probably better reflect what had happened than his own memory at this stage.

[13] Abnormal liver function could be related to cirrhosis, but that had not been diagnosed in Mr Cowie until September 2016, and could not be said to have been shown by deranged results from liver function tests carried out in 2014. Mr Cowie had had subsequent normal results from further such tests, and an ultrasound scan of his liver in October 2014 showed nothing abnormal. The aetiology of the cirrhosis with which he had ultimately been diagnosed was never established; it could have been caused by something other than alcohol consumption, though that was the most common cause in his experience. He discussed the import of Mr Cowie's death certificate. It was put to him that the phrase "relating to" could mean something different than "related to", and accepted that if "relating to" meant "narrating" or "setting out", then none of Mr Cowie's records in the possession of his practice related to the causes of his death in that sense. He now appreciated that he might have misunderstood the request made of him. He did not regard it as a targeted request, but as one asking for the whole practice records relating to Mr Cowie in the period mentioned.

[14] He had only recently become aware that records for a wider period than that requested had been provided. He had not regarded the request as one for a report, but for records. A report would be a document written by reference to the records, but there could be a very large difference in the respective contents of a report and the records from which

it was derived. He had been sent the mandate signed by Mrs Cowie authorising Vitality's request to him, which was very inspecific in its terms. He had assumed that it represented a proper legal basis for the request being made of him. He was not conscious that the request had asked him to ensure that the mandate covered what he was being asked to provide. He had not contacted Mrs Cowie about the matter. Had he been sending a report to Vitality, as opposed to records, he would have offered to show it to Mrs Cowie and would have given her the opportunity to decide whether it should be sent. He was aware in general terms of the Access to Medical Reports Act 1988 and the Access to Health Records Act 1990, similarly of GMC and British Medical Association/Association of British Insurers guidance dealing with the subjects. He had not thought it necessary to contact the Medical Defence Union at the time; he did what he thought was the right thing and did not consider legalities in any depth. He had understood that the purpose of the request was to help Vitality to decide whether to pay out on the policy.

[15] In re-examination, Dr Mclennan stated that he had understood the request made of him on behalf of Vitality was for records within the defined period, whether or not relating to a cause of Mr Cowie's death. He had no actual recollection of what he had thought at the time, but was reconstructing now what he would have thought at the time. He had no explanation as to why records outside the period requested had been sent. That had been an error. The suggestion that "relating to" might mean "narrating" or "setting out" had not previously occurred to him. The difference between records and a report might be one of form rather than substance. If he had been asked for a report, he would have mentioned in it Mr Cowie's deranged liver test results, but would also have explained the wider context of the tests.

[16] I observe that it came to light in the course of Dr Mclennan's evidence that his witness statements had been prepared by solicitors instructed by the Medical Defence Union. Although he was initially happy to adopt them as his evidence, Dr Mclennan ultimately departed from some of their content. Most notably, his initial statement asserted clearly that he had contacted Mrs Cowie before sending any material to Vitality, which (after an attempt to argue that the statement should not be read as saying what it plainly did, which was not to his credit), he was constrained to accept was untrue. I shall return to this matter in due course.

[17] John Archibald Downes (63) provided a lengthy affidavit dated 2 April 2024, the essential burden of which was that he was an Associate of the Insurance Institute of South Africa, held a Master's Degree in Business Administration and was currently employed by Vitality Corporate Services Limited as Director of Underwriting and Claims Strategy, accountable for the development and maintenance of underwriting and claims practice and quality. He had over 30 years' experience in similar roles across insurers and reinsurers in the UK and abroad. He was not personally involved in the events relating to the handling of the claim on Mr Cowie's policy until Mrs Cowie challenged the initial declinature. His first involvement in the case was to review all the relevant papers and business records for the purposes of speaking to Vitality's actions in relation to the recovery of Mr Cowie's medical records. He was aware of the terms of the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA") relating to "qualifying misrepresentations". Vitality's position was that Mr Cowie had made qualifying misrepresentations in breach of the duty described in section 2(2) of the 2012 Act and that those qualifying misrepresentations were deliberate or reckless rather than careless. If Mr Cowie had answered the questions asked of him in the proposal with reasonable care, and he had not made misrepresentations, Vitality

would not have entered into the contract of insurance. When a claim was assessed, it was imperative that claims assessors considered all the information available in order correctly to adjudicate the claim. In the context of misrepresentations, this meant that where the claims assessor identified that there had potentially been a misrepresentation on behalf of the insured, that needed to be investigated thoroughly. There was a standard industry practice regarding how qualifying misrepresentations were investigated and how relevant claims where qualifying misrepresentations had occurred were assessed and adjudicated on. There were certain industry codes and guidance which codified what was standard industry practice, and insurers would always have regard to these, in addition to their own internal claims philosophy.

[18] The Association of British Insurers ("ABI"), an insurers' trade association of which Vitality was a member, had published a code of practice on managing claims involving misrepresentation for individual and group life, critical illness and income protection insurance. The ABI code for dealing with misrepresentation first appeared around 2008 and offered guidance to insurers as to how to categorise misrepresentation, and its potential outcomes. Most of the code was now incorporated within CIDRA. The version of the code in force at the relevant times in relation to Mr Cowie's case was dated April 2013. Section 3 of that version of the ABI code addressed collecting medical information. Section 3.5 stated: "3.5 Insurers are fully entitled to ask for any medical or other information needed to properly assess a claim." That was consistent with his understanding of insurance industry practice generally; in circumstances where medical information was required before an insurer could make a full and proper assessment of a claim, it was entitled to seek to recover relevant medical records. Section 3.6 stated:

> "However, insurers should have a legitimate reason for requesting medical information at the point of claim and should apply the principles set out in the joint BMA/ABI guidance, 'Medical Information and Insurance', on gathering medical information at the point of claim."

Section 3.7 stated:

> "insurers should only ask for medical information beyond that needed to assess whether the insured event has occurred, or to case manage a disability claim, to the extent that the circumstances of the claim reasonably prompt the insurer to believe that there might have been misrepresentation by the customer."

It was Vitality's position that such circumstances existed in relation to Mr Cowie's case. If a potential misrepresentation was identified upon a claim being made, then medical evidence was usually requested to decide whether any potential misrepresentation was material or not. When the evidence was received, the claims assessor, sometimes with underwriting assistance, would determine by reference to the ABI code and CIDRA whether any non-disclosure would have altered the terms on which the policy was accepted, or whether it would not have been accepted at all.

[19] The British Medical Association ("BMA") and the ABI had jointly published guidance regarding medical information and insurance. The joint guidance was published in March 2010 and it was in force at the relevant times in relation to Mr Cowie's case. The contents of the second paragraph of section 10 of the joint guidance was particularly relevant to Mr Cowie's case, and stated:

> "Insurance companies request information about deceased people in order to assess claims. Such requests are known as 'duration certificates'. It is preferable that risks are properly assessed before a company agrees to offer cover. The contract between insurer and insured person is one of good faith and doctors should not be asked to provide guarantees against fraudulent claims. It is recognised, however that the law does in certain circumstances, give people with a claim arising from the death of an individual statutory rights of access to information necessary to satisfy the claim. Insurance companies should exercise those rights only where there are reasonable grounds to believe that relevant information may have been withheld at the time the policy was taken out. In the case of life insurance, this may be for example, where the insured person dies, apparently unexpectedly, say

> within six months of taking out the policy or where an insured person has died of heart diseases although the application made no mention of the condition".

[20] Having regard to the ABI Code and the BMI/ABI joint guidance, it was the usual practice of insurers (including Vitality) to request a targeted general practitioner's report in circumstances such as pertained in Mr Cowie's case. The ABI had produced a further draft explanation document regarding the ABI code, but it had never been published, as the Financial Conduct Authority, in conjunction with which the document had been formulated, had never finally approved the wording. Nonetheless, the document was an accurate reflection of what was insurance industry practice at the relevant times in relation to Mr Cowie's case. In section 2 of that document, the matter of insurers being sent medical information that went beyond the scope of an insurer's initial request to a doctor was discussed. It stated:

> "Insurers should at all times make reasonable efforts to identify any additional information obviously going beyond what they asked for and/or what should properly have been requested. This should be returned, destroyed or kept separate without using it and a clear record kept of their actions (i.e. what they have done and why). Where it is not practical to separate such additional information, it should nonetheless be disregarded and again a clear record kept. However, in the following exceptional circumstances insurers may use such additional information:
>
> - Where the insurer would have ultimately asked for the further medical information on receipt of that originally requested to allow the claim to proceed more quickly.
> - Where the doctor has sent additional medical information that is relevant to assessing the claim.
> - Where the additional medical information indicates clear dishonesty to which the insurer should be free to respond.
> - Where disregarding the information might not wholly be in the interest of the customer. For example, where the medical information might affect the validity of a future claim on an income protection policy, or policies held by the insured that are not the subject of the claim."

[21] Prior to requesting medical information of an insured, it was Vitality's practice to request the insured to sign an authority allowing it to contact the relevant medical practitioner requesting such records. That was in line with industry practice. Where a claim

was being made on a life insurance policy, Vitality's practice was to request that the next of kin sign an authority. Not only was that done in order to ensure that the confidentiality of the insured was being maintained, but medical practitioners would in his experience not disclose medical information without such an authority being provided. Medicals Direct Screening Limited was a third-party provider which was engaged by Vitality in or around 2012 to request and collect medical records and reports from medical practitioners. A representative of Vitality would determine how targeted the request should be and relay written instructions detailing the nature of the information required (eg over what time period, and in relation to what conditions) to that company. Insurers always sought to ensure that any request for medical information submitted was objectively justified in the circumstances of the particular claim. In claims on life insurance policies, that meant targeting the request to the 5-year period prior to death. As a matter of general industry practice, insurers did not make requests for medical records and information that were not targeted. Insurers would not simply request all medical records without giving any consideration to the question of whether that was justified. The ABI code stated that insurers should not ask for information that was not relevant and should focus on information that was connected to the cause of a claim. There was no standard format for a "targeted GP report", but it would be taken to mean that an insurer should only ask for information relevant to the claim. Vitality had written to Medicals Direct stating:

> "We are assessing a Life Cover claim for Mr Mark Fraser Alexander Cowie following his death on 25/10/2016. The Death Certificate has confirmed that the cause of death is: I. (a) Intracerebral Haemorrhage (b) Coagulopathy (c) Liver Cirrhosis. Kindly furnish us with Mr Cowie's medical records relating to or contributing to the cause of death in the 5 year period from 12/11/2010 - 12/11/2015. Please include copies of all consultations, referral letters to other health practitioners, copies of reports and results of all tests/investigations done; together with medication prescribed for any condition relating to or contributing to the cause of death."

[22] Records over the 5-year period between 12 November 2010 and 12 November 2015 were requested as that correlated with the period in relation to which questions had been asked of Mr Cowie when he applied for cover. For example, he had been asked whether in the 5 years before applying for cover he had suffered from any condition of the liver. Medicals Direct would copy the request from Vitality to the relevant medical practitioner. Where records were not received in a timely manner, Medicals Direct would follow up with the medical practitioner via phone call or correspondence.

[23] It was quite common for insurers to be provided with medical records which went beyond the terms of the initial targeted request to the general practitioner. Most commonly, general practitioners sent the entire medical records of the customer to the insurer, despite having been asked only to provide a targeted report or targeted records. In his industry experience, that had been common for many years. The landscape surrounding data protection had changed over time, but doctors did still sometimes send entire sets of medical records. It was also quite common, when asked to provide a targeted GP report, for doctors to send medical records targeted to the request rather than writing a report or letter that set out the requested information. He considered that a response from a doctor that provided targeted records met the definition of a targeted GP report. It was ultimately entirely a matter for the doctor how to respond to the request, and provided the response addressed the targeted information sought, insurers were unlikely to take any issue with whether they were sent a report or a bundle of targeted records. Vitality would not take any issue with the form of how a doctor chose to respond to a request.

[24] Insurers would not disregard information that was needed to assess a claim, and would consider the contents of any such information, even if it was not information that

was specifically requested from the doctor. They would look at what had been sent and take a view on whether it was information needed in order properly to assess the claim. If it was, they would consider it during their decision-making process regarding the claim. If it was not, they would disregard the information. The ABI code and the relevant industry practice, as evidenced in the ABI further draft document, did not prevent insurers from doing so.

[25] Vitality's claims philosophy had been drafted by his team with input from reinsurers and industry bodies such as the ABI. Vitality was audited by its reinsurance partners against its claims, and underwriting practice and reinsurance pricing was heavily influenced by it. If the audits found that it was not investigating instances of suspected misrepresentation, it was highly likely that that would result in higher reinsurance rates and adversely affect its competitiveness in the market. The version of Vitality's claims philosophy in force at the relevant times for Mr Cowie's case was dated 31 July 2017. That philosophy proceeded on the basis that Vitality would adhere to the relevant industry codes and practices. It stated:

> "When considering claims, we should only request medical information about specific conditions or to a time period appropriate to the medical condition that is the subject of the claim and where we have reason to believe that there may have been misrepresentation by the customer. We should document our reasons for doing so. If the customer's doctor provides us with medical information that we did not specifically ask for, but where the information confirms that there has been misrepresentation, the claim will be referred to the Strategic Underwriting Team in the UK for a retrospective underwriting opinion. If the underwriters decide that there would have been a different underwriting outcome if the omitted information had been disclosed at application, then this may be justification for requesting additional information from the customer's doctor e.g. a full GPR may be requested. We should ask the customer about the reasons why the information was not disclosed, before making any judgments about the category of misrepresentation. Only once we have received the additional information from the customer's doctor and the customer's response to the 'reasons why' letter, can we make any judgment about the category of the misrepresentation and what (if any) proportionate remedy should be applied. If, at claim stage, we find that there was misrepresentation where

> it is appropriate to apply a proportionate remedy, and even if the misrepresentation does not affect the outcome of the claim, we do not consider that it is good TCF [i.e. treating customers fairly] practice to disregard the misrepresentation just because the information we got was in addition to what we specifically requested. NB: if the misrepresentation (and any proportionate remedy) has no bearing on the outcome of the claim, then we will not delay payment of the claim whilst we await the client's response to the 'Reasons Why' letter."

[26] The reference to a "GPR" meant a General Practitioner's Report. It was an acronym sometimes used within Vitality in place of the phrase "targeted GP report". The philosophy further stated:

> "An insurer is fully entitled to ask for any medical or other information needed to assess the claim properly, but the insurer should have legitimate reasons for doing so. An insurer should, therefore, carefully consider whether it can limit its request to information about specific conditions or to a time period appropriate to the medical condition it has reason to believe may have existed. The insurer should keep an audit trail of what it requested and its reasons for doing so."

[27] That was entirely consistent with the ABI code. Vitality recognised that it had to have a legitimate reason for requesting medical records; that it should only ask for more medical information beyond that required to assess whether the insured event had occurred to the extent that the circumstances of the claim reasonably prompted it to believe that there might have been misrepresentation by the customer; and that it should not request excessive evidence. If doctors provided more medical records or information than insurers initially requested by way of a targeted request, the philosophy took the position that Vitality should not disregard information that was needed to assess the claim, and should consider the content of any such information, even if it was not information specifically requested. That was consistent with industry practice.

[28] In 2015 Mr Cowie entered a life insurance policy with Vitality. It had received the application for the policy through a financial advisor appointed by Mr Cowie. The application included Mr Cowie's responses to a number of questions relating to his health.

The decision to offer cover was made based on Mr Cowie's application and his responses to those questions. Mr Cowie answered "no" to all the medical or health questions except for the question asking whether he had undergone any investigations in the last 2 years; he answered "yes" to that and "yes" to the follow-up question asking whether this was part of a routine "well person" check, and "yes" to the further question asking "was the result normal?". As a result, the application was dealt with by "Straight Through Processing", meaning it was underwritten by an automated rules engine rather than a human underwriter.

[29] According to his death certificate, Mr Cowie died on 25 October 2016. Mrs Cowie had called Vitality on 28 October 2016 to advise it that he had passed away. Vitality wrote to Mrs Cowie on 31 October 2016 requesting further information to process the claim. The letter enclosed a blank claim form and a blank "Medical Authority Certificate" or mandate for Mrs Cowie to complete and return. The letter requested documentation, including a copy of Mr Cowie's death certificate, and stated, amongst other things, that "A Targeted General Practitioner's report will be requested on receipt of the Medical Authority Certificate". Mrs Cowie wrote to Vitality on 10 November 2016 enclosing the requested documentation, including the death certificate, and the completed form and mandate. The operative part of the mandate stated: "I/we, the executor(s) / next of kin / trustees, authorise VitalityLife to obtain details of the Life Assured's medical history from his/her medical practitioner". The death certificate narrated under "Cause of death": "1 (a) Intracerebral haemorrhage (b) Coagulopathy (c) Liver cirrhosis". Mr Cowie had liver cirrhosis, which caused coagulopathy, which in turn caused him to develop an intracerebral haemorrhage, from which he died. When considering the cause of Mr Cowie's death, it was necessary to consider liver cirrhosis, as this caused the conditions from which he ultimately died. The

claims assessor would have been alerted by the fact that liver cirrhosis was listed as a cause of death. That was a condition which was known to develop over a period of time due to a number of known risk factors, such as alcohol misuse or hepatitis. Given that the condition had not been disclosed by Mr Cowie on his application, it needed to be investigated and the claims assessor would have engaged Medicals Direct to write to Dr Mclennan in the terms instructed, which it did on 28 November. That was a targeted request. It was, in substance, a request for a targeted report from Dr Mclennan. It was requesting medical records and information falling within a targeted time period in relation to the cause of death narrated in the death certificate and reproduced in the letter. It was not a request for Mr Cowie's full medical records from birth nor was it a request for all medical records held by Dr Mclennan's practice whether relevant to the causes of death narrated in the death certificate or not.

[30] In this context, Vitality would use the terms "medical records" and "medical report" interchangeably. They were both targeted requests, and a response to the request by a medical practitioner, irrespective of the terminology used, would render the same result. Materially the same information would have been provided either way to Vitality. It was necessary and proper practice for the targeted records to be requested from Dr Mclennan because liver cirrhosis was a condition that developed over an extended period of time due to known risk factors, none of which was disclosed by Mr Cowie on his application form which had been submitted less than 12 months prior to his death. In such circumstances, targeted records would be requested in order to determine whether there had been a potential misrepresentation by the insured, and if so, to collect medical information in order to re-underwrite the policy in accordance with Vitality's underwriting guidelines with the benefit of the additional medical information. Dr Mclennan responded to the request on

23 January 2017 by producing medical records to Medicals Direct. That was not unusual. It was not immediately obvious that what he had sent exceeded the terms of the request. He was a medical practitioner and had direct professional knowledge of Mr Cowie's medical history. He was best placed to assess what required to be produced in response to the request. There might be a range of conditions that contributed to a cause of death, and it was for the doctor to determine that when responding. A claims assessor conducted an initial review of Mr Cowie's medical records and determined that the case be referred to Vitality's retrospective underwriting team for review and opinion. That decision had been made due to Mr Cowie not disclosing oesophageal issues or abnormal liver function test results at the point of application. The medical records appeared to show that Mr Cowie was aware of those issues and failed properly to disclose them on the application. In particular, liver cirrhosis would have raised a claims assessor's concerns, as this was a condition that generally developed over a relatively prolonged period of time. With a history of deranged liver function and references to alcohol consumption also present, the assessor would immediately have been alerted that there was a strong possibility of misrepresentation. The medical records contained information that was relevant to assessing the claim on Mr Cowie's policy. They revealed deranged liver function tests and a diagnosis of liver cirrhosis. They revealed that elevated liver function tests had led to the postponement of surgery. Mr Downes asserted that all of that fell within the targeted 5-year period, and related to one of the causes of death noted in the death certificate. There was no conceivable scenario, short of Dr Mclennan declining to produce any targeted medical records or report whatsoever, in which Vitality would not have investigated further to the point of recovering the records relating to liver function. Those records were directly relevant to assessing the claim.

[31] In response to a further examination which might aptly be described as cross, Mr Downes accepted that the death certificate was sufficient to establish the event insured against, namely Mr Cowie's death, and that the ABI guidelines required an insurer to have a belief that there might have been misrepresentation before seeking further information. The death certificate had, however, suggested that there might have been misrepresentation. Mrs Cowie had been asked to give a mandate for recovery of medical information pertaining to her husband in advance of Vitality having seen the death certificate in case the certificate raised any issues that might require investigation. That was standard practice, to avoid returning later to ask for more paperwork from someone who might be expected to be grieving for the loss of a loved one.

[32] The timing of Mr Cowie's death, ie the length of time between the inception of the policy and the death, meant that Mrs Cowie's claim was treated by Vitality as an "early" one. An early claim would be in respect of a death within a year or two of policy inception, or up to 5 years if the cause of death appeared to be a condition which would typically be long-standing in nature. There were no fixed criteria for the treatment of a claim as an early one. Some circumstances were red flags for claims assessors. In Mr Cowie's case, his death had occurred within a year of policy inception, which meant that there was a high possibility of an undisclosed medical condition having been present.

[33] The mandate granted by Mrs Cowie authorised Vitality to obtain details of her husband's medical history from his medical practitioner. She had been told that that mandate would be used to obtain a targeted medical report from his general practitioner. There was no definition of a targeted general practitioner report. The request made to Dr Mclennan had been for medical records relating to or contributing to the causes of Mr Cowie's death. That was a targeted request; there was no substantial difference between

a report and records. Vitality would have ended up with the same information either way. Mrs Cowie should have appreciated that Vitality would be asking for records relating to the causes of death.

[34] He was aware in general terms of different legislation relating to access to medical records and access to medical reports, but not of the detail of the legislation. The request had not specifically been made in terms of any particular legislation. It had been for a targeted report, even if it said records. Vitality had asked for a report and had got more information than it asked for. That was not surprising; it happened quite often. Generally, information not specific to the claim was disregarded. Vitality was looking for information that related to the causes of death. It did not fish for more. It was up to Dr Mclennan to decide how to report back. He had provided more than he was asked for. Mrs Cowie had not been provided by Vitality with a copy of the request sent to Dr Mclennan. Such provision of the request was not standard practice, again to avoid disturbing the bereaved more than necessary. Vitality had a reasonable suspicion of misrepresentation and was looking to see if it could substantiate it, or to verify the claim. Mrs Cowie had not been told that. The purpose of the enquiry had not been spelled out to Dr Mclennan either. Mr Downes did not know what would have happened had Mrs Cowie refused permission for recovery of medical information.

[35] The causes of Mr Cowie's death were relevant to the decision to decline the claim. The medical history indicated the existence of an issue known to him which was linked to those causes. Had Vitality been informed of the 2014 deranged liver function test results when the insurance was applied for, it would have refused to take the risk. The ABI code and Vitality's own claims philosophy did not require that all information provided in excess of a specific request had to be disregarded. It would be disregarded if it was not relevant to

the cause of death or to the validity of the claim. It had first to be looked at in order to determine whether it was so relevant. Vitality fully accepted that medical records were confidential. The causes of Mr Cowie's death had led it to investigate, and the investigation had led to the discovery of an issue of non-disclosure. He was not aware of any decision of the Financial Services Ombudsman in a case called *L* v *Liverpool Victoria*; it had not been brought to his attention. There was a general duty on insurers to act fairly, but it appeared that the circumstances of that case were quite different from those of this case. The ABI code was subject to interpretation.

[36] Vitality assumed that Dr Mclennan had sent it information relevant to the claim. He had provided material outwith the requested date range, but Vitality had not reverted to him. Irrelevant information had not been kept separate from what was relevant, but what was irrelevant had been disregarded. There was no separate department in the company which assessed relevancy before passing only relevant information to claims assessors. The assessment of a claim involved the possibility of declining it for non-disclosure, but decisions were not made on the basis of irrelevant information that had not been asked for.

[37] In re-examination, Mr Downes stated that Mrs Cowie's claim had been investigated because of the relatively short time that had passed between the inception of the policy and Mr Cowie's death. She had been asked for a medical mandate as it was an early claim. She had been told that the claim would be assessed, and that involved looking at possible non-disclosure. When the death certificate was received, the mention of cirrhosis suggested the presence of a long-term condition, and that there might, therefore, have been a non-disclosure. That possibility was bolstered when it was seen that the records referred to deranged liver function test results. The distinction between medical reports and medical records had become cloudy. The format in which information was supplied made no

difference to Vitality. Only records relevant to the causes of Mr Cowie's death had been requested.

Minuter's submissions

[38] On behalf of Mrs Cowie, senior counsel submitted that the evidence before the court established, amongst other things, that as a condition for assessing her claim to payment under Mr Cowie's policy, Vitality required her to sign a "Medical Authority Certificate Form". It was at that stage aware only that Mr Cowie had died from a brain haemorrhage, and required the form to be signed because his death had occurred within a year or so of his taking out the policy. That involved an element of pre-assessment of the claim on its part. Its purpose in getting her signature to the form was to enable it to access the medical records of Mr Cowie to see if it could find evidence that he had, in taking out the life insurance policy, made a misrepresentation in breach of his duty as set out in section 2(2) of the Consumer Insurance (Disclosure) Act 2012. It did not advise Mrs Cowie that that was why she was being asked to sign the form, informing her only that on receipt of the signed form a targeted general practitioner's report would be requested. The operative wording of the Medical Authority Certificate Form was as follows: "I/we the executors/next of kin/Trustees authorise VitalityLife to obtain details of the Life Assured's medical history from his/he General Practitioner who is …". Vitality sent a copy of the signed Medical Authority Certificate Form to Dr Mclennan and stated in the covering letter: "We enclose a copy of the Medical Certificate Authority form authorising VitalityLife to obtain details of the Life Assured's medical history", but did not advise him what had been said to Mrs Cowie about the use to which the form would be put. Vitality did not request a targeted general

practitioner's report from Dr Mclennan, but instead made a request to him to supply it with Mr Cowie's medical records, in the following terms:

> "Kindly furnish us with Mr Cowie's medical records relating to or contributing to the cause of death in the 5 year period from 12/11/2010 - 12/11/2015. Please include copies of all consultations, referral letters to other health practitioners, copies of reports and results of all tests/investigations done; together with medication prescribed for any condition relating to or contributing to the cause of death."

Mrs Cowie was not informed about the terms of that request by Vitality. Vitality intended to mislead Dr Mclennan by not telling him that it had told Mrs Cowie that a report, not records, would be asked for. Dr Mclennan did not apply his mind to the question of whether or not the medical records which he was sending to the insurers could be said to be only those records "relating to or contributing to the cause of death in the 5 year period from 12/11/2010 - 12/11/2015". He did not select or redact the medical records which he sent to Vitality with a view to ensuring that it was supplied by him only with those records which were called for. Instead, he responded to its request for Mr Cowie's medical records by sending the complete medical records held by the practice on Mr Cowie, which dated from around 2010 until the date of his death. From the fact that the records sent to Vitality included entries which post-dated 12 November 2015, it would have been immediately obvious to it that he had included records which went beyond what had been requested of him. Vitality made no effort to identify any additional information included by Dr Mclennan obviously going beyond what had or ought to have been asked for. It did not return, destroy, or keep separate without using, any such material. Rather, it read through the complete medical records as sent to it and had regard to all the information contained therein with a view to identifying information it could use to found a claim that Mr Cowie had, in taking out the life insurance policy, made a misrepresentation in breach of his duty

under the 2012 Act. None of the material which it founded upon refusing the claim bore a causal relationship to any of the conditions which were certified in the death certificate as the immediate and underlying causes of death.

[39] Against that factual background, it was submitted that Mrs Cowie did not consent to Vitality seeking or obtaining Mr Cowie’s medical records. It misled Dr Mclennan in representing to him that she had consented to it seeking or obtaining his medical records. It obtained those medical records in breach of the requirements of confidentiality at common law as that applied to those records. The manner in which it obtained Mr Cowie’s medical records was not done “in accordance with the law” for the purposes of compliance with the requirements of Article 8 of the European Convention on Human Rights.

[40] The common law provided that medical records could be recovered for use in court actions only with the specific sanction of the court. In *Boyle* v *Glasgow Royal Infirmary*, 1969 SC 72, 1969 SLT 137 Lord Cameron had observed (at 1969 SC 82, 84, 1969 SLT 145, 146):

> “The records of a patient’s condition and treatment are not kept for the purpose of being made available to the patient on call, but so that a full and complete record of that patient's condition, treatment and response or reaction to treatment may be kept. They may be valuable as an adjunct to research and the advancement of medical science, they may be valuable for further treatment of the patient in other or recurrent circumstances, and it is obvious that those who make or keep them must be wholly free to state fully and frankly what they have to note, express or record. The fact that such specifications as this require by our practice to be served on the Lord Advocate as guardian of the public interest is indicative that these records are not subject to random inspection or recovery at, it may be, the wish of a patient … [Counsel for the pursuers] was not seeking particular information or a particular document to enable him to complete the specification of his pleadings, but a wide collection of documents of all kinds relative to the second pursuer’s treatment in hospital in order that he might search through them to see if he could find something which he could add to his pleadings, some matter of which he is at present unaware and the nature of which he cannot define. … If this diligence were allowed, I think it would be difficult to see how in any case in which an action was raised against hospital authorities for alleged negligent treatment, whether medical or nursing, of a patient under their care, a diligence to recover the whole record of that patient's treatment could be refused at the stage of an open record. I would sustain the reclaiming motion and refuse the diligence sought *in hoc statu*.”

[41] The provisions of the UK GDPR did not apply to the issue of the confidentiality of the personal data contained in medical records of those who were deceased. The rules concerning the lawful processing of personal data about deceased persons were found in the case law on common law duties of confidentiality, as well as in a variety of statutes and statutory guidance, such as the Freedom of Information (Scotland) Act 2002. The rights of next of kin to access a deceased person's medical records were provided for in sections 3(1)(f) and 4(3) of the Access to Health Records Act 1990. The Information Commissioner's Office had published guidance on dealing with information about deceased persons in 2013. The General Medical Council had also published guidance on confidentiality and good practice in handling patient information, noting that the duty of confidentiality continued after a patient had died.

[42] The decision of the House of Lords in *Lord Advocate* v *Scotsman Publications Ltd* 1989 SC (HL) 122, 1985 SLT 705 made it plain that Scots and English law did not differ as regards the common law of confidentiality. Equity had always been part of the common law of Scotland. Even if the formal conceptual legal basis of protection of confidential information might not be the same in both jurisdictions, the practical result was the same. In *BC* v *Chief Constable, Police Scotland* [2020] CSIH 61, 2021 SC 265, 2020 SLT 1021, Lord Justice Clerk Dorrian observed at [83]:

> "The existence in Scotland of an obligation of confidence has long been recognised, and here too the need for a confidential relationship has given way to a focus on the knowledge of those possessing the information that it had been imparted in confidence … I see no reason to think that the effect of Arts 8 and 10 ECHR in respect of this area of the law in Scotland is any different to that in England …".

Reference was also made to *Bluck* v *Information Commissioner and Epsom and St Helier University NHS Trust* (2007) 98 BMLR 1, to *Lewis* v *Secretary of Health* [2008] EWHC 2196 (QB)

at [26] and to *Campbell* v *Mirror Group Newspapers Ltd* [2004] UKHL 22 [2004] 2 AC 457 at [145].

[43] Those statements of English law fell now to be considered in the context of the European Convention on Human Rights, Article 8 of which read as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[44] Vitality did not dispute, but chose to ignore, that the medical records at issue were documents which were protected under and in terms of Article 8, meaning that the court was obliged in terms of section 6(1) of the Human Rights Act 1998 to exercise its powers in relation to the records only in a manner which was Article 8 ECHR compatible. The court should bear in mind that ECHR rights did not form a wholly separate stream in law, but in truth soaked through and permeated the areas of domestic law in which they applied - see Lord Justice General Rodger in *HMA* v *Montgomery* 2000 JC at 117A - B, 2000 SLT 117 at 127A.

[45] The position under the ECHR in relation to continuing duties of confidentiality under Article 8 as owed to the surviving family of a deceased individual was set out in *Éditions Plon* v *France* (2006) 42 EHRR 3610, which made it clear that the obligation of confidentiality imposed by Article 8 ECHR survived the death of the patient. Because the medical records of Mr Cowie fell within the ambit of the protections of Article 8, any disclosure or use of these records in court had to be shown by Vitality to be (i) in accordance with law and separately (ii) justified in all the circumstances of this case under and in terms of Article 8(2). The recent Convention case law on the issue of the confidentiality of medical

records and reports under Article 8 was usefully summarised in *Frâncu* v *Romania* [2020] ECtHR 69356/13 (Fourth Section, 13 October 2020), where the ECtHR had observed (in an unofficial translation from the original French):

> "51. The Court recalls that medical data fall within the scope of the patient's right to respect for the patient's private and family life, guaranteed by Article 8 ECHR: *Mockutė v Lithuania* [2018] ECtHR 66490/09 (Fourth Section, 27 February 2018) at [93]; *I v Finland* (2009) 48 EHRR 31 at [35]; *LL v France* (2010) 50 EHRR 32 at [32].
> 52. In this respect, it also recalls that respect for the confidentiality of health-related information is an essential principle of the legal systems of all the Contracting Parties to the Convention. Respecting this principle is vital not only to protect the privacy of patients, but also to preserve their trust and confidence in the medical profession and health services in general: *Z v Finland* (1998) 25 EHRR 371 at [95]; *LL v France* (2010) 50 EHRR 32 at [44]. The domestic legislation must therefore provide appropriate safeguards to prevent any communication or disclosure of personal data relating to health which does not comply with the guarantees under Article 8 ECHR: *Z v Finland* (1998) 25 EHRR 371 at [95]; *Mockutė v. Lithuania* [2018] ECtHR 66490/09 (Fourth Section, 27 February 2018) at [93].
> 53. Any measure taken by a State to compel the communication or disclose such information without the consent of the person concerned calls for the most rigorous scrutiny on the part of the Court, which must assess with equal care the safeguards designed to ensure effective protection: see, *mutatis mutandis*, in relation to information concerning HIV positive status: *Z v Finland* (1998) 25 EHRR 371 at [96].
> 54. The Court accepts that the protection of the confidentiality of medical information - which is in the interests of both the patient and the community as a whole - can in some cases give way to the need to investigate and prosecute criminal offences and to protect the public nature of legal proceedings, when the latter interests are shown to be of even greater importance: *Z v Finland* (1998) 25 EHRR 371 at [97].
> 55. However, it may be appropriate to limit the interference that inevitably results as far as possible to that made strictly necessary by the specific features of the proceedings and the facts of the litigation: *LL v France* (2010) 50 EHRR 32 at [45] and the case law there noted."

[46] If the medical records in the present case could not be shown by Vitality to have been obtained by it "in accordance with law", then any proposed use of those records by it before this court would be Convention incompatible and, as such, could not be permitted by the court in accordance with its duties under section 6 of the 1998 Act. Thus, in *MK* v *Ukraine* [2022] ECtHR 24867/13 (Fifth Section, 15 September 2022) the Strasbourg court held that where there had been a failure by the respondent to comply with a national

requirement to keep a written record of alleged consent to disclosure of medical information, then the inference could properly be drawn that the lack of written record for consent meant that no consent was in fact given. On that basis the court held that the disclosure of the relevant confidential medical information complained of was necessarily in breach of Article 8 because it could not be justified as being an interference done "in accordance with law". The court observed that:

> "36. Any interference with an individual's Article 8 rights can only be justified under Article 8(2) if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim …
> 37. The wording 'in accordance with the law' requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8 ECHR. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his or her conduct. The foreseeability requirement also means giving individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention ,,,
> 39. By virtue of the domestic law the applicant was entitled to be informed of the results of her HIV test (see Section 7 of HIV act, cited in paragraph 24 above). There is no dispute between the parties on that issue. The parties disputed, however, on whether this provision had been complied with by the hospital: while the Government, relying on the conclusions of the domestic courts, alleged that the applicant had been informed of her diagnosis by the hospital staff, the applicant denied being informed of the results of her HIV-test.
> 40. While it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts, the Court cannot but note that according to the HIV Act, an HIV-positive person should attest in writing of having received information about the positive results of his or her HIV tests and recommendations as to further treatment (see Section 12 of HIV act, cited in paragraph 24 above). No such written evidence had been relied on by the domestic courts and the applicant's arguments in this respect remained unanswered …
> 41. In these circumstances, the Court cannot adhere to the domestic court's findings and concludes that there has been an interference with the applicant's right to respect for her private life on account of the hospital's failure to duly inform the applicant of the results of her HIV testing. For the reasons mentioned above, it further finds that the interference was not 'in accordance with the law' within the meaning of Article 8 § 2 of the Convention …
> 50. In view of the foregoing, the Court finds that the release by the hospital of information about the applicant's health to her mother, whether in the form of

> 'informing' or 'confirming', did not have a Convention-compliant legal basis and was, therefore, not 'in accordance with the law' within the meaning of Article 8 (2) of the Convention. Accordingly, the Court is not required to determine whether the disclosure pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued."

[47] The medical records in the present case had been obtained without Mrs Cowie's informed consent; a misrepresentation about what she had consented to had been made to Dr Mclennan, and his position was that in retrospect he accepted that he had over-disclosed. That being the case, the medical records were not recovered in accordance with the law. Even if the medical records had been recovered in accordance with law, Vitality's proposed use and reliance on them before the court could not be permitted unless it established that such reliance was, in all the circumstances, justified. The Court had to ascertain, having regard to all the circumstances of the case, whether the reasons adduced to justify what was proposed were relevant and sufficient, and whether the interference was proportionate to the aim pursued: *Z* v *Finland* at [94]. Thus, in *LL* v *France* the ECtHR ruled that the decision of the French domestic courts to allow a divorcing wife to lodge and rely upon medical records and reports relating to her husband in support of her divorce and custody case was contrary to the husband's Article 8 rights to confidentiality. The court noted:

> "46. … In reality, it was only on an alternative and secondary basis that the domestic courts used the disputed medical document in justifying their decisions, and it thus appears that they could have declared it inadmissible and still reached the same conclusion. In other words, the impugned interference with the applicant's right to respect for his private life, in view of the fundamental importance of the protection of personal data, was not proportionate to the aim pursued and was therefore not, 'necessary in a democratic society for the protection of the rights and freedoms of others'.
>
> 47 Lastly, as the Court has already observed, the domestic law does not afford specific guarantees in respect of the use of data relating to the private life of parties to proceedings of this kind, except for those guarantees referred to by the Government, and this *a fortiori* justifies strict scrutiny of the necessity of such measures within the meaning of art.8(2) of the Convention."

[48] The decision of the ECtHR in *I* v *Finland* (2009) 48 EHRR 31 underlined that this court was required to ensure the provision of effective remedies against unauthorised access to medical records in breach of the duties of confidentiality, and that simply allowing for the possibility of claiming damages in respect of losses attributable to such unauthorised access did not constitute for those purposes an effective remedy. The court noted:

> "46. .. [T]he applicant's argument that her medical data were not adequately secured against unauthorised access at the material time must be upheld.
> 47. The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorised access occurring in the first place. Such protection was not given here."

[49] In summary, the court had a Convention duty to ensure effective protection of the confidentiality of medical data as contained in medical records or reports. That duty extended to the prevention of any communication or disclosure of personal data relating to health which did not comply with the guarantees under Article 8. That Article required that, in principle, the court should not allow the disclosure or use of medical information contained in medical records or reports without the consent of the person to whom the duties of confidentiality were owed. Reliance or reference for a specific purpose in court to confidential medical information by the party to whom duties of confidentiality were owed was not to be taken as, of itself, waiver of confidentiality in otherwise confidential medical records or reports. In any event, where medical information had been obtained and disclosed to or used by a third party in the absence of a court order and without the consent otherwise required under national law that would, in and of itself, constitute a breach of Article 8 since the interference with the Convention right to privacy which covered medical records and reports would not have been done in accordance with law.

[50] Further, any order by the court for the disclosure, recovery or use of confidential medical data, in the absence of consent, would constitute an interference with the Article 8 rights, although it might be open to a court to make a disclosure (or permitted use) order of confidential medical information without, or in the absence of, the consent otherwise required under the Convention, where such an order could be shown to be justified in Convention terms (which is to say that the order was based on relevant and sufficient grounds and was proportionate to the recognised legitimate aim pursued). The court should apply any proportionality test in the structured way described by Lord Reed in *Bank Mellat* v *Her Majesty's Treasury* [2013] UKSC 38, [2014] AC 700 at [68] to [76], asking serially whether the objective of any interference with an Article 8 right was of sufficient importance to justify that limitation, whether the interference was rationally connected to that objective, whether a less intrusive means could be used without unacceptably compromising the achievement of the objective, and whether, balancing the severity of the impact of the interference with the importance of the objective and the extent to which the interference would contribute to its achievement, the former outweighed the latter. In particular, commission and diligence provided a less intrusive means of interference in the circumstances of the present case.

[51] The presumption, however, was against justification for an order in that it was only where, after the most rigorous scrutiny on the part of the court, competing relevant legitimate interests in favour of disclosure were shown clearly to outweigh the maintenance of medical confidentiality that such an order could be made. No such order could lawfully be made unless it could be shown to be strictly necessary in the circumstances of the case. It was not conceded that the records in the present case were of any relevance to the issues in the underlying action.

[52] Those considerations in effect informed the procedure followed by the Scottish courts in considering whether to grant commission and diligence for the production of medical records sought under a specification of documents. That was the way in which the records could have been recovered "in accordance with law" but was not the procedure by which Vitality obtained them. Indeed, three attempts by it to obtain the medical records by means of a specification procedure were all unsuccessful. That was something that fell to be placed in the balance when considering where the equities of the situation lay. Mr Cowie's medical records had not been "recovered"; they had been obtained improperly, and consequently in a manner which was not "in accordance with law". It would be inconsistent with the requirements of Article 8, and indeed arbitrary, for any order from the court allowing use of the records to be granted with retrospective effect. It would run wholly contrary to the Convention principles of legality and the rule of law for a domestic court simply to declare that that which was not initially lawful was now lawful. That would be clear evidence of arbitrariness, and as such a Convention incompatible action because any such decision of the court could not be said to be adequately accessible and foreseeable such as to conform to the Convention requirement of being in accordance with law.

[53] Vitality's position was that the use and intended use of Mr Cowie's medical records was lawful because Mrs Cowie had provided consent for that by her signature of the mandate, or that it would have recovered the records in any event, and that it was entitled to consider the records produced to the extent that they were relevant in assessing Mrs Cowie's claim. However, there had been no informed consent for the reasons already canvassed, and Dr Mclennan was very clear that a report and the provision of records were not in substance the same. His evidence was that a report would have involved his reviewing and referring only to those records relevant to the particular questions asked of him by the

insurer. A report would have contained a narrative and contextualisation of any reference to the records. Any such report would have been shown by him in draft to Mrs Cowie to obtain her confirmation as to the accuracy of its contents and her consent to it being sent to the insurers.

[54] The law made a clear differentiation between a right of access to others' health records (which was governed by the provisions of the Access to Health Records Act 1990) and a right of access to medical reports commissioned by or requested by insurers (which was governed by the Access to Medical Reports Act 1988). The fact of insurers systematically having adopted a practice of seeking to obtain access to medical records without informed consent undoubtedly informed the BMA Focus on Subject Access Requests for Insurance Purposes guidance. Although that guidance specifically concerned insurers' abuse of the procedure provided for under the Data Protection Act 1998 and now GDPR, it set out clear concerns about the strategies being used by insurance companies to get access to individuals' medical records without ensuring their informed consent to such access.

[55] Mrs Cowie's claim was in terms of a contract concluded between her husband and Vitality. That contract was a consumer insurance contract to which the provisions of the Consumer Insurance (Disclosure and Representations) Act 2012 applied. Separately, the "unfair terms" provisions of Part 2 of the Consumer Rights Act 2015 were also applicable in this case. In particular, section 69(1) of the 2015 Act stipulated that: "if a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail". That applied to the interpretation and application both of the terms of this consumer insurance contract and also to any notice (including an announcement, whether or not in writing, and any other communication or purported

communication) which it was reasonable to assume was intended to be seen or heard by a consumer, to the extent that it related to rights or obligations as between Vitality and Mr Cowie (and through him Mrs Cowie), and in the present case would apply to the interpretation of the proposal form which formed the basis for the contract, all the terms of the contract itself, Vitality's letter to Mrs Cowie enclosing the blank medical mandate, the mandate itself and the letter from Vitality to Dr Mclennan dated 28 November 2016.

[56] Dr Mclennan had accepted that, if the request for medical records made to him were to be read as asking only for records which "related to" the causes of death in the sense of specifically narrating the causes of death, there would have been no records falling within that description. The request to Dr Mclennan had asked him to ensure that the consent form signed by Mrs Cowie allowed Vitality to access the records in question. It was reasonable to assume that that letter was intended to be shown to Mrs Cowie by Dr Mclennan, or at least referred to by him in communication with her. In requesting access to medical records, that letter related to rights or obligations as between a trader (Vitality) and a consumer (Mrs Cowie). The nexus between those two parties had been established by the consumer life insurance contract which entitled her to be paid out on the policy in the event of the death of her husband. The avowed purpose of Vitality in sending that letter was to obtain Mr Cowie's medical records to allow it to trawl through them to find a reason to claim that there had been a relevant misrepresentation when the contract was entered into. It was seeking thereby to avoid liability for payment under the contract to Mrs Cowie.

Dr Mclennan's witness statements, drafted and worded by his lawyers, sought to argue that he would in any event have given Vitality information from the medical records concerning Mr Cowie having

> "a long history of disorders of the digestive system with investigations and treatment; abnormal liver function tests; postponement of neck surgery following abnormal liver function tests on two occasions; Barrett's oesophagitis",

but in cross-examination Dr Mclennan admitted that none of these matters was in fact causally related to the death of the deceased, and that they were thus not relevant to the causes of death. In sum, applying the medical test of relevancy which would have been applied by Dr Mclennan had he been commissioned to produce a medical report on entries in Mr Cowie's medical records between November 2010 and November 2015 relating to or contributing to the certified causes of death, none of the matters upon which Vitality relied in its letter of 27 February 2017 would have been mentioned in such a report. It would therefore have had no basis upon which to seek any further information or apply to recover the medical records to trawl through in order to look for other entries which it might consider to be relevant from its perspective (seeking to repudiate the insurance policy), but which were not medically relevant. If a targeted medical report had been requested, Dr Mclennan's evidence was that he would have reverted to Mrs Cowie with the terms of any draft report and given her the opportunity to comment on it and, having seen it, to withdraw her consent to its provision to Vitality.

[57] In fact, the request to Dr Mclennan was for medical records. No questions were put to him such as might have been expected if a medical report had been sought. The request was not copied to Mrs Cowie, so she was unaware of its terms, or that Vitality was now seeking medical records and not a medical report. Requests for access to medical records were governed by the Access to Health Records Act 1990. That certainly gave the next of kin of a deceased person an unrestricted right to be provided with the deceased's medical records. Whether an insurance company was given any similar rights under the 1990 Act was questionable. But in any event Vitality did not in this case seek to pray in aid the

terms of the 1990 Act. Instead, it provided Dr Mclennan with a consent form which was misleading in that its apparently broad wording concealed the fact that consent had been sought only for a targeted medical report. The reality of the situation was that Vitality had no consent from Mrs Cowie to approach Dr Mclennan to give it any medical records on her husband.

[58] The decision of the Financial Services Ombudsman in relation to a complaint against *Liverpool Victoria* (PB 131/898) reinforced that it was not fair and reasonable for an insurer to read through and examine the complainer's entire medical records mistakenly given to it by her general practitioner and then base its decision to decline her claim and cancel her policy on the basis of the information it had discovered there, and that the ABI Code of Practice and the joint BMA/ABI Guidelines on Medical Information and Insurance were very clear that medical practitioners should only provide relevant information, that it was ethically unacceptable for them to provide extraneous information, and that insurers should have a legitimate reason for requesting information at the point of claim.

[59] A particular feature of this case was that Dr Mclennan in fact sent to Vitality all the medical records he had on Mr Cowie dating from at least 2010 until the date of his death, and that despite that fact three separate attempts had been made to recover by way of court order the same records. All had been unsuccessful because Vitality failed to satisfy the tests applied by the court in considering any application for recovery of documents - tests which ensured proper and proportionate respect for the confidentiality of documents such as medical records.

[60] The evidence of Mr Downes that doctors routinely sent to insurers more medical records than had been asked for or to which they might conceivably be entitled, and that in such cases Vitality had regard to and relied on the information it found there for its own

purposes, was describing a systemic continued breach of confidence from which insurers sought to take commercial advantage. He admitted that Vitality had done nothing to prevent that from continuing to happen and that it had no system in force to ensure that confidentiality obligations were maintained when a doctor mistakenly sent all the records. He accepted that it would be possible for internal practices to be set up in order to check for inadvertent breaches of confidentiality before passing recovered records on for assessment by the claims department.

[61] Vitality had acquired Mr Cowie's medical records unlawfully. It had misunderstood the decision in *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16, 2016 SC(PC) 1, 2016 SLT 723. It was clear at [77] - [78] of that case that "fairness" required consideration of whether consent had been given to the provision of DNA samples. The unequivocal finding of the court was that such consent had indeed been given (ie the DNA was a sample obtained in accordance with law). The only question before the court was, that DNA evidence having been lawfully obtained and consented to, did that consent extend to its use for a closely related purpose? In the present case, there never was any proper consent for Vitality to access the medical records of Mr Cowie. It had engineered a situation whereby it misled Mr Cowie's general practitioner into providing it with confidential documentation in the form of his medical records by representing that it had obtained Mrs Cowie's consent to that, when in fact it had not. In any event, the court in *Re Baronetcy of Pringle of Stichill* had indicated that fairness required a consideration of the equities. The court had to take into account that Vitality accepted that its purpose in requesting the records was to find a foundation to avoid paying out on the policy. It had made a deliberately wide request to the general practitioner with a view to making use of whatever over-disclosure he provided, and did not come to the matter with clean hands. It should not, as a matter of equity, profit

from its own wrongdoing, and having acquired the documents unlawfully, should not be permitted to use them.

Respondent's submissions

[62] On behalf of Vitality, senior counsel submitted that I should accept the evidence of Dr Mclennan and Mr Downes as credible and reliable, and reject any suggestion of deliberate wrongdoing on the part of Vitality. If there was any irregularity in what had happened, it was accidental or at worst careless. The mandate signed by Mrs Cowie entitled it to obtain a targeted general practitioner's report relative to Mr Cowie's medical history. A targeted request was made to his general practitioner, Dr Mclennan, seeking medical records that related to, or contributed to, the causes of his death. Dr Mclennan then provided information in the form of the medical records, considering that those records all related to, or contributed to, the cause of death. In requesting and considering the medical records, Vitality acted in accordance with the consent provided by the mandate, industry guidance (the ABI Code and Joint BMI/ABI Guidance), and its own internal policies. To the extent that any criticism could be made of the fact that information was requested and provided in the form of excerpted records, rather than a formal report, that was an issue of form over substance. Dr Mclennan's position was clear that either format would have contained the same information. If the medical records were obtained in some way that was irregular, they should be admitted in evidence at proof. They were highly significant to the principal question in dispute between the parties, namely whether Mr Cowie made a qualifying misrepresentation under the 2012 Act in his application for a policy of life insurance. Absent the records, Vitality was effectively denied the ability to advance a defence. Any fault on its part concerning the manner in which the records were obtained

was minimal. The relevancy of the records outweighed any prejudice to Mrs Cowie in determining their admissibility. It was likely that, in any event, the records would have been recoverable by way of commission and diligence, and there was no general rule under the Scots law of evidence that prevented the recovery of, or reliance on, medical records where they pertained to relevant issues at proof on the basis that they were allegedly improperly obtained for the purpose of judicial proceedings.

[63] The consistent approach adopted in Scots law was that doctor-patient confidentiality did not render evidence privileged or inadmissible. Reference was made to Dickson on Evidence, Vol 2, p 926:

> "Communications made by a person to his medical attendant are not privileged; for the discovery of truth is in general more important than the preservation of the confidence which has often to be reposed in a physician or surgeon. At the same time, good feeling should induce a party not to force a medical man to disclose communications of a confidential nature unless the interests of justice make that really necessary."

MacPhail on Evidence stated at 18.45:

> "A doctor must, if called on, give in evidence information which he has obtained about his patient from observation. It is thought that an oral or written communication made by the patient to the doctor is not privileged, unless made in connection with the dispute."

and at 18.47:

> "There are other classes of civil litigation where justice cannot be done without the disclosure by a doctor of information which he has obtained in the course of his relationship with the patient, such as cases of medical negligence, or cases where the issue is the sanity or facility or testamentary capacity of the patient, or the truth of statements made by him in order to obtain insurance".

In *D* v *National Society for the Prevention of Cruelty to Children* [1978] AC 171, Lord Diplock stated at p 218:

> "The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the

> informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1974] AC 405, 433-434. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law".

[64] The authorities vouched that communications between a doctor and patient were not privileged. The discovery of truth in litigation was more important than the preservation of confidentiality between a doctor and his patient. Where a doctor was cited to give evidence, and that evidence fell within confidential discussions he had had with his patient, those discussions were not privileged, and the doctor could be compelled to give evidence on them. The fact that information had been communicated in confidence was not a sufficient ground for preventing disclosure of that information where the public interest in the administration of justice required its disclosure. In particular, in cases where the truth of a statement made in order to obtain insurance was at issue, it might be that justice could not be done without the disclosure of confidential information.

[65] A plea of confidentiality based on a doctor-patient relationship did not prevent recovery of medical records. Reference was made to *Kelly* v *Kelly* 1946 SLT 208 and *Higgins* v *Burton* 1968 SLT (Notes) 52. Mrs Cowie had put in issue the health of her husband in the 5 years prior to his taking out the life assurance policy. That was the most pertinent factual issue in dispute between the parties, and Vitality would have been entitled to recover the records by way of commission and diligence on the basis that it fairly required to be able to meet the claim. If doctor-patient confidentiality would not have prevented the recovery of the records by way of commission and diligence, then it followed that it could not be used to prevent the use of records which had already been lawfully obtained.

[66] If the court considered that the records had been irregularly obtained, the authorities of *Rattray* v *Rattray* (1897) 25 R 315, (1897) 5 SLT 245, *Duke of Argyll* v *Duchess of Argyll (No 3)*, 1963 SLT (Notes) 42, *Thorntons Investment Holdings* v *Matheson* [2023] CSOH 85, 2023 SLT 1305 and *Re Baronetcy of Pringle of Stichill* were instructive. The long-standing policy of the law was to admit almost all evidence which would throw light on disputed facts and enable justice to be done, although the court did have a discretion to admit or exclude evidence in civil proceedings having regard to fairness in the particular circumstances of the case. It had now been noted that in the modern law, an important counterweight to the factors that favoured the admissibility of relevant evidence was the right to privacy. The court's starting point should be to consider the significance and relevancy of the evidence in question. The manner in which the party seeking to rely upon the evidence obtained it was a relevant factor. One argument in favour of excluding such evidence was whether by admitting the evidence a party would benefit from its own unlawful act. If there was no question of dishonesty or deception on the part of the party seeking to rely on the evidence, that favoured its admission. The issue of unfair prejudice to the party against whom the evidence would be used at proof should also be considered. Within that factor, the court should have regard to the extent to which the party who sought to rely upon the evidence in question would in any event have been able to obtain that evidence (eg by way of commission and diligence). Vitality's attempt to obtain the records by that route had not been successful, but had not been an attempt to regularise its position, rather merely to see if there were any further records which could be obtained. Its applications for commission and diligence had not been opposed by Mrs Cowie on the basis of confidentiality.
Mrs Cowie had known since early 2017 that Vitality had been sent a considerable volume of

records by Dr Mclennan; it was her attempt to prevent their use now that was cynical and opportunistic.

[67] The factual background to the dispute was narrow and largely undisputed. Mr Cowie entered into a life insurance policy with Vitality on 13 November 2015. The decision to offer him that policy was based upon his application and his responses relative to his health. As a result of his answers to the questions posed in the application, his request for life assurance cover was dealt with by "Straight Through Processing" meaning that it was underwritten by an automated rules engine rather than a human underwriter. In completing the application, Mr Cowie answered a series of questions relating to his health in the 5 years prior to that point. He died on 25 October 2016. The causes of death listed on his death certificate were (a) intracerebral haemorrhage; (b) coagulopathy; and (c) liver cirrhosis. Following his death, Mrs Cowie contacted Vitality to advise it of that fact. Vitality replied by letter dated 31 October 2016, requesting further information to process the claim under the life assurance policy. That letter advised that, in order to assist Vitality in assessing the claim, it required *inter alia* a completed Medical Authority Certificate form, which was enclosed. In addition, the letter advised that: "A Targeted General Practitioner's Report will be requested on receipt of the Medical Authority Certificate". No further detail about that was given, but in itself that wording gave sufficient context to why she was being asked to sign the Medical Authority Certificate. Targeted medical reports were sought by insurers in order that any request for medical information was objectively justified in the circumstances of the particular claim. There was no standard format for a targeted GP report. Vitality was a member of the ABI and the practice of requesting targeted medical reports was reflected in guidance issued by it, entitled "ABI Code of Practice - Managing

Claims for Individual and Group Life, Critical Illness and Income Protection Insurance

Products" The code stated:

> "3.5 Insurers are fully entitled to ask for any medical or other information needed to properly assess a claim.
> 3.6 However, insurers should have a legitimate reason for requesting medical information at the point of claim and should apply the principles set out in the joint BMA/ABI guidance, 'Medical Information and Insurance', on gathering medical information at the point of claim.
> 3.7 Accordingly, insurers should only ask for medical information beyond that needed to assess whether the insured event has occurred, or to case manage a disability claim, to the extent that the circumstances of the claim reasonably prompt the insurer to believe that there might have been misrepresentation by the customer. In particular, insurers should:
> 3.7.1 Keep an audit trail of the reasons for requesting medical records (the Financial Ombudsman Service, FOS, will be concerned at the use of medical evidence clearly obtained without an appropriate reason).
> 3.7.2 Note that an early claim is not a reason by itself (although it may be a relevant supporting factor).
> 3.7.3 Carefully consider the time period for which it is appropriate to request information and the relevant areas that should be investigated.
> 3.7.4 Ensure that claims investigations are consistent with the timely collation of evidence and the need to make claims decisions promptly."

[68] Section 10 of the Joint BMI/ABI Guidance there referred to *inter alia* stated:

> "It is recognised, however that the law does in certain circumstances, give people with a claim arising from the death of an individual statutory rights of access to information necessary to satisfy the claim. Insurance companies should exercise those rights only where there are reasonable grounds to believe that relevant information may have been withheld at the time the policy was taken out. In the case of life insurance, this may be for example, where the insured person dies, apparently unexpectedly, say within six months of taking out the policy or where an insured person has died of heart diseases although the application made no mention of the condition".

[69] Vitality's own claims philosophy provided that:

> "When considering claims, we should only request medical information about specific conditions or which relates to a period appropriate to the medical condition that is the subject of the claim and where we have reason to believe that there may have been misrepresentation by the customer. This means we should tailor the questions we ask the treating Doctors to what we need rather than include the full application question so there is less risk we end up with information we don't need. We must also ensure we document our reasons for requesting the medical information and what information we've requested."

[70] Mrs Cowie returned the completed Medical Certificate Authority form on 10 November 2016, along with a copy of Mr Cowie's death certificate. Vitality would have regarded the claim under the policy as an early one given that the death had occurred within a relatively short period of the inception of the policy and was non-accidental. That there were legitimate reasons to investigate Mr Cowie's medical history would have become all the more apparent upon receipt of the death certificate, as the claims assessor would have been alerted to the fact that liver cirrhosis was listed as a cause of death. Liver cirrhosis was a condition which developed over a period of time due to a number of known risk factors. No such condition was noted by Mr Cowie on his application. There was therefore a legitimate reason for deciding that the medical records relative to his cause of death should be considered in adjudicating the claim, in order to determine whether there had been a potential misrepresentation by the insured. Vitality wrote to its then agents for requesting and collecting medical records and reports from medical practitioners, asking them to obtain Mr Cowie's medical records relating to or contributing to the cause of death in the 5-year period from 12 November 2010 to 12 November 2015, and that request was passed on to Dr Mclennan along with a copy of the signed Medical Authority Certificate. Reminders were sent on 6 and 19 January 2019. On 19 December 2016 and 23 January 2017 Dr Mclennan issued the medical records to Vitality's agent. The request to Dr Mclennan was for records that "related to or contributed to the cause of death", which complied with industry guidance. There were three factors which led Dr Mclennan to determine that Mr Cowie's medical records related to or caused his death. Firstly, when a person had liver cirrhosis, one had also to consider any records relating to alcohol given the potential relevancy of alcohol consumption to that condition. Therefore, entries in the records that

related to alcohol consumption were relevant and recoverable in terms of the mandate and industry guidance. The same logic applied to the records disclosing deranged liver function tests. Secondly, a patient with liver cirrhosis might be at an increased risk of developing Barrett's Oesophagus, so entries in the records relating to that condition were relevant and recoverable. Thirdly, a patient with haemochromatosis was at an increased risk of developing cirrhosis, so entries relating to that condition fell into the same category. Taking those factors into account, Dr Mclennan remained of the view that the records produced were all records "relating to or contributing to" the cause of death. Mrs Cowie led no expert medical evidence at proof to challenge that professional opinion, preferring instead to rely on a narrow and contrived definition of "relating to" as that phrase was used in the letter of 31 October 2016.

[71] Vitality thereafter considered the records and determined that Mr Cowie had made a series of qualifying misrepresentations in terms of section 4(2) of the Consumer Insurance (Disclosure and Representations) Act 2012. It advised Mrs Cowie of that decision by way of letter dated 27 February 2017.

[72] Mrs Cowie had provided informed consent to the request to Dr Mclennan. The correspondence between her and Vitality made it clear why she was being asked to provide her consent via the mandate. Given that the death certificate was being separately requested to confirm that the insured event (ie Mr Cowie's death) had occurred, it was obvious that the mandate was to be used to recover information to be used in assessing the claim. Mrs Cowie's consent was validly given to obtaining information relative to Mr Cowie's cause of death for the purposes of assessing her claim. The Access to Health Records Act 1990 did provide a basis for a request for information such as was sought by the respondent from Dr Mclennan, but did not set out any formal procedure by which such

a request for information should be made. There was no proper basis for any suggestion that Vitality had in some way not complied with the brief terms of the Act.

[73] The information sought by the respondent from Dr Mclennan was a targeted request for information as envisaged in Vitality's letter of 31 October 2016 to Mrs Cowie. Records were only sought that related to or contributed to the cause of death. Those records were sought only for the 5-year period prior to the commencement of the life insurance policy. An issue of interpretation arose in relation to the letter of 28 November 2016. Mrs Cowie argued that section 69(1) of the Consumer Rights Act 2015 ought to apply to that letter on the basis that it was a notice in terms of section 61 of the 2015 Act. However, the letter was not a consumer notice. It did not relate to rights or obligations as between the parties. While it was part of Vitality's investigations into Mrs Cowie's right to claim under the life assurance policy, it was simply a request for information and did not relate to her rights. Further, section 61 was concerned with documents which it was reasonable to assume were intended to be seen by a consumer. There was no evidence to suggest (and neither did its terms suggest), that that applied to the letter of 28 November 2016. It was a letter written directly to Dr Mclennan in his professional capacity and should be interpreted in that context. The court ought to apply the normal principle of interpretation when considering its terms, ie determining the natural and ordinary meaning of the words in their context. In any event, section 69(1) did not apply because it only came into operation where a term of the consumer notice could have different meanings. As was noted in *CC Construction 22 Ltd* v *Mincione* [2021] EWHC 2502 (TCC), [2022] BLR 48 at [63]:

> "The section [section 69(1)] does not come into play simply because it is possible to argue for differing interpretations at the start of the exercise of interpreting a contractual term. Instead for the provision to operate there must be genuine ambiguity after the normal process of analysing the language used in its context to determine the intention of the parties has been undertaken".

[74] There was no genuine ambiguity after analysing the language used in the letter of 28 November 2016, such that the court should apply the interpretation most favourable to Mrs Cowie. The first issue of interpretation was what was meant by the words: "relating to or contributing to the cause of death". On a plain and ordinary reading of those words, they referred to records which were related to the cause of death in the sense of having some connection to it. The second issue of interpretation was whether the letter was a request for the entirety of Mr Cowie's medical records. Again, it was clear that all that had been asked for was material relating to or contributing to the cause of death.

[75] Vitality had complied with the ABI Code, the joint BMA/ABI guidance, and its own claims philosophy. It had a legitimate reason for requesting medical information at the point of claim and it only asked for medical information to the extent that the circumstances of the claim reasonably prompted it to believe that there had been a misrepresentation. At no stage did it ask for Mr Cowie's full records. It only sought information relative to the causes of death and within a 5-year period of Mr Cowie completing his application.

[76] A question existed in relation to the distinction, if any, between "records" and a "report". A variety of terms were used in the relevant correspondence and documentation. As a matter of substance, if not form, these concepts described the same information. Whether that information was produced in the form of excerpted medical records, or by a doctor typing out what those medical records stated in the form of a secondary report, details of the life assured's medical history would be provided, as was consented to in the mandate. What Dr Mclennan provided to Vitality was, in substance, a report. He did not simply print and send the complete set of medical records. Even if he had undertaken the preparation of a secondary report, it would have been prepared using the medical records

and would have contained the same information, as he confirmed in his evidence; in effect, a report would have simply pieced together the information in a narrative.

[77] The decision of the Financial Ombudsman in *Mrs L and the Liverpool Victoria Friendly Society* (DRN7370582) was of limited assistance to the court. The volume of medical records disclosed in that case went far beyond that requested. A claim was made on a policy in 2012, the policy having been taken out in 2008. The entire medical records dating back to 1975 were produced and considered by Liverpool Victoria. The insurers, further, relied upon information that was entirely irrelevant to the claim made.

[78] If the court considered that Vitality was not entitled to receive records to the extent that it did, then the question of the admissibility of that evidence at proof arose. There was no general rule that irregularly obtained evidence was inadmissible in a civil proof; rather, the court had a discretion whether to admit or exclude that evidence having regard to the fairness of the particular circumstances of the case. Vitality acknowledged that the records were confidential information for the purposes of Article 8 of the ECHR, and indeed that they were of a highly confidential and private nature. That was a factor to be weighed against their admissibility. However, the records were of such a high degree of relevance and significance to the dispute that the scales strongly tilted towards them being treated as admissible. Vitality's entire ability to defend the action raised against it would probably depend on them. The effect of the 2012 Act was that there were narrow grounds upon which an insurer could reject a claim made under a consumer insurance policy. The burden was on an insurer to show that a qualifying misrepresentation was deliberate or reckless. In circumstances where an insurer required to demonstrate that a consumer was aware of health conditions that he should have disclosed in completing an application for life insurance, that consumer's medical records relative to those conditions were highly relevant.

Indeed, it was difficult to see how an insurer could ever avoid an insurance policy on the grounds of a qualifying misrepresentation under the 2012 Act having been made if it were not able to consider the insured's medical records where there was a reasonable basis for considering that a misrepresentation had been made. The evidence of Mr Downes was clear that, had Vitality been aware of Mr Cowie's deranged liver function tests as disclosed in the records, it would not have accepted his application for life insurance. The question was not whether the records disclosed entries that were relevant in causing Mr Cowie's death, but rather whether they were relevant to whether he made a qualifying misrepresentation in terms of the 2012 Act in completing the application. It would be disproportionately against the interests of justice to exclude the records from evidence.

[79] The next factor that should be considered was the manner in which the party seeking to rely upon the evidence had obtained it. The balance would swing against admitting evidence where a party would thereby benefit from its own unlawful act. In this case, there was no question of dishonesty or deception on the part of Vitality, and that was another factor favouring admission of the records. Any criticism which could be levied against Vitality in relation to the manner in which it obtained the records should be limited to the fact that the letter of 31 October 2016 was not explicitly clear that the targeted medical report to be sought might take the form of excerpts of medical records. The letter of 28 November 2018 sent to Dr Mclennan explicitly asked him to ensure that the consent form allowed it to access the records requested. All that was requested was information targeted to the causes of death within the period of 5 years before the application. In the two chaser letters of 6 and 19 January 2017, Dr Mclennan was given the option of providing either records or a report. He ultimately took the decision on what would be relevant and provided that to Vitality, which relied upon him to exercise his professional expertise in determining what

information related to or contributed to Mr Cowie's cause of death. Vitality's requirement to refer to the records outweighed any prejudice to Mrs Cowie. The records were evidence that would probably have been recoverable, in any event, by way of commission and diligence. At no point had the court ruled that Mr Cowie's medical information was not recoverable on the basis of confidentiality. Doctor-patient confidentiality alone was not a sufficient basis for treating evidence as privileged or inadmissible. Further, Dr Mclennan had confirmed that if he had prepared a report, in a strict sense, that report would have been written using the medical records and would have contained the same information, albeit in a different format.

[80] It was recognised that if the court were to determine that the records were recovered without consent, then the ability to enforce the right to confidentiality was in itself a weighty consideration to be entered into the balance when the common law exercise as to admissibility was being carried out. However, in the present case, the relevant medical records did not amount merely to one adminicle of evidence amongst others which supported Vitality's case on the substantive merits. Absent the records, it would be denied the possibility of establishing a qualifying misrepresentation. Mrs Cowie would, in effect, succeed in her action without any consideration of whether there had been a qualifying misrepresentation. In those circumstances, there was a clear and obvious risk of there being a wrong and unjust result as between the parties. It is not just that the court would be deprived of evidence so that it might be led to the wrong result. Mrs Cowie had raised these proceedings and put in issue her husband's state of health and his knowledge during the 5-year period preceding the proposal, so that it must have been plain that the medical records would be relevant. Against that background, it was artificial for her now to complain about their admissibility.

[81] The court was required also to consider the admissibility of the records in terms of Article 8 of the ECHR. Vitality accepted that the records were information in which there subsisted a reasonable expectation of privacy. The application of Article 8 to the admissibility of irregularly obtained evidence was discussed in *Thorntons Investment Holdings Limited* at [91] where the court held that use of the information must be necessary for one of the purposes set out in the second paragraph of the Article. That could include use in judicial proceedings where the information in question was potentially material. Such use of information must be fair and proportionate to the protection of the rights and freedoms of others. However, that question was, in essence, resolved by the discussion and determination of the same issues under the common law tests. Finally, there had to be a clear and accessible basis upon which the court could proceed in allowing the desired use. The question of the public interest in the administration of justice was also engaged. However, the common law tests were sufficiently clear that a suitably experienced legal practitioner would be able to assess and advise a client who required to know his legal position.

[82] Mrs Cowie's approach to the question of whether Vitality obtained the records "in accordance with law" was at odds with the court's analysis in *Thorntons Investment Holdings*. While it was correct that any interference with Article 8 rights must be "in accordance with law", the potential interference in this case lay in the court deciding to permit Vitality to rely upon records at proof; see *Thorntons Investment Holdings* at [91]. The application of the rules contained in the common law of evidence on the admissibility of evidence was the domestic legal basis upon which the court could determine whether to treat the records as admissible, and thereafter apply the tests noted under Article 8(2). The records should be treated as admissible at common law, and treating them as admissible would also be compliant with

Article 8. *LL* v *France* was a case where the court found that the domestic French courts had breached Article 8 by permitting reliance on medical records obtained without the patient's consent. However, that was on the basis that the interference with the patient's private life could not be justified, as the disputed evidence was not decisive to the outcome of the case. In other words, the interference with the applicant's right to respect for his private life was not proportionate to the aim pursued and was therefore not necessary in a democratic society for the protection of the rights and freedoms of others. In the present case, Vitality had set out why the records were highly relevant to the present dispute.

[83] *MK* v *Ukraine* could be distinguished for several reasons. It was an action for damages relating to the disclosure of medical information and was not concerned with a court subsequently complying with Convention rights in permitting reliance on the material at trial. Further, the court did not require to determine whether any interference could be justified by reference to legitimate aims and proportionality, because the disclosure did not comply with domestic law, which had also been applied inconsistently by the domestic courts. *I* v *Finland* was to like effect.

[84] *Z* v *Finland* at [44] articulated the justifications for interference with Article 8 in a way entirely consistent with the approach taken in *Thorntons Investment Management*. It held that the domestic courts could make reference to medical records on the basis that that pursued a legitimate aim, albeit those courts had failed to take necessary steps to protect the anonymity of the applicant.

[85] In the present case there was a clear basis upon which the initial burden of complying with domestic law could be satisfied by the proper application of the common law test as to the admissibility of evidence. Thereafter the court should apply the approach articulated in *Thorntons Investment Holdings* at [91].

[86] Mrs Cowie finally argued that Vitality was not entitled to rely upon the records because they were not obtained for the purposes of the litigation. However, Vitality did not propose to use the records for a different purpose to that for which they were originally obtained. The mandate was granted by Mrs Cowie in order that Vitality could obtain details of Mr Cowie's medical history, in order properly to adjudicate on the claim. It was upon receipt and consideration of those records that it determined that Mr Cowie had made qualifying misrepresentations in terms of section 4(2) of the 2012 Act and that it was entitled to avoid the life assurance policy and refuse the claim. In this action, Mrs Cowie challenged its entitlement to do so. The records related to the basis upon which it made its determination. *Iomega Corp* v *Myrica (UK) Ltd (No 2)* 1998 SC 636, 1999 SLT 796 had no relevance to the present case, as the material in question here had not been recovered by way of commission and diligence.

Decision

The witnesses

[87] Mrs Cowie's affidavit was accepted as representing her evidence with no need for cross-examination. The content of the affidavit was straightforward and I see no reason to doubt her credibility or reliability in relation to any matter with which she dealt. She did not address the question of what she would have done had she been asked specifically to consent to the release of Mr Cowie's medical records, either generally or in "targeted" terms, but ultimately I have come to the view that, in this respect as in others, this is not a case which turns upon the consideration of any counterfactual situations, but rather on the ascertainment of what actually happened (a matter ultimately not in much, if any, doubt) and a determination of the legal consequences of that situation.

[88] Dr Mclennan was also in my estimation fundamentally honest in giving his evidence. However, having appreciated that errors with potentially significant ethical and legal consequences had been made on his part, it appeared to me that - naturally enough, perhaps - he had persuaded himself, and in turn sought to persuade the court, that those errors were relatively minor and that matters would have turned out more or less the same even had they not been made. I do not place any reliance on his evidence in these regards. He had no actual recollection of what had happened when he considered and responded to Vitality's request for information, and any evidence of what would have happened in other circumstances is every bit as much an artefact of his imagination. Again, however, since I am concerned with what did happen and not with what might have happened in other circumstances, the matter is of little moment.

[89] Much more serious is the fact, already mentioned, that Dr Mclennan was unable in his oral evidence to stand by elements of his statement, which he had at the outset affirmed as a true and accurate account of events, in particular but not exclusively in relation to the issue of whether he had communicated with Mrs Cowie before sending any material to Vitality. The use of pre-prepared affidavits or statements as the evidence in chief of witnesses in commercial proceedings was an innovation on the part of a former commercial judge of this court, borrowed more or less directly from the practice in England and Wales. The introduction of the facility was unaccompanied by the sort of committee deliberation, guidance note or protocol which one might have expected to attend such a fundamental change in the dynamic of the proof process. Subsequent judicial guidance on the subject has been at best reactional and piecemeal - eg *Luminar Lava Ignite Ltd* v *Mama Group plc* [2010] CSIH 1, 2010 SC 310, 2010 SLT 147 at [71] - [75]. Perhaps it was thought that the proprieties of preparing the requisite statements were obvious, or would be osmotically absorbed from

the practice south of the border. If so, experience has not entirely vindicated any such expectations. Occasions such as the present, or similar situations in which a witness has plainly been presented with a script which is not of his own making to adopt as his evidence (cf *Beaton* v *Beaton* [2024] CSOH 41) are by no means uncommon. It may be that the time for more comprehensive and authoritative guidance has finally come, building on and developing the two core propositions that the source of the content of a statement should be the witness him - or herself, and that the mode of presentation of that content should be as close to the witness's own expression of it as will prove helpful to the court. In the meantime, it requires to be recognised that, where a witness in giving evidence orally reverses his position on a simple point of fact asserted in his affidavit or statement, it is highly likely that something substantively wrong has occurred. At worst, that something may be an attempt at perjury on the part of the witness, or professional misconduct on the part of those who assisted in the composition of the document in question. At best, it may be carelessness on the part of either. In any event, for the court to do nothing amounts to a tacit acquiescence in, if not encouragement of, whatever has led to the situation. That would be an undesirable situation. It is normally entirely open to the court in such situations to conceive that it has lost such confidence in the truth and accuracy of any affected statement as to justify its being disregarded in its entirety, as well as to cause appropriate enquiry to be made as to how the situation came to pass. In the present case, I am only prepared to accept Dr Mclennan's evidence insofar as it coincides with the unchallenged evidence of Mrs Cowie or other agreed matters. In its other aspects I do not consider it sufficiently reliable to form a basis for any conclusion of fact, for the two separate reasons (ie, its reconstructed nature and the doubts which exist in any event as to whether it was the product of his own mind) which I have identified.

[90] In relation to Mr Downes, again I have no doubt that he gave his evidence honestly on the matters of fact to which he had been asked to speak. He also deserves credit for maintaining his composure whilst continually being, in effect, branded the scoundrel representative of a thoroughly disreputable industry by senior counsel for Mrs Cowie. As to the objections made to elements of his evidence, I repel the objection (made generally, rather than solely in relation to his evidence) that the medical records in issue should not be referred to in evidence in advance of a determination of their admissibility. As will subsequently be discussed, the potential relevance of the contents of those records to the proper determination of the issues in dispute in the underlying proceedings may well be a weighty matter, one way or the other, in striking the balance as to their admissibility in those proceedings, and the court is unlikely to be able to perform its function in ruling upon that question without being made aware, to some extent at least, of the nature of those contents. I accept that it is good practice in circumstances such as the present for parties to restrict reference to sensitive material, the admissibility of which is disputed, to the minimum extent necessary to enable the court properly to perform that function. That practice was followed in the proceedings before me.

[91] I also repel the objection that Mr Downes, in talking about working practices in the insurance industry, was giving expert evidence without being qualified as an independent expert within the meaning of *Kennedy* v *Cordia* [2016] UKSC 6, 2016 SC (UKSC) 59, 2016 SLT 209. He was simply speaking to his extensive experience of what happens in fact in that industry, not furnishing the court with any sort of technical or scientific insight for it to apply to matters of fact in order to enable it to draw conclusions pertinent to the decision it had to make. The valid objection to the evidence of Mr Downes is that, in very large measure, it had no relevance to the issues which the court had to determine. Plainly, his

views on the proper import of various documents and on the mixed matters of fact and law which were for the court to determine are of no moment whatsoever, and have been entirely disregarded by me in coming to the legal and factual conclusions necessary for the determination of the dispute. Again, the relatively unregulated manner in which witness statements and affidavits have been introduced into the practice of the court to represent the bulk of the evidence in chief of witnesses appears to have left some doubt in the minds of practitioners as to how and when objection should be taken to the content of such statements, often leading (as here) to the presentation of extensive notes of such objections at the commencement of the proof diet, which is rarely, if ever, a convenient point at which to deal with them. While there may occasionally be fundamental objections to the competency or admissibility of evidence which do sensibly have to be dealt with before the evidence in question is led, in most cases the better practice is simply for counsel to indicate in general terms before the proof commences that it is desired to reserve questions of relevancy, in particular, until the stage of submissions at the end of the proof diet - by which point matters are in any event likely to have become more focussed than was previously possible.

Were Mr Cowie's medical records lawfully and properly obtained by Vitality?

[92] The first question which requires to be addressed is whether the acquisition by Vitality of Mr Cowie's medical records was unlawful or otherwise attended by material impropriety. I have not found this a difficult question to answer. Mrs Cowie signed a medical authority certificate which on its face bore to give Vitality permission "to obtain details of the Life Assured's medical history from his/her medical practitioner". That was the certificate which was presented by Vitality to Dr Mclennan. However, that certificate

had been obtained from Mrs Cowie against the express narration (contained in Vitality's letter to her dated 31 October 2016) that it would be used to obtain a "Targeted General Practitioner's Report". That was not the purpose for which the apparent consent obtained from her was used. Rather, it was presented to Dr Mclennan along with a request that he should provide Mr Cowie's medical records within the period 12 November 2010 to 12 November 2015 insofar as they contained material relating to or contributing to his cause of death. Although the subsequent two chasing letters to him from Vitality's agent mentioned the option of a report instead of records, he had by then sent some records and subsequently sent more. Further, instead of providing the selection of records which had been requested, he provided all or virtually all of the records pertaining to Mr Cowie held by his practice, without limitation of time or subject-matter. The material in fact obtained by Vitality was, therefore, not a medical report, nor was it in any way targeted or limited by reference to subject-matter or timespan. It was not material which Mrs Cowie had consented to Vitality obtaining, and accordingly was not obtained lawfully by it.

[93] Inherent in that conclusion is the rejection of the contention that there is no material distinction between a medical report and medical records. A report is the product of the application of a medical practitioner's mind to the material presented in a patient's medical records, and to some extent at least will (or at least should) involve an informed assessment of what is material to the subject-matter and purpose of the request for the report, and the filtration out of information surplus to that subject-matter and purpose. Records are simply a collection of raw data. A person to whom they are provided is able to decide entirely for himself what he finds interesting or useful in them, unconstrained by the limitations which should be inherent in the provision of a report. There is no relevant equivalence between the two forms of request for information.

[94] A number of ancillary points may be made in relation to the general question of Vitality's acquisition of Mr Cowie's medical records. Although I consider that the focus in this case must be on what actually happened rather than what might have happened, it is appropriate to note that the evidence does not permit any conclusion to be drawn as to whether Mrs Cowie would have consented to Mr Cowie's records being obtained by Vitality, whether on some targeted basis or otherwise, had she been asked to do so. It cannot, further, be maintained that a targeted request for a report from Dr Mclennan (which is what she did consent to) would have produced essentially the same information as was in fact provided by him. There was no evidence before the court as to what form such a targeted request would have taken, and even if one assumes that it would have sought information relevant to the cause of Mr Cowie's death and relating to the period from November 2010 to November 2015, there is - for reasons already discussed - no reliable evidence as to what Dr Mclennan would have provided in response to such a request.

[95] I do not accept that the Consumer Rights Act 2015 has any impact on the issue of whether Vitality falls to be regarded as having obtained Mr Cowie's medical records unlawfully. As I understood the argument in this regard, it was that the letter sent to Dr Mclennan on 28 November 2016 requesting the provision of those records was ambiguous in that it could be read as requesting only records narrating or setting out the causes of Mr Cowie's death, and that standing the terms of section 69(1) of the 2015 Act, it should be so read because it fell to be regarded as a consumer notice within the meaning of section 61 thereof. That argument doubly fails, firstly because the letter to Dr Mclennan cannot properly be regarded as a notice which it was reasonable to assume was intended to be seen by a relevant consumer (in this case, Mrs Cowie). The letter was sent to Dr Mclennan and Mr Downes explained that Vitality's policy was to minimise its interaction

with bereaved claimants in order to attempt to avoid causing any unnecessary distress. Whether or not one accepts that such was indeed the rationale lying behind that policy, Vitality did not present the letter in principal or copy form to Mrs Cowie and, although it was a matter for Dr Mclennan whether he did so or not, it cannot be said that it is reasonable to assume that that was what Vitality intended. The second reason why the argument fails is that, even if the letter had been a consumer notice within the meaning of section 61, the construction contended for, that "relating to" actually means "relating", is not an available reading of the letter. Whatever the precise limits of the exercise contemplated by section 69(1) may be (a matter upon which I express no view), they certainly do not extend to the reframing of the language actually used for no reason other than to produce a situation more favourable to a consumer than would otherwise pertain. The language used in the letter to Dr Mclennan of 28 November 2016, seeking Mr Cowie's medical records containing entries "relating to or contributing to the cause of death in the 5 year period from 12/11/2010 - 12/11/2015" was entirely clear. The only room for debate was whether any particular matter so recorded did or did not relate to, or contribute to, the cause of death. The request was not on any view merely one for records setting out or relating the cause of death, and no canon of construction - literal, purposive or otherwise - could support such a reading. In such circumstances section 69(1) of the 2015 Act can provide no assistance. Since I have already held by another route that Vitality obtained Mr Cowie's records unlawfully, that conclusion has no practical consequence.

[96] Had the only criticism of Vitality's actions been that it acted in breach of some relevant ABI guidance, I would have found it difficult to sustain such a complaint. The guidance tends to advance broad general propositions and equally wide potential exceptions, about the scope of which much argument could be had. Even if it had been

possible to conclude that the guidance had not been followed, the only conclusion could have been that Mr Cowie's records were obtained by some element of impropriety on the part of Vitality, a finding which would be wholly overtaken by my conclusion that, in fact, they were obtained unlawfully. In these circumstances, it is not useful further to explore the question of the import of ABI guidance in this case. Similarly, I did not find the decision of the Financial Ombudsman in *L* v *Liverpool Victoria* to be useful for present purposes. The Ombudsman was dealing there with what was fair and reasonable conduct on the part of the insurer in a particular set of circumstances. Given my conclusion on the question of the legality of Vitality's acquisition of the records, that is not a question with which I have to deal.

Should the medical records be admitted in evidence in the substantive proceedings?

[97] It will be recalled that Vitality now seeks to use in the substantive proceedings only a selection of the records provided to it. However, those documents were part of the set of records which was unlawfully obtained, and accordingly a serious question arises as to whether they should be admitted into evidence at all. That question falls to be answered both according to the common law of Scotland and by reference to the requirements imposed on the court by the Human Rights Act 1998, particularly in connection with Article 8 of the ECHR. I accept that the content of the modern Scots common law in this regard has been heavily influenced by the treatment of the corresponding subject matter in the Convention. Given that the latter expresses the minimum legal standards acceptable in European democratic societies, it could hardly be otherwise. However, it would be going too far to claim that the common law has been entirely subsumed within the Convention principles; it retains a life of its own within the parameters set out by the Convention. So

much is acknowledged by Article 8(2)'s recognition that interference with the rights conferred by that Article may only be permitted if such interference is "in accordance with law", a stipulation that would make no sense if the only applicable law was itself expressed in the Convention.

[98] It is indisputable that the common law now regards the confidentiality inherent in medical records, even after the death of the patient, as a very strong aspect of an individual's fundamental right to autonomy and privacy, although not an inviolable one. I doubt that all of the observations made at the end of the 1960s in *Boyle*, particularly those concerning the balance of private and public interests in this context, continue accurately to represent the relative content of the common law. Although the notions that "most rigorous scrutiny" of any attempt to displace the confidentiality in question should take place, and that the confidence should be breached only where that is "strictly necessary" in the specific circumstances of any particular case, have primarily been expressed by the ECtHR in the context of Article 8 (eg *Frâncu)*, they equally represent features of the modern common law, and exemplify the influence of the relative Convention jurisprudence on that law.

[99] At common law, the court has a discretion to admit or exclude unlawfully obtained evidence, the ultimate touchstone being whether it is fair in all the circumstances to admit it. In assessing fairness the court looks at the nature of the evidence, the purpose for which it would be used, and the manner in which it has been obtained. A significant factor is whether its admission would throw light on disputed facts and enable justice to be done: *Baronetcy of Pringle of Stichill* at [77] and, more generally, the cases reviewed therein. Adopting that approach, it is in my view appropriate to begin by recalling the overall context against which the question arises. Mrs Cowie claims to be entitled to a payment from Vitality in consequence of her husband's death. That entitlement is said to arise from a

contract entered into voluntarily between him and Vitality. Vitality's willingness to enter into that contract proceeded upon certain statements which Mr Cowie chose to make to it about the state of his health. It follows that this is a case in which Mr Cowie provided information about his health with a view to accessing the benefits which his widow now claims. It is not a case in which questions about the state of his health arise without his having chosen to put that matter in issue (by making statements about it so that the contract which is now sued on would be entered into in the first place) or where information about his health has by some unexpected or unforeseeable turn of events come to be thought to be relevant to the disposal of the substantive dispute. That is a particular feature of this case which distinguishes it from the others cited to me in relation to the proposed use of confidential medical information; it provides the backdrop against which the factors informing the court's decision as to what fairness demands must be viewed.

[100] Turning to those factors, it is obvious that the material which Vitality wishes to adduce in evidence is potentially of very significant import for the outcome of the underlying dispute. Its defence to Mrs Cowie's claim is that Mr Cowie's statements about his health, made as part of the process of obtaining the relevant contract of insurance, were "qualifying misrepresentations" in terms of section 4(2) of the Consumer Insurance (Disclosure and Representations) Act 2012. I accept counsel for Vitality's submission that its prospects of making out that defence are essentially non-existent without the content of Mr Cowie's medical records, insofar as they touch upon the underlying facts said to render what he said misrepresentations, being available for use in evidence in the substantive dispute. Further, although it cannot be said that such evidence in itself will necessarily be determinative of that dispute, there is a very clear basis for argument on the basis of the content of the medical records that qualifying misrepresentations may indeed have been

made. In those circumstances the potential significance of the disputed material in enabling the court to reach the correct and just conclusion in the substantive dispute is clear. I was unable to understand, let alone agree with, the repeated assertion of counsel for Mrs Cowie that the disputed material was quite irrelevant to the proper resolution of the underlying dispute. This factor supports the view that it might well be wholly disproportionate to exclude material of such potentially probative quality from the court's consideration in that dispute.

[101] On the other hand is the inherent strength of the private and public interests in the confidentiality of medical records. Although the use of the disputed material in the present case is, for the reasons just stated, "strictly necessary" for the purposes of just resolution of the underlying dispute, and it is to be hoped that the court's current scrutiny of the circumstances of the case may properly be described as rigorous, the fact remains that the concept of a right to privacy and the related notion of a right to maintain the confidentiality of one's medical information is much more developed at common law, and falls to be accorded much more significance in the court's balancing of the various factors in play, than was the case when decisions such as those in *Rattray* and *Duke of Argyll* were made.

[102] Next fall to be considered the circumstances in which Vitality came to be in possession of the controversial material. One argument in favour of excluding unlawfully-obtained material is that the court may, by admitting it, enable a person to benefit from his own unlawful act (see *Rattray*, per Lord Young at 319 - 320). It was argued by counsel for Mrs Cowie that the presentation to Dr Mclennan of a request which was unjustified by the consent in fact obtained from her ought to be regarded by the court as a deliberate ploy on its part to obtain a greater range of information than that to which it was entitled. While one can certainly see a basis for suspicion that that was indeed the case, the evidence ultimately

fails to support it. The South African-based claims assessor who instructed the request for information to be issued to Dr Mclennan ought to have known, in the context of a properly-run organisation, that the terms of that request exceeded the scope of the consent obtained by the UK end of the operation, but a conclusion that she actually did know that would be speculation rather than an inference properly capable of being drawn from the available evidence. Further, much of the information in fact sent to Vitality by Dr Mclennan was sent because of his rather idiosyncratic reading of the terms of the letter of request sent to him and his unpredictable choice to disregard the plain limitations as to timescale there expressed. I conclude that Vitality was at least partially at fault in the sequence of events which led to its unlawful acquisition of the records in question, but not that that acquisition was the result of conduct on its part calculated to achieve that outcome.

[103] Each party suggested that the availability to Vitality of an application for commission and diligence as a means of lawfully obtaining the records in question was a factor that should be taken into account in striking the balance of fairness in the present context. Vitality argued that it could have obtained the records by that means and that the availability of a lawful route to the recovery of the material in dispute drew the sting, to some extent at least, from the fact that they had in the event been obtained by another means. Mrs Cowie argued that the fact that attempts had been made by Vitality to obtain the records by way of commission and diligence, and had failed, meant that any grant of permission to use the material otherwise obtained would in effect be an arbitrary reversal of the court's previous decisions not to allow recovery by an available legal route. I do not agree entirely with either submission. It is certainly an unusual feature of the case that Vitality made attempts to recover the records in question by way of application for commission and diligence after it had already obtained them directly from Dr Mclennan,

and the fact that those attempts failed in all material regards does not provide much support for its suggestion that there was a viable legal route to their recovery, although the issue of confidentiality was not - at least directly - the ground of their failure. Equally, a decision by the court now to allow use of the records would not amount to a vacation of its previous decisions not to permit their recovery by way of commission and diligence. The fact of the matter is that the records have come into the hands of Vitality, and the court has to decide what it is fair to do in that situation. If the decision is that the records should be admitted in evidence, that is in no way arbitrarily negating the unlawful nature of the manner in which they were obtained by Vitality; rather it is a ruling on what the consequences of that illegality ought to be, taking into account all the circumstances and deciding what is fair in the balance of the private and public interests engaged. The fact that a lawful route to the recovery of the material in question existed and was not successfully used for their recovery weighs in that balance, but not to the extent argued for by either party.

[104] Drawing these various strands together, I conclude that that balance in this case falls to be struck at common law in favour of the admissibility of the material in question. Had this been a case in which the medical history of Mr Cowie had unexpectedly become highly relevant to some issue in dispute between the parties, and Vitality had obtained records pertaining to that matter unlawfully and in consequence of a degree of fault on its part, I would have had little hesitation in determining that the records were inadmissible. However, the decisive, indeed overwhelming, factor which renders it fair to admit the disputed material despite its confidential nature and the unlawful manner in which it was obtained is the fact that the state of Mr Cowie's health in the 5 years prior to his application for cover was - entirely in accordance with his own choices - foundational to his contractual relationship with Vitality. There would be no such relationship, no claim and no need for a

defence to a claim, had he not voluntarily made statements about his health in order to obtain the policy of insurance in question. To exclude evidence capable of casting a particular light on the truth and accuracy of those statements would be grossly unfair to the private interests of Vitality in advancing its own position and to the public interest in seeing the court do justice on the basis of all material relevant to its decision. Those interests clearly outweigh the public and private interests in maintaining the confidentiality of information pertaining to Mr Cowie's health in circumstances where he chose to make the state of his health the basis of his dealings with Vitality.

The exercise in terms of Article 8

[105] Apart from what it would do at common law, the court may only, in conformity with its duties as a public authority in terms of the Human Rights Act 1998, countenance the disputed material being used as evidence in the substantive dispute if the conditions set out in Article 8(2) are met. One of those conditions is that interference by a public authority with the exercise of the Article 8 right is impermissible unless it is "in accordance with the law". Counsel for Mrs Cowie argued under reference to *MK* v *Ukraine* that, since the records in dispute here had clearly not been acquired in accordance with the law, the requirements of Article 8(2) could not be met and any attempt to justify the use of that material accordingly had to fail *in limine*.

[106] I have no hesitation in rejecting that submission. Firstly, it is not what Article 8(2) actually says. The terms of the Article require any action of a public authority (here, the court) which interferes with Article 8 rights to be in accordance with the law. It does not require that the situation which the court is addressing in a way which may interfere with those rights must itself have occurred in accordance with the law. Secondly, *MK* v *Ukraine*

does not vouch the proposition contended for. In that case, a public authority (a state-run hospital) had used confidential medical information in a manner which was (at least according to the ECtHR) not in accordance with domestic law, and the claimant was seeking compensation for that action. There was in those circumstances no prospect of justifying the public authority's established interference with the claimant's Article 8 rights, since that interference had not been in accordance with law. That was all that the case decided. In the present case, no public authority has yet done anything that is not in accordance with the law. Rather, the question is whether the court, as the relevant public authority, would or would not be acting in accordance with law by interfering with Mr Cowie's Article 8 rights by way of the mechanism of allowing his medical records to be used for the purposes of the underlying dispute. That resolves itself into the question of whether there is a clear and accessible legal basis upon which the court might proceed to allow that use. If that basis is some aspect of the public interest - as it is in the present case, namely the public interest in the proper administration of justice - that interest must not be too "vague or amorphous", or else it risks failing to provide the clear and accessible basis necessary (*BC* v *Chief Constable*, per the Lord Justice Clerk at [108]). Having considered this matter in *Thorntons Investment Holdings* at [91], I concluded that the elements which fall to be considered in determining the question of the admissibility of evidence at common law are sufficiently clear to enable a suitably-experienced legal practitioner to assess and advise a client who requires to deal with the question what the likely outcome may be, or at least how likely any particular outcome is. Neither party in the present case sought to persuade me to reconsider that conclusion, to which I adhere. The requirement of Article 8(2) that the court's interference with the Article 8 right in issue must be in accordance with law is, accordingly, satisfied.

[107] Turning to the other conditions imposed by Article 8(2), any interference with Mr Cowie's Article 8 rights requires to be necessary for one of the purposes set out there. In this case, that the interference is necessary, and fair, for the protection of the rights and freedoms of others, namely Vitality, emerges clearly from the balancing exercise carried out at common law, as already set out.

[108] Counsel for Mrs Cowie submitted that it was implicit in Article 8(2) that any interference with Mr Cowie's Article 8 rights should be proportionate in the sense described in *Bank Mellat*, summarised in *Christian Institute* v *Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29, 2016 SLT 805 at [90] as follows:

> "It is now the standard approach of this court to address the following four questions when it considers the question of proportionality: (i) whether the objective is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure)."

[109] Assuming that to be so, I did not understand counsel to dispute that the objective of protecting the rights and freedoms of others in the context of civil litigation was sufficiently important, in principle at least, to justify the proposed limitation on Mr Cowie's Article 8 rights. In any event, I so hold. As to whether that proposed limitation is rationally connected to that objective, if it may reasonably be expected to contribute towards the realisation of the objective at which it is directed, it will satisfy that requirement; *Bank Mellat* per Lord Reed at [92] and [116], and the cases cited there. Again, I did not understand it to be in dispute that allowing use of the medical records in the substantive dispute was

rationally connected in the necessary sense to the vindication of the public interest in the just and accurate resolution of the civil proceedings in question.

[110] Rather, counsel submitted in relation to the third element of the *Bank Mellat* proportionality test that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, in that the court could require medical records to have been recovered by way of commission and diligence before permitting their use in litigation. However, for the reasons already set out, I do not consider that the availability of that route for the recovery and use of medical records touches upon the question of proportionality which is actually in issue in the present case. The question which faces the court is whether it is proportionate to allow the use of unlawfully-recovered material in the substantive dispute. It is not the more general and abstract question of under what circumstances confidential medical records should be admissible in evidence in civil litigation. If that were the question, then one might argue that even commission and diligence could be seen as an unduly intrusive mode of interfering with Article 8 rights in the confidentiality of medical records, and that some test centring on the reasonableness of any refusal to consent to such use on the part of the person claiming those rights would be more appropriate. Addressing the correct question, however, the confiding to the independent court of the power to decide the issue in the context of the nuanced and sensitive common law test is a reasonable expedient to deal with the problem and no less intrusive measure which would not unacceptably compromise the achievement of the objective suggests itself.

[111] The fourth and final question to be asked is, read short, whether, balancing the severity of the impact of the interference with the importance of the objective and the extent to which the interference would contribute to its achievement, the former outweighs the

latter. This is a perhaps a rather more formal and elaborate way of asking the same question which falls to be posed at common law. In the present case, the objective of protecting the rights and freedoms of others in the context of civil litigation is an important one and the proposed interference will undoubtedly contribute to its achievement. The severity of the impact of the interference, on the other hand, is much attenuated by the fact, already canvassed, that the state of Mr Cowie's health was voluntarily put forward by him as foundational to his' relationship with Vitality, so that there is correspondingly less room for Mrs Cowie, as representing him, convincingly to maintain that his privacy is greatly invaded when information about that very matter is to be relevantly used in the determination of a dispute arising out of that relationship.

[112] I conclude that the proposed interference in Mr Cowie's Article 8 rights is justified in terms of Article 8(2).

Disposal

[113] For the reasons stated, I rule that the medical records in issue shall, subject to Vitality's relative undertaking already noted, be admissible as evidence in the parties' underlying dispute. I shall pronounce an interlocutor to that effect and refuse the craves of the Minute.