



**BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL**

F(09)11

**GENERAL OPTICAL COUNCIL
AND
AHTHESAMUL ISLAM CHOWDHURY (SO-2766)**

**SUBSTANTIVE HEARING
Wednesday, 20 JANUARY 2010**

**SUBSTANTIVE HEARING: AHTHESAMUL ISLAM CHOWDHURY (SO-2766)
20 JANUARY 2010**

Committee Members: Mrs C Kershaw (Chair)(Lay)
Dr V Harris (Lay)
Mr A Khan (Lay)
Dr R Stevenson (Optometrist)
Mr R Kapoor (Optometrist)

Legal Adviser: Mr N Levisaur

For the Council: Mr B Albuery

For the Registrant: Mr S Singh

Hearings Manager: Mr D Henley BEM

[Hearing commenced at 09:59]

Mrs Kershaw: Good morning. Could I just thank you for your patience in waiting to start, but yet again, transport difficulties have caused problems in getting here.

Mr Levisaur: I apologise to everyone – I'm sorry you've all been kept waiting. I'm afraid I sat on the train, and sat on the train, and when I had finished sitting on the train, I just sat on the train!

Mrs Kershaw: Good morning. I am Corinna Kershaw, a lay member of the Hearings Panel, and I have been elected by the Committee to chair today's hearing. The Committee today is made up of two optometrists and three lay members, and I will ask the members of the Committee to introduce themselves, and the capacity in which they sit. *[Introductions made]*

Dr Harris: If I may, I'd like to make a declaration, that my husband in his capacity as a deputy for water protection, currently uses Blake Laphorn, but I don't believe that that in any way affects my judgement in connection with this case; but I'd be grateful for Mr Singh's views on that - he's heard me make this declaration before.

Mr Singh: My view is exactly the same: I don't think it's any problem at all.

Dr Harris: Thank you.

Mrs Kershaw: To my right is Mr Levisaur, the Committee's Legal Adviser, who will provide legal advice and assistance to the Committee, and ensure that the proceedings are conducted in accordance with the rules of procedure, so as to arrive at a result which is fair and just. The Legal Adviser may accompany the Committee should it sit in private to deliberate. In the event that any matter arises during the course of the Committee's deliberations, and upon which the Committee seeks advice, the parties will be invited to return to hear

the matter which the Committee has raised, and the advice to the Committee. Where advice on any issue is not accepted by the Committee, this will be indicated in the course of its decision on that issue.

To your right is David Henley, the Hearings Manager, who will provide administrative support to the Committee. Next to Mr Henley is Charles Nisbet, the transcriber, who will be keeping an official record of all that is said today during the sessions of the hearing at which the parties are present. The remaining persons sitting in the hearing room rather than the public and press areas are members of the respective legal teams.

You should be aware that it is the Council's policy for the determination of the Committee and the transcript of the proceedings to be displayed on the Council's website for public viewing.

Before we begin, are there any applications to be made?

Mr Albuery: Madam, good morning. Yes, by me, please, on behalf of the Council: there is an application to amend particulars of the allegation. This application is made on notice to my learned friend and those who instruct him, and indeed, is in relation to two parts of a three-part application, at their request. Madam, I wonder if you could have in front of you, please, the proposed amended allegation which I handed to your Hearings Manager earlier, and I can then explain what the application is about.

The first application relates to particular 3, and is to make clear at 3ii that the registration in September 2006 was a student registration, so that word has been inserted, and the date for the application at 3iv was incorrectly stated as being 15 June 2008 – it should be 15 July, so I have made that amendment. The third and last amendment that I seek is that the verb in the preamble to 4 change from 'are' to 'were', because at that stage, at least, you are looking backwards to determine the dishonesty or otherwise.

Madam, your power to amend may be found in Rule 34 of the Fitness to Practise rules, set out at page 98, and although I know you are all, being an experienced Committee, familiar with that rule, perhaps I should, for the sake of the record, read it out. It says this:

- (1) The Presenting Officer may apply to the Fitness to Practise Committee for the particulars of the allegation contained in the notification ... to be amended.
- (2) The Fitness to Practise Committee may grant such an application where they are satisfied that it is just so to do."

Madam, bearing in mind the nature of the application I make, the fact that it's on notice and agreed by the defence, I ask you to make, having heard from Mr Singh, those amendments.

Mrs Kershaw: Thank you. Mr Singh.

Mr Singh: Madam, we agree those amendments. I know some of them may seem like nit-picking, and they are nit-picking on our request, two of them at least, I'd ask that you make them as well.

Mrs Kershaw: Thank you. It is always helpful when it clarifies things. Mr Levisieur, have you anything to say?

Mr Levisieur: You have a discretion; you should exercise that discretion in a way which is just, that is to say, just between both the parties, and in circumstances where the purpose of these amendments is to clarify both the time that you are supposed to be looking at allegations and also to make clear the details. It would be a perverse, and indeed, an unjust thing not to allow these amendments. But the discretion is yours.

Mrs Kershaw: Thank you. I am just going to look to my colleagues, to seek their agreement. [Agreed] We are content to make the necessary adjustments to the charges.

Mr Albuery: Madam, that was my only application.

Mrs Kershaw: Thank you.

Mr Levisieur: May I, for my own note, check that the particulars at the bottom of the page of the allegation are correct, and the only particulars that you rely on?

Mr Albuery: Yes, Madam, I infer from the question that I am being asked whether or not convictions should appear. My response is, no, because although at particular 2, reference is made to the theft of clothing, the receipt by Mr Chowdhury of a conditional discharge, as you know, means that under the Powers of the Criminal Court (Sentencing) Act, that is a conviction only for the purposes of the proceedings in which that sentence was given. Therefore the regulator cannot use it in regulatory proceedings, and so brings that act or omission as a matter of misconduct.

Mrs Kershaw: Mr Singh, do you want to say anything on this issue?

Mr Singh: No, nothing to add to that.

Mr Levisieur: I feared that was the answer. It is clear, however, the Committee are entitled to take into account the facts which underlie what later became a conviction.

Mr Albuery: Yes, absolutely, Madam, and if it were not for the fact that, as you are about to hear, that fact is admitted, that would be the way in which I would have sought to prove it.

Mrs Kershaw: Thank you for that clarification. Mr Chowdhury, could you stand, please? Mr Henley, would you read the allegation, please?

Mr Henley: [Reads allegation]

"The Council alleges that in relation to you, Ahthesamul Islam Chowdhury, a student optometrist:

1. On 4 September 1999 you received a Police caution for shoplifting contrary to the Theft Act 1968 Section1;
2. (i) On 15 May 2004 you stole clothing belonging to Selfridges valued at £559; and
(ii) On 8 July 2004 you received a conditional discharge of 2 years.
3. You failed to declare that you had received a caution and a conviction for which you received a conditional discharge on the following applications made to the Registrations Department of the General Optical Council:
 - i Application for student registration dated 20 October 2005;
 - ii Application for student registration dated 21 September 2006;
 - iii Application for retention 2007-8 (student) dated 9 July 2007;
 - iv Application for retention 2008-9 (student) dated 15 July 2008
4. Your actions at paragraph 3 above were:
 - i Dishonest;
 - ii Not of the standard expected of a student optometrist.

AND by virtue of the matters set out above your fitness to undertake training is impaired by reason of your

- (a) Caution;
- (b) Misconduct."

Mrs Kershaw: Thank you. Would you like to sit down. Mr Singh, can I ask you if any parts of this are admitted.

Mr Singh: Madam, you and your colleagues have before you the nature of the allegation, and I'll read out the specific parts as I go through it. In relation to particular 1, that he received a Police caution for shoplifting, contrary to the Theft Act, Section 1, that is admitted.

Paragraph 2(i), 'On 15 May you stole clothing belonging to Selfridges valued at £559', that is admitted.

Particular 2(ii), 'On 8 July 2004 you received a conditional discharge for two years', that is admitted.

In relation to paragraph 3, that he failed to declare that he had received a caution and a conviction for which he had received a conditional discharge on the applications in relation to 20 October 2005, 21 September 2006, 9 July 2007 and 15 July 2008, that paragraph is admitted in its entirety, in that particular i to iv are all admitted.

Paragraph 4i, that his actions at paragraph 3 were dishonest, that is admitted, and ii, that they were not the standard expected of a student optometrist, that is also admitted.

Mrs Kershaw: Thank you.

Mr Singh: For the sake of completeness, the rest of the allegation, if I can come to misconduct first, it is admitted that the matters set out in respect of paragraph 2, that is, the theft of clothing from Selfridges, amounts to misconduct, and that he has admitted that the matters relating to the non-declaration amount to misconduct separately. It is not admitted that those matters amount to impairment of fitness to undertake training.

Mrs Kershaw: Thank you. Mr Albuery.

Mr Albuery: Thank you. Madam, the only issue, then, for you to determine, is whether or not those things which are admitted amount to impairment of Mr Chowdhury's fitness to undertake training.

Mr Levisseur: Strictly, that's not quite right. Strictly, they will have to find those facts, which is, I quite accept, an absurd situation, but nevertheless, it is absolutely clear that the facts, although admitted, do not in any way bind the tribunal. There ought to be formally a separate fact-finding stage –

Mr Albuery: Madam, perhaps I put it clumsily: I wasn't allowed to finish my sentence – had I done so, I would have clarified what has now helpfully been clarified for me, which is that, although the only issue between us – let me put it more elegantly – is whether or not the admitted facts amount to impairment, still, obviously, you'll have to find the facts proven. Bearing in mind the admissions which have been made, and they are made through counsel, that may not take you terribly long, though obviously I will take you to the facts which I say allow you, in addition to the admission, to find the facts proven.

Perhaps more importantly, I can see, of course, that the matter relating to misconduct is a matter for you and is a matter of judgement, as indeed, is impairment, which is the one issue between my learned friend, at least, and I, which is not agreed, and notwithstanding the admissions, I will make submissions in relation to both misconduct – perhaps caution is more straightforward – and also impairment.

Madam, I propose to do that, if I may, in this way: firstly to take you in the hearing bundle to those parts that I believe relate to the facts of the caution and conviction, then those that relate to the admitted failure to disclose, then I will make submissions about misconduct and impairment. Madam, I hope you were sent in advance of today a bundle of evidence, and perhaps you would confirm that you and your colleagues were sent that bundle and have had an opportunity to read it?

Mrs Kershaw: We have all had an opportunity to read it.

Mr Albuery: Thank you, Madam.

Mr Henley: Can we refer to that bundle as C1, please?

Mr Albuery: C1, thank you. Madam, the first particular of allegation relates to the receipt by Mr Chowdhury of a Police caution for shoplifting in 1999. His date of birth is 10 March 1985, and at that time, therefore, he was 14. Madam, you will have read already in the bundle that there are very few facts now known about that matter, in view of its age, but at page 41 in your bundle, you will find an extract of a CRIS report, as referred to by the Police, which gives you the only details we have, and I'll read the part of this form, if I may, which I think is relevant: at the top of page 41, it says this:

“The three accused were seen to take CDs and after taking off the security tags, they placed them in a bag and down the front of their trousers. They then left the store, making no attempt to pay or produce any items, and were stopped outside. When interviewed in the presence of their appropriate adults, each boy fully admitted the thefts.”

And Madam, you know, you have read from the CRB disclosure and the police national computer printouts, that insofar as Mr Chowdhury was concerned, that resulted in him receiving caution.

Madam, I should say, at this stage – but you know it anyway – that the acceptance of a caution by Mr Chowdhury was an acceptance of his guilt, and an acceptance of each of the essential elements of the offence, which, when we're dealing with theft, includes an admission of dishonesty.

Madam, the second set of particulars relates to an incident when Mr Chowdhury was, I believe, 19, and relates to his theft of clothing to the value of £559 from the Burberry concession in the Selfridges store, and you know that he was given a conditional discharge for two years. Madam, the papers insofar as they now exist, relating to this, begin in your bundle at page 42, and I'll take you through them, in brief order if I may. At page 42, you have a copy of the charge record, which in Section 1 states:

“Reason for arrest: shoplifting. Seen to select items from the store and go to the cashier, who only barcoded for one item, totalling £17, when actually in possession of goods in excess of £500.”

He was arrested on 15 May 2004, that's the date of the offence. We know from page 45 that he was bailed by the Police after interview under the Police and Criminal Evidence Act, and under caution, to appear at Horseferry Road Magistrates Court on 8 July 2004, and we know from other documents in the bundle that it was on that day that he pleaded guilty to the theft and received the sentence of a conditional discharge.

Madam, at page 46 appears the store detective's statement, dated 15 May 2004, and having already read it, you'll know that much of it relates just to the design of the store and how the tills work, and it might be tiresome if I took you through that, so I won't. But if you turn with me to page 51, there we find, I think, the relevant part, and again, I'll read what I believe is the relevant part, if I may. It starts about 12 lines from the bottom:

"At approximately 13.20 hrs, the CCTV operator informed me that a member of staff was about to process a transaction for a member of the public. At this point, I inspected the RMS system, to check the amount that was being put through the till. A transaction was completed for cash at £17, of which £20 was tendered, and £3 change was given to the customer."

The customer, it is accepted, was Mr Chowdhury.

"The customer was at this point making his way down to the ground floor. I was informed by my two-way radio that the customer had two full bags of stock, that the member of staff handed over to him, which related to the transaction. As we suspected that collusion had taken place at this point, it was decided to detain the member of the public. The member of the public exited the store out onto Oxford Street, where colleagues and myself approached him, identified ourselves, and conveyed him back to the security office."

and then they detained the member of staff with whom Mr Chowdhury was operating in collusion, and they checked the value of the stock to be £559.

Madam, thereafter in the bundle, just staying with the facts relating to this particular, you have the notes of the arresting officers, I've read them, you will have done also, I don't think there's anything in there that is particularly relevant.

At page 56, though, you have the record of interview of Mr Chowdhury. Madam, may I explain, please, why the person interviewed at the top has had his name deleted from this record: that deletion was made by the Police before this document was sent to the General Optical Council, and was because the incorrect name was inserted there, so for data protection reasons, it was edited out, but all accept that this is a summary – a very short summary – of the interview by the Police of Mr Chowdhury, and it says this – and the interview only took ten minutes:

“The allegation was put to the defendant and he made a full and frank admission to selecting a number of clothing items, taking them to the counter where the co-defendant was working as a cashier, handing the clothing over with a £20 note and receiving £3 in change before exiting the store.”

Madam, just as I said in relation to particular 1, so I say in relation to particular 2, that the matters which we say amount to misconduct, and which Mr Chowdhury admitted in the criminal court, included an admission by him of dishonesty. Perhaps you might think, in any event, that’s implicit in the word ‘stole’. I make that point because when you look at particular 4 in the allegation, you will see that the allegation is drafted in such a way as to refer to dishonesty only in relation to the failure to disclose the facts relating to the conviction and also the caution. I hope no point is taken of it, but it is obvious anyway, isn’t it, that dishonesty is also present in particulars 1 and 2. It must be, otherwise Mr Chowdhury would not have accepted the caution, and he would not have admitted to the facts which form the basis of the misconduct.

Madam, can I turn now, please, to the third particular of allegation, which relates to his repeated failure to disclose the caution and the facts of the conviction. The chronology, which you’ll have read already in the statement of Laura Hytti, from page 1 in your bundle, in relation to registration history, is as follows: application for student registration made on 20 October 2005. On 12 September 2006, Mr Chowdhury was removed for non-payment of fees. I make no point about that, and I don’t ask you to: I’m just telling you in terms of the narrative and the chronology. Probably an error on his part, because on 21 September 2006, he then applied again to the student register. Having now been on it, on 9 July 2007 he applied for retention to that student register, and then submitted a further application for retention on 15 July 2008. He then applied on 21 July 2009 for entry to the full register of optometrists, which application was refused as a result of matters which he declared in relation to that application.

Madam, I want to take you, if I may, to the various applications made by him, as set out in the allegation, because it is important that you are reminded of that which you’ve already read, which is what he declared and what he didn’t declare, and the certifications on them. So, starting then, please, at page 4 in your bundle, you’ll find there a copy of the application for student registration made on 20 October 2005, and you’ll see that in answer to the question at the top of page 6 in your bundle,

“Are you the subject of a criminal investigation or proceedings, or have you been the subject of a criminal conviction, caution, or other matter?”,

he has responded, “No”. Now Madam, particularly important, you might think, this one, because it is dated October 2005, and Mr Chowdhury, who says he has not been the subject of any of these things, was at the Magistrates Court only the year before, in July 2004. Perhaps that’s why he has admitted dishonesty, but no doubt we’ll hear more about that from him later.

Madam, the next application, dated 21 September 2005, begins at page 7, and I ask you to look at it from page 9, where again, he fails to disclose, in relation to the question in section 4, the conviction or caution, that is despite, on page 10, at the end of the form, signing a declaration in which he says,

“I understand that the GOC will use the information I have provided to exercise its proper and statutory functions”,

and then,

“I declare that the information given on this form is true and accurate”.

The next application starts at page 11, is dated 9 July 2007, and is for retention in the year 2007/8. Again, at page 13, at the top, in section 4, he fails to disclose the conviction or caution, despite the declaration at the top of page 14, which is in similar words to the declaration I have just read out, and unless you want me to, I therefore won't read it again.

Madam, then at page 15 we have the application for retention to the student register dated 15 July 2008, and yet again, in answer to question 4, he ticks the box “No”, not declaring the conviction and the caution he had, and signs the same declaration, dated 15 July 2008.

Madam, it's not until 21 January 2009, in his application for full registration, which begins at page 19, that the conviction and the caution is first disclosed to the Council, some three and a half years after the first application for student registration was made. Mr Chowdhury quite properly mentions the caution in 1999, and he quite properly mentions the conviction, and helpfully explains that although it was said at that time to be theft by him as an employee, that was in fact incorrect, because although his co-defendant was the employee of Selfridges, he was not, and as you've seen, there was an amendment to the disclosure to confirm that.

Madam, he supports that application by a letter – you may hear more about the letter when Mr Singh perhaps gives evidence, but I take you to that letter, Madam, at page 23. Madam, this is a letter written by Mr Chowdhury to the Council in support of his application, and I do rely on some of what he says in relation to the submissions I will later make about impairment, so I ought, in fairness to him, to go through it with you. He says in the second line,

“It only recently came to light that I have a previous caution and conviction, which I was unaware of.”

Let's just, if we may, pause there, please. How can that be said by Mr Chowdhury, you might think, with any credibility? He was at the police station in 1999, when he received his caution, he would have had an appropriate adult with him. More concerning, perhaps, is the fact that he was in court in 2004 when he admitted the criminal matters he was facing, and received a criminal sentence for them. These are matters for you, obviously, to consider

and to explore, but it seems to the Council, and I submit, that even in January 2009 – though he now admits dishonesty - Mr Chowdhury was not displaying the insight that you can properly expect of registrants to show. Case law makes clear that that is a matter that you can and should properly take into account. I will return to that later.

Sticking with this letter for the moment, Mr Chowdhury says,

“I found this out through the CRB check done to support my application to work for Westminster PCT”,

which check appears to have been made around December 2008, but my learned friend will correct me if I'm wrong about that. Now, he does say that he had previously done a police national check, which he says did not reveal these convictions, and that he had been assured he would not have a criminal record. No doubt Mr Chowdhury will explain by whom and in what circumstances, and perhaps he can be asked about that, but he asks you to believe that it was as a result of some uncertainty in his mind that he decided to get a police national check undertaken upon himself, and he then goes on to say that he was surprised to receive a CRB form confirming that he had a conviction.

Madam, he then goes on to say – fourth paragraph:

“Even as a student registrant to the GOC, through university, and during my pre-reg training, I was unaware of the conviction”,

I remind you that he was in court when he was convicted,

and the caution on my record. At no point was it my intention to mislead anyone”.

You have heard him today admit dishonesty in relation to his failure to disclose these matters.

Some of the confusion, if there was confusion in his mind, in relation to documents he has received from the Police national computer check, or as a result of it, may come as a result of aliases being used by Mr Chowdhury, I don't know, but certainly we know from the paperwork, that there are two aliases used by him, because they are recorded in the paperwork. Madam, I was hoping to take you to the page where they are recorded but at the moment I can't find it –

Mr Levisaur: It's either the caution or it's the conviction.

Mr Singh: Page 37.

Mr Albuery: Madam, I'm very grateful to everyone for their assistance. It is page 37 – you will see on the PNC printout that there are two aliases there: Jihad Choudhury and another forename, and also, Chowdhury spelt differently in

the first alias. But my point – I don't want to labour it, and I hope you don't think I already have done – is that you may think that it lacks credibility of Mr Chowdhury to suggest that he was not aware he had a caution or a conviction that he needed to disclose. Madam, that application was refused, and fitness to practise proceedings brought as a result of that disclosure.

Madam, neither misconduct nor impairment is defined in –

Mr Khan: I apologise for interrupting. Can I just raise one point central point before you go on to misconduct: you have very kindly drawn our attention to the application forms, and I just don't remember it in full. You see, caution is not a conviction, and today we also learned that a conditional discharge may not be a conviction for certain purposes. Is the form quite clear, is there any warning saying, caution means this and conviction means other things, and you must declare it, whatever form? I'm just reminding myself –

Mr Albuery: Yes. I wonder if the best way for me to answer that is to remind you all of what each form says. It is a fair point, sir, for you to raise because the form does change, it evolves, and the question changes. Let's start, then, with the first application, in October 2005 –

Mr Levisaur: This is page 6, is it?

Mr Albuery: Page 6, thank you, sir, of the bundle. The question is,

“Are you the subject of a criminal investigation or proceedings or have you been the subject of a criminal conviction, caution or other criminal matter?”

Now, by that stage, firstly, Mr Chowdhury had received a caution, and I don't think it can be any clearer: he received a caution, and was asked, do you have a caution, and he said, no. Then it also refers to him being the subject of a criminal conviction 'or other criminal matter'. Now, the word used twice there is 'criminal'. Firstly, he had by then been the subject of a criminal conviction – that's a fact. The fact that you, or the Council as the regulatory body, cannot, because of the drafting of the rules, use a conviction as a trigger for a finding of impairment, does not and should not be taken by you as a suggestion that he did not have to disclose it. It was a conviction – the fact was, he went to court and he was convicted, and I don't think there's any doubt as to what the expectation was.

Mr Levisaur: Forgive me, I raise this with you now only simply because a tribunal member has raised it, and I know that both of you will need to deal with this – what is the effect of the provision of Section 14(1) of the Criminal Courts (Sentencing) Act 2000, the one which says – I summarise – thou shalt not be guilty of any offence if you answer the following question 'No', where you have had a conditional discharge?

Mr Albuery: I separate the ability of the regulator to use as a trigger for impairment the conviction from an obligation to disclose the fact of the conviction. It may

be helpful here to remember the purpose, in terms of its regulatory function, of the Council, as set out in the Opticians Act, in relation to the protection of the public and the maintenance of standards. I was going to come onto the code later.

“The main objective of the Council, in exercising such are the Council’s functions as affect the health and safety of members of the public, is to protect, promote, and maintain the health and safety”, etc.

Mr Levisaur: So, to take an absurd example, you would say that if a man had been conditionally discharged, let us say, for rape, a matter of ‘such significance’ that the Council would need to take it into account, in assessing whether or not a man was fit.

Mr Albuery: Yes, I think that’s helpful, because of course, all the question seeks to do is to give the Council the opportunity to make an informed decision, after proper investigation, of fitness to undertake training or to practise as an optometrist or dispensing optician.

That’s the first form, and that’s in October 2005. The second form is on 21 September 2006, and the question appears at page 9. This question is slightly different to the last question. This question is,

“Have you been convicted of, or cautioned in relation to, a criminal offence (or been the subject of an Agreed Order, Penalty Payment Agreement or Absolute Discharge Order in Scotland), or are you currently being investigated in relation to a criminal offence?”

The important point may be, perhaps, the first part, ‘Have you been convicted of, or cautioned in relation to, a criminal offence?’ –

Mrs Kershaw: Mr Albuery, sorry to interrupt you, but for the purposes of Mr Khan understanding this particular point, it might have been helpful to include the brackets, because they make a slight difference to the meaning of the sentence.

Mr Albuery: If I could see them on my poorly copied – I would

Mr Levisaur: My copy is so bad that I’m highlighting, and I should correct one thing: it appears to me that the words say – that is to say, after the bracket – ‘(or been the subject of an Agreed Offer, Penalty Payment Agreement or Absolute Discharge Order in Scotland)’, but the writing is so bad, that I’m open to any correction.

Mr Singh: That is absolutely right, that’s how I read it as well.

Mr Albuery: Mr Khan, do you want that re-read?

Mr Khan: Now that the Chair has very kindly made it clear, and the Legal Adviser has read it, no, thank you.

Mr Albuery: Thank you. Then moving on to the third application, which is dated 9 July 2007, the wording has –

Mrs Kershaw: Sorry, Mr Albuery, there's another –

Dr Harris: I think it's helpful also to make it clear that in the one that you've just read, there is a heading that says "Section 4: Criminal and Disciplinary Proceedings" – it's helpful to show that that's there, whereas it wasn't in the other one. That's for Arif's benefit.

Mr Albuery: I'm very grateful, thank you. Page 13 in your bundle is the relevant section of the application dated 9 July 2007, and in its entirety, that reads as follows:

"Heading: Section 4, Criminal and disciplinary proceedings.

Have you been convicted of, or cautioned in relation to, a criminal offence (or been the subject of an Agreed Offer, Penalty Payment Agreement, or Absolute Discharge Order in Scotland), or are you currently being investigated in relation to a criminal offence which,

- you have been asked to declare at this retention by the Registrar
- has occurred at any time since the last retention?"

The fact of the failure to disclose has already been admitted, but lest it worries you, and if it's in your mind - I hope I'm not putting something in your mind that isn't in your mind – you might think, well, notwithstanding the admission made, actually, on a strict interpretation of that question, there's no evidence he was asked to declare it this time by the Registrar, and it hasn't occurred since the last retention application, and therefore should he declare it? I raise that issue because I don't know what is in your minds, and I don't want to lose an opportunity to. If it's in your mind, let me answer as best I can, in this way. It can never have been the intention of the draftsman of the legislation or the draftsman of these forms, that somebody who has concealed their cautions or convictions can benefit from the wording – clearly implicit in this is that you have already disclosed that which you should have done on previous forms. It may be such a bad point and obviously not taken, that I'll move on to –

Mrs Kershaw: I think that's a helpful comment to make.

Mr Albuery: Thank you, I'm glad to hear you say that. The next application, then, is dated 15 July, and at page 17 you'll find the question, which again, it has an extra bit this time, so may I read out just the extra bit? It is the same as it was in the last one I've just read out, with this clarification underneath it:

"You must declare any conditional caution, and any condition which led to the imposition of a conditional or absolute discharge. You do not need to declare road traffic offences that have been dealt with by way of a fixed penalty".

So, further clarification is given there.

Madam, the last application is the one in which the disclosure was made, and the relevant part of that application dated 21 January 2009, though signed by Mr Chowdhury on 20 January, is at page 21 in the bundle, and I believe, unless anyone corrects me, that the wording under the heading 'Criminal and Disciplinary Proceedings', is the same – is it not?

Mrs Kershaw: They have added back the words 'Have you ever been convicted', which of course, perhaps they thought they'd had in over previous years and realised that –

Mr Albuery: So Madam, I submit that, if you're asked the question, 'Have you been convicted?' that the word 'ever' is superfluous, but since it's been added in –

Mrs Kershaw: Perhaps, but –

Mr Albuery: That's the submission I make, it's obviously for you to determine it, but in view of that, do you want me to read out the whole section, or can we all proceed on the basis it's the same wording, with the word 'ever' added in?

Mr Khan: Yes.

Mr Albuery: Mr Khan is happy with that, Madam, if you and your colleagues are? If there's any hesitation, I'm happy to read it –

Mrs Kershaw: No, it's fine. I think provided Mr Khan is clear on that –

Mr Khan: Yes.

Mr Albuery: Madam, every time Mr Chowdhury signed the form, he signed the certification confirming the accuracy of the information he was giving, and he knew the purpose to which it was going to be put. The Council has a reasonable expectation that registrants and those seeking registration are fulsome in the giving of information in relation to the questions that they are asked, and indeed, Mr Chowdhury fully accepts that, because he has accepted that not only was there a failure to disclose these items, but that it was dishonest.

Madam, I think the word 'failure' is important – we've had many debates, haven't we, in this place, as to the difference between the words 'did not' and 'failure', and the word 'failure' imports a duty, I think it's generally accepted. Mr Chowdhury, represented so ably by Mr Singh, would not have admitted a failure which imports a duty clearly set out in the application forms if it wasn't so clear what he was meant to be doing.

Madam, the Code of Conduct, with which you will be very familiar, requires registrants to be honest and trustworthy – that is at page 5 of your handbook, and it is number 10 of the list of matters expected of registrants. Dealing,

then, firstly with the issue of misconduct: not only did Mr Chowdhury commit two acts of theft - one, admittedly, as a young man of fourteen – but as seriously, or, you may think, more seriously, he failed to disclose the existence of that caution and that conviction on a number of occasions, four, between 2005 and 2008. By doing so, he departed from the standards of integrity and propriety that you can reasonably expect of those who are and want to remain members of this profession, and he frustrated the proper enquiries that the Council would otherwise have made in relation to his fitness. Madam, it's your judgement, but I say no more about it than that in relation to misconduct.

In relation to impairment, these are my submissions: that if you find the facts proven, which are admitted, including dishonesty, and in your judgement that those facts amount to misconduct, you should relatively easily be able to conclude that that constitutes a current impairment. I say that, fully conceding, of course, that not all facts, not all findings of misconduct will amount to impairment, either, perhaps, because they don't reach the threshold, or because, looking at that line of cases, the likelihood of repetition is slim, or matters of concern have been remedied. Very often you will have heard, perhaps me, certainly those who defend here, rely on that line of cases – *Azzam v General Medical Council* [2008] EWHC 2711 (Admin), *Cohen v General Medical Council* [2008] EWHC 581 (Admin) – which explain and set out clearly the fact that you might find it difficult to find current impairment, quite rightly, if you are not satisfied of matters of remediation and repetition of concern.

Madam, though that point may still be made, it has less weight, of course, when you're dealing with matters not of clinical concerns, but relating to integrity and honesty, and you might think that's obvious anyway, but even if it is, I have authority for the point.

The authority is fully accepted by Mr Singh, I have copies here of the case, which I can hand to you if you want it, but I am going to read an extract of the case, which I've mentioned to Mr Singh this morning – he may want to develop the point. It's the case of *Yeong and the General Medical Council* [2009] EWHC 1923 (Admin) in July of last year, when that case came before the Honourable Mr Justice Sales in the High Court.

Mrs Kershaw: I think it would be helpful for us to have copies, if you have them to hand.

Mr Albuery: Yes, of course. [*C2 is distributed*]

Mr Albuery: Madam, it's quite a long judgement, and I wasn't intending, unless you want to, to suggest that you read it all now, though that's obviously a matter for you when you retire.

Mr Levisaur: There are two crucial paragraphs, aren't there?

Mr Albuery: Yes.

Mr Levisaur: Can I suggest for these purposes, go straight to those paragraphs, and if necessary I can develop this deeply interesting case, but if you take us to those.

Mr Albuery: Thank you. That's what I was intending to do.

Mrs Kershaw: I was going to say, I have no intention of requesting time for the Committee to read the whole case, but it is an interesting and helpful judgement, and at times it's useful for the Committee at other times to look in the round.

Mr Albuery: Yes, of course. Madam, would it reduce the authorities as well, which is always very helpful?

Mrs Kershaw: Yes, and can we call it C2, while we're about it?

Mr Albuery: Yes, C2. Madam, although I'm going to take you to the paragraphs that I think are relevant – others will take you to the parts they think are relevant – I should just summarise, very briefly, what the issue was, which will explain the context of the judgement. It was an appeal by Dr Yeong concerning a decision by the General Medical Council to suspend him for a period of twelve months following findings relating to misconduct, which related to a sexual relationship he formed and maintained with one of his former patients. The Fitness to Practise Panel of the General Medical Council had received evidence relating to the unlikelihood of that behaviour being repeated in the future, because as they rather quaintly put it, unlike some doctors, he didn't suffer from a psychological disorder which caused him to have sexual relationships with his patients, rather that he just did on this occasion because of a whole number of other circumstances. One of the grounds of the appeal was whether the Committee had properly considered the issue of impairment, and the relevance of the fact of it having been remedied or it likely to be repeated.

The relevant parts, I think, are paragraphs 50 and 51 - certainly 51, there's an argument for saying 48 as well, but perhaps I can just deal with 50 and 51, and just read those parts out to you:

“First, in my judgement, the overarching function of the General Medical Council” –

I'll leave out the statutory references –

“informs the meaning of impairment of fitness to practise by reason of misconduct, so that”

– under various references –

“the GMC is entitled to have regard” –

you are entitled to have regard –

“to the public interest, in the form of maintaining public confidence in the medical profession generally and in the individual medical practitioner when determining whether particular misconduct on the part of that medical practitioner qualifies as misconduct which currently impairs the fitness to practise of the practitioner. Where a medical practitioner violates such a fundamental rule governing the doctor/patient relationship as the rule prohibiting a doctor from engaging in a sexual relationship with a patient, his fitness to practise may be impaired if the public is left with the impression that no steps have been taken by the GMC to bring forcibly to his attention the profound unacceptability of his behaviour and the importance of the rule he has violated. The public may then, as a result of his misconduct, and the absence of any regulatory action taken in respect of it, not have the confidence in engaging with him which is the necessary foundation of the doctor/patient relationship. The public’s confidence in engaging with him and with other medical practitioners may be undermined if there is a sense that such misconduct may be engaged in with impunity”.

And then, lastly, paragraph 51,

“Secondly, where a Fitness to Practise Panel considers that fitness to practise is impaired for such reasons, and that a firm declaration of professional standards so as to promote public confidence in that medical practitioner and the profession generally is required, the efforts made by the practitioner to address his problems and reduce the risk of recurrence of such misconduct in the future may be of far less significance than in other cases, such as those involving clinical errors or incompetence. In the former type of case, the fact that the medical practitioner in question has taken remedial action in relation to his own attitudes and behaviour will not meet the basis of justification on which the Fitness to Practise Panel considers that a finding of impairment of fitness to practise should be made. This view is also supported to some degree by the judgment of McCombe J in *Azzam* (distinguishing the case before him, which involved clinical errors in respect of which evidence of remedial steps and improvement was relevant, from a case involving ‘a rape or misconduct of that kind’” –

those words are in inverted commas, Mr Khan –

“in relation to which, by implication, such evidence might be less significant”.

Madam, just as in a doctor/patient relationship not exceeding proper professional boundaries is key to the maintenance of standards and what the public can properly expect of professionals, so must dishonesty be up there as equally important. It is mentioned in the Code, but even if it were not, those who are members of this profession must at all times act honestly, with

integrity, and not in a way which can bring or does bring the profession into disrepute.

Madam, of course I accept the age of the caution, but I do ask you to remember that Mr Chowdhury was nineteen when he committed the act which led to the, I hope, you'll find misconduct, which is admitted in relation to what went on at Selfridges, and he didn't disclose that just one year later, and that repeated – which he accepts, it's your judgement, but he accepts – dishonesty by him. This isn't just one act isolated, he repeats it on four occasions, and each time he does, he certainly believes that he was acting dishonestly, and not of the standard expected of a student optometrist.

So Madam, although I accept, of course, that you have to assess impairment now and look forward, that cases, particularly the case of *General Medical Council v Meadow* [2006] EWCA Civ 1390 makes clear, doesn't it, that in so doing you'll have to take account of that which has already occurred, and behaviours in the past. But having said all of that, I don't say that the points I believe Mr Singh is going to make - and he shared some of them with me - are not ones he can make. I just say, only this, that the significance of them and the weight you may feel able to attach to them is less in a case like this than it would be in a case of clinical concerns.

Madam, I fear that if I said more, I would repeat myself, and that's not going to help you, so unless you have any specific questions, those are my submissions on the facts, misconduct and impairment.

Mrs Kershaw: Thank you, Mr Albuery. I will just look to my colleagues and see if anyone has any questions – no? We have no questions.

Mr Levisaur: For the avoidance of doubt, you have read into the record the entire bundle C1.

Mr Albuery: Thank you, I have. That's very helpful.

Mr Levisaur: I don't want any disputes at a later stage.

Mr Albuery: Well, if I hadn't before, I think I have now.

Mr Levisaur: Definitely.

Mrs Kershaw: Mr Singh.

Mr Singh: Madam, yes. In terms of how to progress from now, we have to adopt the approach by stages, and Madam, you and your colleagues have decisions to make at this stage, first of all on facts, second on misconduct. Before you make your decision on impairment I would seek to call Mr Chowdhury to give evidence, and at the impairment stage to refer to character evidence which is in the bundle that you have – it's been put into the Council's bundle, I'm sure you've all had a chance to consider it. I'm in your hands, Madam, as to how we proceed. I understand what your likely decision will be on the facts and

misconduct, but we can't pre-empt anything. It may be that a decision on those two preliminary stages first should be reached, before we proceed to calling Mr Chowdhury and submissions on misconduct.

Mrs Kershaw: I think we take the view that we would be happier making decisions on those two. Although at times I know we have rolled several stages into one, this is perhaps a place where we could separate stages, however artificial it could appear to be. So therefore, anything you have to say would be in relation to the facts.

Mr Singh: In relation to the facts and to misconduct, Madam, I have very little to add. Can I just say this about the application forms and retention forms: it may not be necessary to go into too much detail about them, but if we go through – Madam, you and your colleagues will no doubt look at the wording of them. The only issue is the one that Mr Albuery has raised in respect of July 2007 and July 2008. Those are the ones which have the extra wording, and it's the issue that Mr Albuery raised: could it be read in a certain way? The point that he makes about, it presupposes that they have been declared at an earlier stage, you may feel is a persuasive one, and from the registrant's part, he accepts that he has, throughout this period, not declared those matters when he should have done, and it's quite obvious from the first form – and I say this as a matter of fairness, so that you're not misguided in your consideration of it – at page 6,

“Are you the subject of a criminal investigation or proceedings, or have you been the subject of a criminal conviction, caution or other criminal matter?”.

It's quite clear that both matters would fall to be disclosed under that first form. He was cautioned, he was, on one view, still the subject of criminal proceedings, because it was during the currency of the conditional discharge, so on one view the conditional discharge and conviction was discloseable on that basis, and he was the subject of a criminal conviction, so it really flows from there. We don't take the point, and we don't seek to waste the panel's time, that fine distinctions of language in various forms that the obligation of his was to disclose these matters, and they weren't. Unless I can assist you and your colleagues any further, I have nothing else to add.

Mrs Kershaw: Mr Khan.

Mr Khan: So you are saying that he understood the form correctly?

Mr Singh: Yes.

Mr Levisaur: There's a rather different question, if I can ask it, that might give a more focused view of it, and the question is this: do you accept for these purposes, that is to say, for the purposes of misconduct - not impairment, misconduct – that the Rehabilitation of Offenders Act did and does not apply to this registrant?

Mr Singh: In respect of disclosing the conditional discharge?

Mr Levisaur: In respect of disclosing the conditional discharge.

Mr Singh: I don't know if you have that Act in front of you, I think you probably –

Mr Levisaur: Funnily enough, I do.

Mr Singh: Can I have *Archbold*, very quickly?

Mr Levisaur: I'm extremely concerned: I asked a question, and I ask it at this stage, because I will have to give some clear direction to the tribunal, and I don't want to give clear direction to the tribunal if inadvertently there is a considerable difference between the Council's position and your own position. If forced to I will, clearly, give those directions, but it might be appropriate, Madam, if I hand over my copy of *Archbold*. If Mr Singh does not attempt to make his mind up in the space of 30 seconds while we glare at him, it might be of assistance if both the Council and you refreshed your memory about this, because it would be of considerable assistance to me if there is a parting of the ways, at this stage and on misconduct only, that I knew what it was. I don't want to put the Council in a difficult position, and I certainly don't want to put you in a difficult position.

Mr Singh: It may take longer than 30 seconds, but no longer than about five minutes, I would have thought.

Mr Levisaur: It undoubtedly will take longer than 30 seconds. There are two references, so that I can give them to you now: you need to begin, look in the index under the effect of conditional discharges. You are then referred in an entirely different section, to the Rehabilitation of Offenders Act, so you'll need to look at both of those. The supplement is equally unhelpful

Mrs Kershaw: Can I suggest that we take a ten-minute break, which will enable you to do the necessary reading and consideration, and will also allow everyone present to make use of the facilities, should they wish to.

Mr Albuery: Thank you, Madam.

[Hearing adjourned at 11.08]

[Hearing resumed at 12.24]

Mr Singh: Madam, can I explain where we are, and why it has taken us so long – I'm sorry for the delay. We were trying to confirm what was our belief in respect of the Rehabilitation of Offenders Act, but it's been confirmed now by reason of a statutory instrument – I won't go into the details of it, but - that was in force at all material times that this case relates to – that being 2005 through to the present. Optometrists as a profession were exempt from the provisions of the Rehabilitation of Offenders Act. That, I hope, answers the question that your learned Legal Adviser posed just before we broke off.

Dr Harris: Sorry, were exempt from all provisions –

Mr Singh: Of the Rehabilitation of Offenders Act, so in relation to spent convictions, that does not apply, and did not apply throughout the material times of this case to optometrists.

Mrs Kershaw: Mr Albuery, do you have anything to say on the matter?

Mr Albuery: I agree.

Mrs Kershaw: Thank you.

Mr Khan: I'm surprised it took this long, because it has come up several times, and we all knew that.

Mr Albuery: Can I explain, then, lest there be criticism implied in your comment, that getting to that point did not take time, getting the evidence to support it did, for various technical reasons, which, unless you want me to go into, I won't trouble you with.

Mr Khan: It's all right.

Mrs Kershaw: I think we will accept the fact that technical problems delayed –

Mr Albuery: And to be fair to the parties, it was not a point raised by us.

Mrs Kershaw: No, indeed. I'm going to turn to the Legal Adviser, to see if he has anything he wishes to add on this point at this –

Mr Levisseur: Nothing at this point and I know Mr Singh is now going to say something which flows from the other matters that the parties have been looking at, which itself flows from this discussion.

Mrs Kershaw: Mr Singh.

Mr Singh: Yes, thank you. Whilst we've been discussing this, we started to look at the wording in respect of the various application forms, and I know that you and your colleagues, Madam, have been looking at those as well, both before this hearing and during it. Madam, I don't know if you have the applications to hand, starting at page 4, and I'll read the relevant parts for Mr Khan's benefit as well. In the first application – we're looking at page 6 – the question is,

“Are you the subject of a criminal investigation or proceedings, or have you been the subject of a criminal conviction, caution or other criminal matter?”

Mrs Kershaw: That's a very broad wording.

Mr Singh: It is – that is the broadest form of wording. Now, Madam, you and your colleagues will probably be aware of the Powers of the Criminal Courts

(Sentencing) Act 2000, Section 14(1), which is the book that's in front of your learned Legal Adviser, but can I summarise it in this way? As Mr Albuery said, a conditional discharge is a conviction only for the proceedings from which it flowed. The effect of that, confirmed by case law - which we confirmed over the short adjournment - was that a person does not commit an offence of making a false representation if he answers 'no' when the question is simply, 'Have you been convicted of a criminal offence?', because as a result of that section, it is not classed as a conviction as such. If the wording goes further than that, then it is accepted by all parties that a conditional discharge would fall to be disclosed.

Now, that causes, potentially, some issue in respect of these forms. It is accepted by all that the first form, which relates to 2005 - which is page 6 - the wider wording, which, Madam, you've just referred to, clearly catches a conditional discharge, it refers to 'another criminal matter', and it was also in this case, Mr Chowdhury was subject to the discharge period of the conditional discharge at the time. It's agreed between all that the conditional discharge fell to be disclosed at the time of that form, based on that question.

There may be - and it's a matter, Madam, for you and your colleagues - an issue in respect of the second and third form, and you know Mr Albuery's position on this, and I'll make my position clear in a moment. If, Madam, you and your colleagues flick forward to page 9, the wording being,

"Have you ever been convicted of, or cautioned in relation to, a criminal offence, (or been the subject of an Agreed Order, Penalty Payment Agreement or Absolute Discharge Order in Scotland), or are you currently being investigated in relation to a criminal offence?"

What the effect of Section 14(1) in respect of that question is, Madam, will be a matter that, no doubt, you and your colleagues will consider - does that require the disclosure of a conditional discharge? Can I say that in respect of each form, it's also agreed that the caution fell to be disclosed in respect of each form, because it's clear in the wording that the caution falls to be disclosed.

Madam, if you and your colleagues look at page 13, again, I'll read it for Mr Khan's benefit. The question is,

"Have you been convicted of, or cautioned in relation to, a criminal offence"

The same in brackets again,

"or are you currently being investigated in relation to a criminal offence?"

The wording, again, very similar to the previous form. Again, what is the effect of the question simply asking whether a person has been convicted?

The fourth form – Madam, it's page 17, I know you're probably familiar with this wording, but it's the same question, but at the end it says,

“You must declare any conditional caution, and any condition which led to the imposition of a conditional discharge or absolute discharge. You do not need to declare road traffic offences that have been dealt with by way of a fixed penalty”.

Now, on the face of it, at least, that question seems to be seeking information relating to conditional discharges and absolute discharges, as part of the question in relation to criminal proceedings. One difficulty is – and I know your learned Legal Adviser will give you some advice on this – “You must declare any conditional caution and any condition which led to the imposition of a conditional or absolute discharge” – it doesn't really make a whole lot of sense, putting it kindly. What, no doubt, it meant to say, is what is on page 21:

“You must declare any conditional caution, and any conviction which led to the imposition of a conditional or absolute discharge.”

It's been corrected; however, that is not what it says on that form.

Now, the simple position is that, because this matter has been raised, Madam, you and your colleagues will obviously be looking at what was required to be disclosed. Our position on behalf of the registrant is that the caution was required to be disclosed on all of those forms. The conditional discharge was certainly required to be disclosed on the first form. It is a matter, Madam, as a matter of fact, for you and your colleagues, whether the wording of the second form, the third form and the fourth form required the conditional discharge to be disclosed.

Mrs Kershaw: Could I ask – and I don't know if you can answer this at this point – this is this most recent form we are looking at, which appears to have the typo, the 2009 form: has the 2010 form been produced yet?

Mr Levisaur: Sorry, can I get the dates right: I think, it's page 17 which has the word 'condition' in, that is the 2008 form. Page 17 has 'condition', 2008 declaration, and 2009, on page 21, has the word 'conviction' clearly in the place of the word 'condition'.

Mrs Kershaw: Thank you, that's clarified – I was one step out on my pages at that point.

Mr Singh: I hope that has set out the position as to what, Madam, you and your colleagues will have to decide, and the position of the registrant – on his behalf – this is a purely legal matter, a matter of construction of the wording, our position is simply that it must be decided on the basis of the form itself, and the wording that is in there. But, Madam, it is a matter for you and your colleagues.

Now, in the light of that, can I make an application, which I know Mr Albuery knows about, and your learned Legal Adviser: in respect of the allegation, you'll know that paragraph 3, subparagraphs ii, iii and iv relate to those three forms that I've said there is an issue in respect of what had to be disclosed. My application is to, what I suppose is a partial retraction of the admission, not in respect of the caution, but in respect of the conviction, as to whether it was a failure to declare. I hope that such a retraction won't count against Mr Chowdhury personally, it being a matter relating to the construction of the language, rather than reflecting on his own personal insight and willingness to make admissions, but that, Madam, is a matter that I can address you on. I don't ask for that retraction in respect of the first form, in respect of paragraph 3i, because it is accepted that there was a failure to declare in respect of both the caution and the conviction.

Mrs Kershaw: Thank you. Mr Albuery.

Mr Albuery: Madam, unusual though it is for admissions when counsel are representing registrants to be asked to be withdrawn, I don't oppose the application, because you will want to do justice to the fairness of the case, and to Mr Chowdhury, but I do have some submissions to make, if I may, before you receive your advice on a number of other matters.

Mrs Kershaw: That would be helpful.

Mr Albuery: Madam, we're dealing not now in relation to misconduct, we are still at the fact-finding stage, of course, and therefore it's right I remind you that the facts which are in dispute have to be proved by me, and that the standard of proof here is now on the balance of probabilities, so you're looking at whether it is more probable than not that there was a failure to declare information requested on each of those dates. To the extent that you will take any note of the admission which remains, it is admitted by Mr Chowdhury that certainly on each occasion he should have declared the caution - you can take proper account of that admission, and I hope you will take the view that there is no lack of clarity about that anyway, and no-one appears to be suggesting there is.

In relation to the conviction in 2004, that admission by Mr Chowdhury is now limited to i of particular 3, that is 20 October 2005, because of the particular wording of that question, and, for the same reasons as Mr Singh says Mr Chowdhury will admit that, I rely also on that wording as being so broad in its reference to 'criminal proceedings', and 'other criminal matter', such as to catch all, if I can put it in that rather colloquial way.

What Mr Singh then says – and I ask you to reject it – is that because of the more restricted wording of the application form in September 2006 and July 2007, he need then not disclose the conviction. I say on behalf of the Council, bearing in mind the reason why the question is asked, and the remit of the Council, that he has an ongoing duty to disclose matters which should have previously been disclosed and were not, and that he should not seek now to hide behind the inelegant use of words on a form. He did not disclose, he

accepts, when he should have done in October 2005, the conviction, or indeed, the caution, and it seems to me clear that there is an ongoing duty for him to do so, whatever the exact wording of the question.

In relation to July 2008, the last application, a slightly different point is made, I think, or may be, and it's this, isn't it: that because there is a typographical error on the form, and all accept it probably should have said 'conviction' leading to a conditional discharge, rather than a 'condition', which, I think, doesn't make sense, and there may have therefore been some doubt in his mind about it, it wasn't clear, you shouldn't find that there was a duty because of the lack of clarity.

Madam, I ask you to reject that, not only because at ten o'clock, Mr Chowdhury appeared not to be in any difficulty in understanding his obligation, but because he was also prepared to accept that that was dishonest, and he would not have admitted – and that's not being withdrawn – dishonesty, it seems to me, if there was any doubt in his mind as to what was expected of him. That point is not, actually, just a legal niche, creative clever point, it's actually a fact of what was in his mind at that time. Also, you're not here in some commercial contractual court, looking restrictively and carefully at the exact words used. I think you can, and I invite you to, adopt a more purposive interpretation of what was meant by the wording.

So, Madam, for all those reasons, though I don't object to the application to withdraw the admissions, I ask you still to find that there was a duty on each of the four occasions set out, and that the failure of Mr Chowdhury to comply with that duty results in a finding, in your judgement, of misconduct.

Mrs Kershaw: Thank you. Before I ask our Legal Adviser for any advice he may wish to give, I'm just going to check that none of my colleagues wish to ask any questions of either of you. [*No questions*]

Mr Singh: Madam, can I just respond very quickly on one point that Mr Albuery has raised, and it won't take long. The point that I think Mr Albuery made is that the points being raised on behalf of the registrant that the typographical error, for example, may have caused some confusion in his mind, that is to bring into consideration at this stage irrelevant considerations, in my submission, simply because all you and your colleagues will be considering is the wording of the question, and as a matter of fact, was there an obligation on the question to disclose it? No suggestion has been made whatsoever that Mr Chowdhury was or wasn't misled by anything in the form, and to suppose that that will or won't be said is to presuppose evidence that hasn't been given yet.

The reason the admissions have been withdrawn is because the point has been raised – and quite properly been raised – you and your colleagues will no doubt want to consider keenly what is in the forms, and if there are admissions in respect of that, that may make your decision-making task rather more difficult. The right thing to do, in Mr Chowdhury's interests, was for me to ask for those admissions to be withdrawn, and the issue of whether there is a failing or not, which flows from whether there was an obligation or not, in

respect of those three forms, can be considered without any other encumbrances. That's the reason why the –

Mr Khan: Can I ask a question: just for my own clarification, you're not withdrawing the admission of dishonesty, are you?

Mr Singh: No, absolutely not, sir.

Mr Khan: Thank you.

Mr Singh: The dishonesty applies, obviously, to the admitted actions in respect of that paragraph of the allegation, though. So, if the admissions in respect of the conviction for the 2006, 2007 and 2008 forms are indeed retracted as I am asking for, then obviously the admission of dishonesty would apply to everything else that is admitted – the non-declaration of the conviction and caution in the first form, the non-declaration of the caution in the second, third and fourth form, and if you decide that there was an obligation as a matter of fact to disclose the conditional discharge conviction in 2006, 2007 or 2008, dishonesty will be admitted in respect of those as well. The only question is, did he have an obligation or did he not? Does that clarify matters?

Mr Khan: Well, artificially, it does.

Mr Levisaur: To make sure that my mind is quite clear about this - the withdrawal of admissions relate to paragraph 3?

Mr Singh: Yes.

Mr Levisaur: As I understand you to be saying, it follows that in paragraph 4, which reads,

- “Your actions at paragraph 3 above were:
i Dishonest;
ii Not of the standard expected of a student optometrist.”

What you are submitting now is that since you have admitted part of paragraph 3, those admissions necessarily include the fact that they were dishonest and necessarily include 'not of the standard to be expected'; but insofar as you have not admitted or denied allegations in respect of the conviction under 3ii, iii and iv you do not admit so far as that is concerned - because you don't admit the primary facts - dishonesty and falling below a student optometrist, but that if the Committee find those facts to be proved in paragraph 3, then you would not seek to dissuade them from saying that your client fell below the standard to be expected of a student optometrist, and that necessarily, he would be dishonest.

Mr Singh: That's absolutely right. The simple point is, a finding of dishonesty can only attach to the finding of primary fact in paragraph 3.

Mr Levisaur: As Mr Khan said, it's a very nice point, but it's a real point.

Dr Harris: It may not be a real point, but I just want some clarification while we're all here together. In the preamble to i to iv in paragraph 3, 'You failed to declare that you had received a caution *and* a conviction', what import should I understand the 'and' to mean? We have acceptance from you that there was a requirement to disclose the caution and a failure to do so, that's accepted. In i, it's accepted that there was a requirement to disclose both the caution and the conviction, and that's accepted. It's only under ii, iii and iv that there is an issue to be resolved about the requirement to disclose the conviction. What do I have to read into the 'and'? Do both parts of it have to be satisfied?

Mr Albuery: Madam, should I start, since I have to prove this case: it's a good question, where that word is used. My answer – and I think there is authority on this, but I don't have it here, but you must take the law from your learned Legal Adviser – is that you're dealing here, of course, with facts, rather than a charge, and it's quite open to you to find some of the facts proven, but not others. That is why, in terms of charging now, you rarely see in terms of style 'and/or', because you have that discretion anyway.

Dr Harris: So I don't have to worry about it.

Mr Albuery: Well, I hope that you won't have to worry about it, but your Legal Adviser will assist you.

Dr Harris: If what you say is right, I won't have to worry if only one bit is found, it doesn't require the finding of both in the preamble.

Mr Albuery: That's my position.

Mr Levisaur: That is absolutely right, yes.

Dr Harris: Thank you.

Mrs Kershaw: Could I raise a point, that in our consideration of this matter, you would presumably be expecting us to take the view of the man on the Clapham omnibus faced with this sort of form, rather than a highbrow view?

Mr Levisaur: No, I will direct you in due course. If either of you gentlemen want to make submissions on that point, you must feel free to do so.

Mr Albuery: Could we reserve our positions until we have heard your advice?

Mr Levisaur: Yes, of course.

Mrs Kershaw: I should have waited till I'd heard your advice to raise the point.

Mr Levisaur: Whenever lawyers say that the matter is 'interesting', laymen should immediately run as far as they possibly can. However, the law is interesting, and it's particularly interesting in this case.

My advice on this matter is as follows. You, of course, are now required to make findings of fact. It is right for me to repeat what has already been told to you, namely that the burden of proving those facts lies on the Council, and it remains on the Council at all stages. You must be satisfied on the balance of probabilities, that is to say, something must be more likely than not before you can find it to be proven, and sometimes people say that is 50 per cent plus a scintilla.

You must, of course, be satisfied on the evidence: interesting though counsels' submissions are, they are not evidence. Evidence in this case is what is to be found in the document which we have called C1. It is all before you, and the counsel very carefully read it in, that is to say, the whole of that bundle is before you, and all of that evidence is in play. It is also right to remind you that, simply because allegations are admitted, that is not conclusive – the duty lies on you to find the facts.

I should say something about honesty and dishonesty, which I may need to return to, but honesty or dishonesty is or are commonly-used words and you understand what they mean perfectly well. The one thing the law has ceased to do is to tell people precisely what they mean: you bring your standards to bear, the standards informed by your own personal life, and informed, of course, by your professional life. What is honest and dishonest is pre-eminently a matter for the fact-finding tribunal.

I am now required to say something about these forms: when you are considering honesty and dishonesty, it is very important not to correct forms, so that they say what you would like them to say – you must look at the form as it was, not as you would like it to be, or, indeed, as it now may be. You must look at the declarations that were made on the days that they were made, and you are required to judge the words used on that date in relation to each of these separate allegations. It's a truism, but nevertheless, I repeat it, that of course, each of these facts and matters must be considered separately, you can't make your mind up about fact number 1 and just say, every other fact slots in – consider each of the relevant facts and matters, and make findings in respect of each of them.

You may think that in truth in this case, the outstanding area of dispute is in relation to the questions – and I emphasise that it is not a question, it is the questions – whether the failure to declare the conviction in September 2006, July 2007 and July 2008 was dishonest, and secondly, not of the standard required of a student optometrist, such as to amount to misconduct. I make it clear that there are a number of questions, all flowing from different forms, and you must be satisfied in respect of each that the behaviour was either dishonest, in order to find that allegation proved, or not of the standard required of a student optometrist, such as to amount to misconduct.

Impairment, I wish to make absolutely clear, is not a matter that you are to consider at this stage - evidence needs to be heard on that matter, and indeed submissions, very properly, have to be made. So restrict yourselves, please, and draw short before you get anywhere near impairment.

I offered both parties the chance to say anything on the question of a) the forms and b) dishonesty. Gentlemen, is there anything you want to add, clarify or ask me to add and clarify?

Mr Albuery: Sometimes Committees benefit from assistance as to how they should approach the issue of dishonesty following the *Twinsectra Ltd v Yardley & Ors* [2002] UKHL 12 ruling, and it's of course a matter for you entirely. I don't want to trespass into matters of your province, but I wouldn't want any of us to be criticised elsewhere if that wasn't done, and others felt that it should have been. I'm thinking of the mixture of the subjective and objective test. I hope you don't mind me raising that.

Mr Levisaur: No, I don't, not at all. I had some difficulties in this case in formulating – I'm going to say, *Ghosh* direction (*Ghosh v General Medical Council* [2001] 1WLR 1915), but a *Twinsectra* will do – because it seems to me, that this is not a 'Robin Hood' style of case – forgive me for using the shorthand – in other words, the honesty question here is a subjective question.

I suppose I could formally give this advice: if having read the relevant form in respect of the relevant declaration, you took the view that no reasonably objectively-minded person could conclude that the answer given was dishonest, you then do not go on to consider the question of the subjective honesty or dishonesty of this registrant. If, therefore, you reach the conclusion that the wording of the forms, the way the forms are expressed, is such that no objective reasonable person sitting on the Clapham omnibus could conclude that this was dishonest behaviour, then you don't go on to consider the subjective honesty or dishonesty of this particular gentleman.

Mr Albuery: Thank you.

Mr Levisaur: I'm very sorry that I had to give that direction, but I think you're quite right to raise it, and I'm grateful. Mr Singh, do you want to add anything, by way of clarification?

Mr Singh: No, thank you very much.

Mrs Kershaw: Would everyone, therefore, now withdraw while we consider. It seems to be almost one o'clock, bar a minute, which could seem time for all parties to feel able to have lunch. We will also take our lunch, and certainly would not be giving you a response before 2pm.

Mr Levisaur: Might I add one matter, and I think, perhaps in the circumstances, I ought to add, this is in truth by way of a direction or advice properly so-called, you must not speculate about matters that you have not heard of. You are to restrict yourself to consideration of the evidence before you. I give that advice because I am concerned that members don't trespass in any sense, inadvertently, into what one might describe as 'the impairment stage'.

Mrs Kershaw: Thank you for that extra advice. We will resume in the early afternoon.

Mr Henley: Shall we say everybody should be available from two o'clock?

Mrs Kershaw: Yes.

Mr Henley: Thank you.

[Hearing adjourned at 12.58]

[Hearing resumed at 16.11]

Mrs Kershaw: The determination on the further application:

The Committee considered an application by Mr Singh to retract some of his admissions. In the interests of justice, the Committee considered it right to allow these partial retractions. These were entirely based on the words used in the printed forms provided by the GOC. The Committee has therefore had to consider them with care.

The determination in relation to the findings of facts:

In respect of each of the allegations, the Committee has considered all of the evidence contained in the Council's bundles, and has accepted the legal advice provided. In respect of paragraphs 1, 2(i) and 2(ii), the Committee, having considered the records in the Council's bundle, find the facts proved.

In respect of paragraph 3i, the Committee finds these allegations to be proved. The words in the form are clear and unambiguous, and the registrant has admitted them. The Committee notes that the registrant appeared before the Horseferry Road Magistrates Court in respect of the conditional discharge some 18 months before he filled in the form.

In respect of paragraph 3ii, the Committee finds the facts alleged in relation to the caution proved. The facts relating to the conviction are not proved.

In relation to paragraph 3iii, the Committee finds the facts relating to the caution proved. The facts relating to the conviction are not proved.

So far as the paragraph 3iv is concerned, the Committee has read the words which appear on page 17 of the bundle:

'You must declare any conditional caution, and any condition which led to the imposition of a conditional or absolute discharge'.

The words 'condition which led to the imposition of a conditional discharge' are clearly inapt and inelegant. The word 'condition' was

almost certainly inserted in error for 'conviction'. The problem the Committee faces are the actual words used. The registrant faces an allegation that he should have declared a conviction, not the offence giving rise to the conviction. The Committee is not satisfied in these circumstances that this allegation is proved.

The Committee turns now to the allegations in paragraph 4i. The Committee finds it impossible to believe that the registrant had forgotten that he had been cautioned as a fourteen year-old, or that he was subject to the conditional discharge when he filled in his application on 20 October 2005. This registrant is an educated and intelligent man. The wording on page 6 of the bundle is clear. The decision to tick the 'no' box was a deliberate act. He himself admits that his action was dishonest. The Committee finds in these circumstances that his actions in 2005 were dishonest.

So far as the separate failure to disclose his caution in 2006, 2007 and 2008, the Committee finds that his actions were not honest. The registrant has admitted that his actions were dishonest; the Committee finds them to be so.

The Committee has no hesitation in finding that student optometrists are required to be honest and trustworthy. This registrant was dishonest. The Committee finds that the matters proved in respect of paragraph 3 were not of the standard expected of a student optometrist, and it therefore finds the allegation at paragraph 4ii, proved.

We have now reached a problem in our proceedings, in that, because of the necessary delays earlier in the day, it became apparent to us a little while ago that there was no way of finishing the case today. We have considered our availability, and that of the Legal Adviser, and that of the Hearings Manager, and have hit upon a problem: to be quorate, we can proceed on 26 March with a Committee of three. It may be, indeed, that we could continue on 26 March with a panel of five, but someone is on the last day of a long hearing at another body, and it's 'how long is a piece of string?', as to whether they would be available or not.

Were that not to be acceptable, the earliest date available would be somewhere between 4 and 8 October. You can understand that we have gone through, forwards, backwards, sideways, trying to work out a means of bringing this case to a close sooner than October, but the options I can put before you are purely 26 March with either a Committee of three or a Committee of five, which we won't know about till possibly even that week; or somewhere between 4 and 8 October. Mr Albuery.

Mr Albuery: Madam, I think it's in everyone's interests, particularly Mr Chowdhury, that the case be disposed of as soon as possible, because it limits, to some extent, his ability to earn his livelihood. For that reason, my submission, on behalf of the Council, is that we would be content for the 26 March – I wasn't

being rude, by looking at this, I was checking my own availability – so I am free on that day, and happy to come back, and think that that is preferable, even if it means a smaller quorum, than waiting till October.

Mrs Kershaw: Mr Singh.

Mr Singh: In terms of, probably one of the least important bits, my availability, I can do that date as well, 26 March. I will have to take instructions and just explain the matter to Mr Chowdhury, very briefly – not for more than five minutes or so – but it's an important decision to take, and it's obviously –

Mrs Kershaw: It is indeed, if he needs to understand what –

Mr Singh: His attitude is obviously, to get it resolved as quickly as possible, because of the restrictions, as Mr Albuery says, on his ability to work unsupervised.

Mrs Kershaw: If you would like to leave the room for a moment, with him, perhaps it's best if we all stay, it will save time.

Mr Albuery: I wouldn't normally stay in the absence of my learned friend, but if you're content for me to –

Mrs Kershaw: If he's content, as a matter of saving time.

Mr Albuery: Of course.

[Hearing adjourned at 16.18]

[Hearing resumed at 16.22]

Mr Singh: Madam, could we respectfully take up the offer of the earlier hearing, and thank the panel for trying to accommodate it as best it can be. Obviously – I do state the obvious – five is better than three, if the five are available, but if five are not available, we would be happy with a smaller panel quorum.

Mrs Kershaw: You'd rather have three in March than five in October. We fully understand the dilemmas on these dates. Obviously, Mr Henley will be in touch with you as soon as it's clear whether it's going to be one or the other, but as I've already said, it might be as late as that week that we know that it's going to be five and not three. I hope you'll bear with us on that. So, I'm sorry we were unable to finish today, and thank you for your understanding on that, and we will see you on 26 March.

Mr Albuery: Thank you.

Mr Singh: Thank you very much.

[Hearing adjourned at 16.23]