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

GENERAL OPTICAL COUNCIL

AND

LYNDON CLARKE (SD-3865)

Thursday, 18 March 2010

**Determination of Application
for an Interim Order**

**APPLICATION FOR AN INTERIM ORDER: LYNDON CLARKE (SD-3865)
Thursday, 18 March 2010**

Committee: Ms Fran Jones – Lay (Chair)
Ms Margaret Hallendorff - Lay
Ms Abi Grute – Dispensing Optician

Legal Adviser: Mr Mark Lucraft QC

Clinical Adviser: Dr Nick Seivewright

Hearings Manager: Mr David Henley BEM

For the GOC: Mr Chris Alder

The Registrant did not appear and was not legally represented.

[Hearing commenced at 09.09]

Ms Jones: Good morning, I am Fran Jones and I have been elected by the Committee to chair today's hearing of the Council's application for an Interim Order. The Committee today is made up of one dispensing optician and two lay members, and I shall ask the members of the Committee to introduce themselves and the capacity in which they sit, beginning on my left. *[introductions]* To my left is the Council's Adviser, Dr Nick Seivewright, who will provide clinical advice to the Committee on any matters of health which may arise in the course of the hearing. The Clinical Adviser may accompany the Committee should it sit in private to deliberate.

To my right is Mr Mark Lucraft QC, 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 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 the transcriber, Mr Nisbet, 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 in the public and press areas, are members of the respective legal teams.

Please note that, in accordance with the Council's protocols, the identity of the registrant will not be revealed until such a time that the Committee announces

its decision. Where the Committee decide that an order should be made, the registrant's details will be revealed. Alternatively, if the Committee decide that an order should not be made, then the registrant will remain anonymous. Throughout the hearing, the registrant will be referred to as the registrant. You should be aware that it is the Council's policy for the determination of the Committee and a transcript of proceedings to be displayed on the Council's website for public viewing. This may be waived in matters where health is raised, and we may come to that.

Are there any applications other than the interim order application?

Mr Alder: Madam, not at a substantive level. The first issue, I suspect, is an application on behalf of the Council to request this Committee to proceed in the absence of the registrant today. I understand that the Committee has available to it a document which is Service of Notice of Hearing.

Ms Jones: That is C1, Mr Henley.

Mr Alder: Madam, this deals with the contact which has been had with the Registrant in the lead-up to the interim order application today. First, I would go to page 2 of the bundle, and you can see there the address for the Registrant is *[address removed]* – I won't attempt the next word – Cardiff. Then if you want to look at page 1, you will see a screen print from the register, and on the right-hand side there you will see the registered address for the registrant. Madam, I make those points and then refer, first, to your ability to proceed in the absence of the registrant today. I suspect the first point is the service requirements that are imposed upon the Council. Rule 17 of the Fitness to Practise Rules 2005 at page 95 of the White Book:

“Where a matter has been referred to the Fitness to Practise Committee to consider the making of an interim order, the registrar shall serve on the registrant a notification that an application is to be made for an interim order”.

That has a number of requirements including the date of the interim order hearing, a statement of the facts constituting the basis of the application, the names of any witnesses, copies of any documentary evidence and the information set out at Rule 26(2)(a) to (c).

Madam, the document at page 2 is that notice of the review hearing. It clearly sets out in that document at the first paragraph the date, being today's date, time the hearing to commence at nine o'clock and the address for the venue being here at 41 Harley Street. The final sentence of that paragraph states:

“I understand that the Council has written to you and supplied you with documents that it will rely on at the hearing.”

All those documents have been supplied to the registrant and were supplied on 3 March 2010. Those documents included, as is required under Rule 17, a copy of the Statement of Facts, the documents which are available to this

Committee in terms of the bundle of documents, and notice that no witnesses were due to be called by the Council. I make those points, Madam, to recommend to you that the service requirements have been fully met by the Council.

The Committee, once service has been effected, does have a power to proceed in the absence of a registrant, and it would take you to Rule 21 again of the Fitness to Practise Rules on page 96 of the White Book, which states:

“Where the registrant is neither present nor represented at a hearing, the Fitness to Practise Committee may nevertheless proceed if –

- (a) they are satisfied that all reasonable efforts have been made to notify the registrant of the hearing; and
- (b) having regard to any reasons for absence which have been provided by the registrant, they are satisfied that it is in the public interest to proceed.”

The Council, perhaps to put the cart before the horse, Madam, before I refer to the documents, is very keenly of the view that it is in the public interest to proceed in this case. The Committee has read all the documents I am sure in terms of the bundle, and will understand the seriousness of the issues which are raised within that document, including the nature of the convictions and, indeed, the nature and background of the two convictions.

Madam, you will have had the opportunity to review the interim order application documentation, notice has been served. What is also of significance to this Committee is the file note at the back of the pack which is at page 7, in which the registrant telephoned David Henley, your Hearings Manager, on 4 March in which he confirmed receipt of the papers - he confirmed receipt of the notice. It goes on there to explain that he asked Mr Henley for advice regarding the procedure and how the allegations may progress to a final hearing. It says there, and this is of some significance, I suspect, to the Committee, that the registrant stated he was thinking of retiring from the optics course and retraining on the SMC Tech course but asking questions as to whether the GOC still retains regulatory authority over him during that period of time. In the penultimate paragraph, you will see reference to the registrant asking whether it was necessary for him to attend the hearing.

Following this note, there has been no further correspondence from the registrant, no further telephone calls and no further communication from him. Madam, I refer you to that note and equally to the document you will have seen at page 24 of the hearings bundle documentation. It is a letter from the registrant to the GOC dated 8 January 2010. I would just refer to the Committee to the final sentence of his one paragraph there:

“Also I have had to terminate the DO course due to my working hours in practice to 20 hours per week and possible redundancy, which is also affecting 1 other employee as well as myself.”

I bring that letter to your attention in connection with the file note prepared by Mr Henley as a way, hopefully, of providing some information to the Committee about potentially the registrant's thought process, and whether it is necessary to attend the hearing. Of course, much of that is speculation, we have had no communication but that limited information is there for the Committee.

In short, Madam, the registrant has knowledge of the hearing today at this time, at this venue. He has not communicated with the Council or the Committee any further other than the file note of 4 March. He has made no request to postpone, he has given no indication that he has a representative, there is nothing from him at all.

This Committee will also be aware that they have no power to summons or subpoena a registrant to attend a hearing either in this context, or at a substantive Fitness to Practise Committee hearing. That clearly gives the Committee something to deliberate about in terms of how likely, if it were to adjourn this hearing today, it is that this hearing will in the future secure the attendance of the registrant. It is his right to be able to waive his right to attend and lack of communication, I would suggest, can be used by this Committee as an indicator that he has taken the decision not to attend before you. Madam, I cannot put it any more than that.

I would also briefly remind the Committee that this is an interim order hearing, an interim order application, and I make that point because of the nature of this hearing. The Council, and indeed the referral through from the Investigation Committee, see this as a significant and serious case. They make an application that it is necessary on the three elements you have already read in the Statement of Facts, that an interim suspension order is required correctly and appropriately to address the conduct which is evidenced through the Statement of Facts in the documents that you have. Because of that necessity, there is a degree of urgency involved, I would suggest, and, therefore, that should be a factor for the Committee to consider in terms of whether it should proceed today in his absence. I would urge the Committee to do that today. Unless I may assist the Committee any further, those are my submissions on that point.

Ms Jones: Do you wish to add anything?

Mr Lucraft: Madam, perhaps I may simply say this. You have been taken to the two sections which are relevant here, the first of which is notification. The documentation in your bundle indicates clearly that the notification requirements of today's hearing have been complied with and perhaps the strongest indication of that is the file note you have been shown, where the registrant has spoken to Mr Henley. The test of which you have to be satisfied in rule 21 is whether it is in the public interest to proceed. The importance of that is that those words are preceded by "having regard to any reasons for absence which have been provided by the registrant". Clearly, no reasons have been provided and the important issue there is that, if reasons have been given, that may have been a reason for the Committee to decide to

postpone for the registrant to be here. However, as you have been quite rightly told, attendance is voluntary; there is nothing you can do to compel attendance. The power to postpone is there if there is good reason. Here no good reason has been shown, so the test is much easier to satisfy.

Ms Jones: May I just check whether the Committee have any questions?

Ms Hallendorff: I just have one question. He asks whether in giving up the DO course to do the SMC, would the GOC still hold regulatory power over him and DH would need to speak to the GOC to confirm. There is no note to confirm whether or not that was done.

Mr Alder: Madam, I wonder whether I could assist. In terms of the regulatory process, the Council retains the right and, I would say, the duty to continue its regulatory investigation.

Ms Hallendorff: Yes, I appreciate that but was the registrant told this? There is no indication: he asked the question but did he get the answer?

Mr Alder: There has been no further communication with the registrant and, therefore, the answer to that, Madam, is no, he has not been told of that specific power other than, of course, Mr Henley's note that, as is set out in the notice, the Committee has the ability to proceed in his absence notwithstanding.

Mr Henley: I told him that he would have to ring the Council to find out for himself because I could not provide the answer; it is merely the way I have written it.

Ms Hallendorff: I am sorry, I misinterpreted that, I thought that you were going to find out and go back to him.

Mr Henley: No, I left the onus on him to do it.

Ms Jones: Mr Henley, can you clear the room please?

Mr Alder: Madam, before you do that, completely respectfully to your learned Legal Adviser, I had anticipated reference being made to the case of *R v Jones* [2002] UKHL 5 in terms of the consideration for the Committee to bear in mind when considering proceeding in absence. I have touched upon a number of points in my submission but I wonder if I could assist the Committee by going through those guidelines just perhaps as a framework of the criteria for the Committee to consider, in order that the Committee may, as *Jones* tells us, exercise the utmost care and caution in this deliberation.

Mr Lucraft: The reason I did not take you to *Jones* is that, of course, this is an interim hearing. The Committee is not making any final adjudication on conduct. It is simply being asked at this stage to make an order on an interim stage and it seems to me that the prerequisites that *Jones* deals with are when the Committee is dealing with the facts where fitness to practise of itself is an issue as opposed to an interim order at this stage.

Mr Alder: Very well, sir, if that is the approach you propose to take.

Mr Lucraft: *Jones* was a case where the court proceeded in the absence to try a defendant who was not there and the question really was whether the court had satisfied itself of various safeguards that should have been gone through to ensure that the defendant was fully aware of the consequences of it. Therefore, the distinction between *Jones*, which was a trial where a conviction would have followed, and this situation here is that all this Committee is being asked to do at the moment is to make an interim order, not to make a final adjudication on whether in fact the registrant is fit to practise or not. It is simply whether, at this stage, in the public interest he should be the subject of an interim order. For those reasons, I did not feel it necessary to take you through all of the rubric of *Jones*, which is a House of Lords authority, which, as I said, really focuses on how a court should approach a situation where it is determining a trial in the absence of a defendant.

Mr Alder: I am very grateful, thank you.

Ms Jones: Mr Henley, could you please clear the room?

[Hearing adjourned at 09.26]

[Hearing resumed at 09.28]

Ms Jones: The Committee has considered the application to continue and has agreed that we shall continue with the interim order. Mr Alder, may I invite you to take us through the allegation?

Mr Alder: Madam, if I could start just before that point if I may. There are considerations to be taken into account, I would suggest, in terms of whether this hearing should be held in public or private. Any application or discussion around that should be itself heard in private, so I wonder whether this Committee would concede to an application that we go into private to consider that issue.

Ms Jones: We do.

THE HEARING COMMENCES IN PRIVATE

Decision

The Committee considered the test set out in Section 13L of the Opticians Act 1989 and whether it was satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interest of the registrant for his registration to be suspended. The Council did not seek a conditional registration and this Committee did not feel that it was either practical or appropriate in this case.

On the facts placed before this Committee, the Committee was satisfied that it would be appropriate to make an interim order of suspension. The Committee was satisfied that it was both necessary for the protection of members of the public and is otherwise in the public interest that such an order be made. The registrant had been convicted of driving with excess alcohol in March 2007. He was found in the early hours of the morning two and a half times over the legal limit. On the 9 March 2007, he was disqualified from driving for 24 months and also sentenced to a community order. He volunteered for and successfully completed a drink drive rehabilitation course and, as a result, his disqualification was reduced to 18 months.

In December 2009 it came to the Council's attention that the registrant had also received a fixed penalty notice for disorder in October 2005 and that he was then (December 2009) on bail in relation to an allegation of causing actual bodily harm. He was subsequently found guilty of this charge and was given a community order and a fine. The Committee has seen a summary of the facts relating to this case, which is one of domestic violence following alcohol consumption.

All of these circumstances lead to the Committee being satisfied that there are substantial concerns over the safety of him having contact with the public in carrying out his duties.

The Committee considered the other issue of public interest and confidence in the profession and found that these proven behaviours are not compatible with the standards expected by both the profession and the public.

The Council also advanced the argument that his registration be suspended in his own interests on possible medical grounds. The Committee was not satisfied on the basis, firstly, of what was said in a letter from the registrant's general practitioner and, secondly, on the basis of the advice received by the Committee's Clinical Adviser. It would appear on the evidence and advice given that this is a behaviour rather than a health issue. However, this matter may be the subject of further consideration in due course.

The Committee ordered that the registrant's registration be suspended for a period of 18 months from today. The order will be reviewed within 6 months from today unless all matters are resolved within that time, or earlier should new evidence be made available, or if the registrant, at any time after three months from today's date, requests an early review.

[Hearing concluded at 11.39]