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

GENERAL OPTICAL COUNCIL

AND

JEREMIAH MICHAEL FRANCIS KELLY (01-23549)

**SUBSTANTIVE HEARING
24 May 2010**

**SUBSTANTIVE HEARING: JEREMIAH MICHAEL FRANCIS KELLY (01-23549)
24 May 2010**

Committee: Ms M Jeyasingham (Lay) (Chair)
Mr A Baldwin (Lay)
Ms F Jones (Lay)
Mr M Lomas (Optometrist)
Ms J McCrudden (Optometrist)

Legal Adviser: Mr A Milne QC

Hearings Manager: Mr D Henley BEM

For the GOC: Mr J Hepworth
For the Registrant: Mr T Hogman

[Proceedings commenced at 9.38 am]

Ms Jeyasingham: Good morning. I am Mercy Jeyasingham, 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. I will ask the members to introduce themselves and the capacity in which they sit, starting from my left. *[Introductions made]* To my right is Mr Alex Milne 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 Mr Nisbet, the transcriber, who will be keeping an official record of all that is said during the sessions today 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 decisions. Where the Committee decides that an order should be made, then the registrant's details will be revealed. Alternatively, if the Committee decides 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 web site for public viewing. But where matters of

health have been discussed, the determination and transcript will be redacted accordingly.

Can I just enquire if there are any applications from either party?

Mr Hepworth: Madam, there is a legal issue. It does not necessarily need to be dealt with now but I think I should raise it now and it is in relation to the admissibility of some references. The registrant seeks to have them admitted at the impairment stage; the Council say that the majority are only relevant at sanction stage, if you reach that stage. So, Madam, that is an issue. I am happy to deal with the admissibility at the point where you consider it to be most relevant.

Ms Jeyasingham: Thank you, Mr Hepworth. Can I ask the registrant to stand? Sorry – Mr Hogman, were you about to say something on that?

Mr Hogman: Well, you can carry on with this part then I will make some submission in a moment.

Ms Jeyasingham: Thank you. Can I ask the Hearings Manager to read out the allegation, please?

Mr Henley:

The Council alleges that in relation to you, Jeremiah Michael Francis Kelly, a registered optometrist:

1. On 23 March 2009, you were cautioned for common assault contrary to the Criminal Justice Act 1988, Section 39;

And by virtue of the matter set out above, your fitness to practise is impaired by reason of your caution.

Ms Jeyasingham: Thank you, Mr Kelly, you can sit down. Can I ask if any of the facts set out in the allegation are admitted?

Mr Hogman: Madam, certainly the fact of the caution is admitted absolutely.

Ms Jeyasingham: Okay, thank you. At this point we move on to the next stage.

Mr Hogman: Madam, if I may, I did wonder whether it would be wiser to address the issue of the references now, before perhaps we get into the more substantial part of the hearing.

Ms Jeyasingham: So I guess we hear submissions really?

Mr Hepworth: Madam, can I say, I am prepared to deal with it now, if it is the point that you wish to deal with it. You will hear – and I think you will have read in the pre-reading that you have done – that the caution which formed the basis of the referral was for an offence of assault. Clearly, when you come to make

your decision on impairment, there will be three criteria against which you will judge matters. The first is public confidence in the profession; the next is the declaration and upholding of proper standards. In the Council's submission, those two criteria do not depend on anything the registrant may have done since, so reference evidence not relevant to that issue – either the misconduct, the behaviour was so serious as to satisfy those tests, or it was not, so that is a matter that you judge based on the conduct. Of course, Madam, the third criterion is protection of the public and the risk, if it exists – and of course, that will be a matter for you – but the risk, if it exists, to members of the public from the registrant must be of violence, because that is what the offence was based on. So, Madam, in the Council's submission, the only mitigation evidence which is relevant when you come to assess impairment is that mitigation evidence which goes to the registrant's propensity to commit violence.

Madam, within the bundle of references which the registrant would seek to admit at impairment stage, there is reference to whether or not the registrant poses an ongoing risk of violence. Clearly, those parts of the references are relevant. But there are also comments about his competence as an optometrist – of course, that is not relevant – and also more general comments about his character, again, in the Council's submission, not relevant at impairment. Given that we are on the morning of the hearing, I am not going to ask you to tell the registrant and his legal advisers to go away and 'black line' through the parts that are not relevant. You are an experienced panel and I would be perfectly content to allow you to read the documents but restrict yourself at impairment to taking into account those parts of the documents which are relevant to the narrow issue which is relevant at impairment: whether or not the registrant imposes an ongoing risk of violence.

So, Madam, that is the Council's position in a nutshell. I hope that I have been brief and clear but if I have not, Madam, of course I will do what I can to assist further.

Ms Jeyasingham: Thank you. Mr Hogman?

Mr Hogman: Madam, the Committee is asked to consider whether Mr Kelly is impaired, of course, and you are asked to consider that because of the caution. Now, that is an incident that happened completely outside of his professional life. It happened in a domestic situation. Therefore, the assumption is - which is not disputed - that a non-professional incident can impact on impairment, on his ability to do his job, in short. That being the case, I would submit that evidence of his confidence, his competence, his propriety, his behaviour, professionally and non-professionally, are important for the Committee in coming to these decisions. The references we have here – there are seven here then a further one from Mr Kelly's partner, the 'victim', so to speak of the common assault – and yes, they do speak about Mr Kelly's clinical ability, and they speak in very praiseworthy terms. But that does of course have an impact, I would say, on public confidence: whether he can actually do his professional work properly. But also, some of these

references do talk about how Mr Kelly behaves in respect of interacting with patients, how he interacts with colleagues in practice, how he interacts with colleagues in his research work, in his academic life and how he behaves socially. I would submit that all of these factors are indeed relevant, particularly if you are considering if there is a risk of Mr Kelly behaving in a violent manner in the future, I would say these testimonies are relevant. But of course, as you have just heard, should there be parts of these references that you think, 'Well, these aren't relevant right now', you will of course put them to one side.

Ms Jeyasingham: Mr Milne, can you advise the Committee?

Mr Milne: I am not sure that there is any longer a dispute between the two parties but that the documents should come before the panel and that essentially what is said, which will necessarily be a mixture of references, a mixture of different sources of material, can be dealt with simply by means of effectively submissions almost on a line-by-line basis once the panel has actually seen those documents. As I understand it, the GOC are not arguing that you should not see them in any event, so at this stage, a decision does not really need to be taken.

Mr Hepworth: Madam, it is the Council's submission – and I apologise if I have not put it clearly – that you ideally would not have seen those parts which are not relevant but, given that we are on the morning of the hearing, you should not take into account those parts which are not relevant. Madam, I think it is a point of principle, which can be decided without you having sight of the references but if you would rather look at them and then hear further submissions then I am content for that to happen as well. Of course, Madam, it is a matter for you.

Mr Milne: As I understand it, without having seen these documents, what is being submitted is that parts of it are wholly relevant, parts of it may be relevant for the purposes of the initial determination and parts may be relevant only for the purposes of the sanction determination, if we get to that stage?

Mr Hepworth: That is not the Council's position. The Council's position is that some of it may be relevant as impairment but all of it may well be relevant at sanction, if that stage is reached.

Mr Milne: I see. In that case, it seems to me that they should be placed before the panel and then submissions on a line-by-line basis made rather than a decision being made in principle and advance.

Mr Hepworth: Madam, if that is the decision of the Committee, then it is a matter for you and of course I will make those submissions in due course.

Ms Jeyasingham: Okay. I will just ask the Committee: do you have any questions on this point? Are we content then to have the reference but only take into account what might be relevant at impairment stage?

[No questions from the Committee]

For the evidence we have before us, the hearing bundle from the Council we will call C1. The list of seven references we will call R1 and the one reference from the registrant's partner we will call R2.

Mr Hepworth, can I invite you then to present evidence on impairment?

Mr Hepworth: Madam, I think I had better start by giving you some details about the facts. Clearly, the registrant has accepted the fact of the caution and, I understand, accepted he committed the offence which led to the caution. Madam, can I then perhaps direct you to the Council's hearing bundle, to C1? The facts are contained within that bundle. Page 1, then, is the letter from the Greater Manchester Police to the Council, indicating that the registrant was cautioned at Bootle Street Police Station on 23 March 2009 and you can see that the circumstances of the incident are described as follows: that, during a verbal argument with a 38 year old known female struck her, causing bruising to eyes, left and left shoulder. Madam, you can see at pages 2 and 3 the record of that caution. It is unsigned. I am told that, despite an extensive search by the police, they were unable to find the signed copy but the registrant, as you have heard, accepts that he was cautioned.

Page 4 is a summary from the police computer about what happened and, Madam, I think in fairness to the registrant, I point out in the message section that the AP, who I think is a reference to the Assaulted Person – so, the aggrieved - states that, the registrant has never been (and that must be a reference to domestic violence) has never been violent in the past. You can see the entry which is timed at 13.36: this is clearly an account taken from the aggrieved. It says:

“Although there has been arguments in the past this is the first time that he had been violent towards her. They have been together for six yrs, and this is the first time that the Police have been asked to get involved. Injuries consist of slight bruising to both eye area and cheek bones.

Madam, then from page 5 to page 12, you have the record of the interview which the registrant had with the police and, because the registrant was cautioned, the evidence upon which the Council relies is his own admission because, of course, someone can only be cautioned if they make admissions and if they agree to be cautioned and the basis of the caution must be their own admissions. That is the reason the Council relies on the registrant's admissions to prove its own case.

Madam, I will quote, if I may, some sections from the record of interview and I will be brief and just take out the nuggets, if I may? Page 7 of the bundle – continuation sheet 3 of the record – the police officer asks: “Michael so tell me what your involvement's been in this assault?” The registrant says, “I struck Louise on Friday the 13th” and he goes on to give an account of the evening and says:

“Late in the evening. Um, I’d been at work and I came home. Um, there were a couple of beers in the fridge. I had a couple of beers. I knew Louise would be in later, sort of half past nine, ten o’clock. About ten o’clock and in anticipation of her coming home I got the bottle of champagne out because it was my birthday the following day and we weren’t going to be spending the day together so we’d celebrate that evening. Um, I rang my cousin to enquire after my uncle who was ill, fiddle about on Facebook, just messing around.

Um, and then Louise came in about 10, half past, and we, um, talked about what we’d done in the day, told her about my uncle, what she’d been up to, er, we had a couple of glasses of champagne and then we started to talk about other things. Er, I’d said that I wasn’t happy about something changing about our relation - ”

And he then says:

“that deteriorated into an argument um about things not being changed being changed, it was very silly. Um, and then I lost my temper and slapped her across the face with the back of my hand um and knocked her glasses off. And then I lost my temper I think and um struck her several times with my hand. And er went to bed. And then left the house first thing in the morning. That’s pretty much what happened really”.

At page 8, the registrant said that he had three cans of Red Stripe lager whilst waiting for his partner to come home and, at the bottom of page 8 you can see that he did not know how much of the champagne had been drunk before the argument started.

At page 9, towards the bottom of that page, the registrant accepted that when he hit his partner she was sat on the sofa and that he was standing up. He said that he hit her “on the side of the face, on the right side of her body and the back and side of her head and probably on her right arm”, and that he struck her with an open fist, which must mean an open palm.

You can see at the top of page 10, that the registrant said that he hit his partner “six or eight times” and he said at that point that it all took place in the sitting room, although I think later in the interview he said that he hit her once in the hall.

You can see that, at page 10, there is reference made to some photographs. The aggrieved did not consent to the police sharing those photographs with the Council, so they are not available but hopefully, the description is sufficiently informative for your purposes.

There are two things that I need to bring to your attention, which are found on page 11. Towards the middle of page 11, there is reference to a book perhaps being used. I want to make it clear that it is no part of the Council’s

case that a book was used; the registrant did not admit that in his interview, it is no part of the Council's case. Likewise that there may have been an assault in the bedroom; that was suggested. Again, that is no part of the Council's case that the assault took place there. It took place mostly in the lounge with one blow, as the registrant admitted, in the hallway.

Madam, those are the facts. Nothing else to say as far as the facts are concerned. Clearly because the facts are admitted you will then go on to consider impairment, because of course the facts are the facts of the caution, so the second stage is automatically passed. As far as impairment is concerned, I have already outlined the criteria by which you will judge this matter. It is clearly a matter for you how seriously you take the conduct exhibited by the registrant and the effect of that on public confidence in the profession and the need to declare and uphold proper standards. Madam, I do not say anything further about that.

As far as any ongoing risk that the registrant may pose, whether you are assessing protection of the public, I will just point out four factors. It is clearly a matter for you. In this assault, there were repeated blows, causing physical harm to the aggrieved. It is violence within a domestic context and there had been prior consumption of alcohol. Madam, they appear to be the four strands to be taken from the offence. Other than to remind you that at impairment stage, of course, matters such as burdens and standards of proof are not relevant, you will exercise your professional judgment when making that decision. I have nothing else to add, other than to take you through the registrant's references to point out where, the Council say, there are relevant parts and where there are irrelevant parts. Madam, I can do that now, if you wish, or after you have heard from my learned friend on behalf of the registrant. I am in your hands.

Ms Jeyasingham: I am just thinking about the best way forward. If we hear from Mr Hogman, he will probably introduce references and then you can point out to us the relevant parts.

Mr Hogman: That seems a simple way to proceed. I will begin by calling Mr Kelly.

**JEREMIAH KELLY, called and sworn
Examined in chief by MR HOGMAN**

Q. Mr Kelly, would you give us your age?

A. I am 46 years of age.

Q. And very briefly, your academic qualifications to date.

A. In 1986, I graduated from Aston University in - I did a degree in Ophthalmic Optics; 1987, a Diploma in Optometry, leading to registration as an optometrist; 1994, BA in Mathematics from the Open University; 1999 MSc in Investigative Ophthalmology and Vision Science from the University of Manchester and I am presently studying a PhD in Neuroscience at Manchester University with Dr Murray.

- Q.** Thank you. Whereabouts are you in practice?
A. I work as a locum two days a week in Salford.
- Q.** And how long have you been working there?
A. Two and a half years, I think.
- Q.** Could you describe the type of patients that you encounter?
A. It is a wide mix, as is normal. The part I find interesting is the great many immigrants and recent arrivals in the country, so they have very interesting stories to tell about the reasons for them being here or what they like here. One of the things that is quite touching is that the people are very grateful, which I find affects me greatly really. It is a nice practice; the directors are very friendly and approachable; the staff are very competent. The only complaint I have really is that the public transport to it could be a little bit better.
- Q.** How do you find being with members of the public on a daily – well, on your two-day basis?
A. I find it very enjoyable on the days I am working with the public. As I have said, I enjoy listening to their stories and finding out what are their reasons for being in Salford, really. Salford, like many parts of large cities, is a first landing place. It fascinates me. My parents came to this country in the fifties and they have told me their stories of their arrival here and I find it very interesting and enjoyable to hear of people's new experiences when they come to this country.
- Q.** And how about your colleagues at the practice? How do you get along with them?
A. I would say I get on quite well, very well. We have a friendly, open relationship. I feel confident that I can approach the people I am working with whenever I need to talk about anything, and when identifying a concern regarding a patient that I will be supported in my discussions with somebody about this. I have an example: recently I saw somebody with what I thought was dry AMD and wanted to check what my colleague thought this was and we both examined the patient and discussed it and decided what to do after that. But I did not have any hesitation in asking my colleague.
- Q.** And do colleagues come to you as well? Is it a two-way process, would you say?
A. Yes. It is a two-way process, yes.
- Q.** You have touched on this briefly, I think – but if you could just describe for us what your work as a practising optometrist and in your research, what that means to you?
A. My working practice is something that I do. It seems to define part of me really, being an optician. It is something I am very proud of. As I say, I enjoy the stories of these people that come to England and I am fascinated by the joy they have, really, for being here. I just really like it; I don't know how to put it more eloquently really. And in my research, I enjoy that also because it is

more reflective, there is time to stop and think, explore maybe unusual things at greater length and in my work with Philip Morgan, for example, I get an opportunity to explore datasets that I would not come across otherwise and apply mathematical skills that I have not really had an opportunity to use in practice. So I feel at university I am always learning and always finding out great things and it is very exciting for me. I feel almost like I am a child again, learning what it's like to find out things.

Q. Thank you, Mr Kelly. Now, we will turn to the incident that led you to being cautioned. You are, of course, aware of the contents of the interview transcript, when officers interviewed you about this, aren't you?

A. Yes.

Q. You know what is in them. And you know it is right, don't you – I will lead slightly on this – you agree the content of that interview transcript?

A. Yes.

Q. Is this behaviour, this sort of behaviour, something that you have ever done before this incident?

A. Never.

Q. And have you acted in this manner since this incident?

A. No.

Q. Not just in respect of your partner but –

A. No, not with anybody. I am just very, very embarrassed and ashamed to be here. I realise I have to give an account of what happened but if you had asked me, before the event, would I ever see this kind of thing happening, I would have said, 'Never'. Since this happened, it has been a great source of distress to me really, as it has to other people. But for my own self, I have felt very ashamed about it.

Q. Why do you believe that on this particular evening in question you acted the way that you did?

A. I have thought about this a great deal and I have not really come to a very clear answer, I am afraid. I know that at the time my relationship with Louise was not as I wanted to it be. I had not very long before lost a very dear friend and so was probably a little depressed and I was, looking back, drinking heavily. I think there was just a combination of factors, a feeling of being trapped, a feeling of being left and alone without my friend and none of these things are mitigation, I don't think, but they are all I can think were what happened that night.

Q. And looking back now – you have already touched on this but – how do you feel about your behaviour that evening?

A. As I said, I am very embarrassed about my behaviour. It was very difficult for me to ask for the references that you have in front of you because I really could not think of any way in which I would appear in anything other than a very negative light when asking for these references. It is not very easy asking for something knowing that the person you are asking will have a lower

opinion of you than they did before. I also have a very low opinion of myself in regard to this behaviour. I think this behaviour in somebody else I would find very easy to condone.

Q. Mr Kelly, what steps have you taken, personally, to ensure that such behaviour is never repeated?

A. I have talked with Louise a great deal. We separated for a while, following the event, and then we have resumed contact, I suppose, and talked at great length about how we felt about each other and about other situations. And talking about those, our relationship is stronger, I think. My drinking has changed completely. I don't drink at home any more, following this event. I only drink when I go out with friends. I have spoken to people about my behaviour and my anger and my sense of loss regarding my friend. When I feel stressed or anxious, which I am slightly prone to, I get the advice and help of my GP.

Q. Are you confident that these steps are sufficient?

A. I think so. I believe so. I know that I have far more opportunities than I thought I had this time last year. At the time I felt very trapped and there were very few things that I could do to make things better, whereas now I am convinced that there are a great many things I can do to make things better if I feel that way again.

Q. If a similar set of circumstances were to arise at some time in the future – unusual periods of stress, for example – how do you think you would handle that?

A. I found this process very stressful and daunting and I went to see my GP to help me manage my anxiety and he prescribed some beta blockers for me to take as necessary. So I think that illustrates how stressful situations are being managed now, rather than how they might be managed. Not drinking at home, obviously, has made for clearer thinking on my part and knowing that I can go to people and talk to them about things, other than Louise, is also different to last time.

Q. Just briefly, how would you describe your relationship with Louise, your partner, today?

A. It is as good as it has ever been – or, it is better than it has ever been, I should say, I suppose. But it is as good as it has ever been. It is a normal relationship. We have very good days. We have not such good days. This is life and we seem happy together. I am certainly happy. Louise seems happy. Just the minor stresses and strains of life trickle on as they do.

Q. Professionally speaking, what are your hopes, your plans, for the future?

A. Ideally I would like to continue my research and finish my PhD. I am excited by looking at the performance of the ageing rod photo receptor and feel that it is important work, not just interesting. Then I would just like to see what happens really when I finish that in two years' time.

Q. Mr Kelly, thank you. I have no further questions but you will have to wait there a little longer; there will be some more questions.

Mr Hepworth: No questions from me, thank you.

Questioned by the Committee

Ms Jones: Yes, I have a question. Twice you have said you were feeling very trapped when this behaviour happened: what does that mean?

A. I did not feel that I had many options in the sense that I did not have people I could go and talk to, or that the situation I was in I could not leave. So I felt that I was trapped in the situation of a poor relationship that was not improving and I believe now – I look back now – and it is silly but at the time, I did not really believe I could just walk out the door.

Q. Thank you.

Ms Jeyasingham: I have got a couple of questions. When did you start your PhD, Mr Kelly?

A. I started the research project, which was an MPhil three years ago. But the funding ran out for that after two years; it was part time. So I started my PhD full time, with funding, from 1 January this year.

Q. Right. And you say in the past you have never had violent behaviour before. Is that correct?

A. Yes, it is.

Q. Even when you have been drinking?

A. Yes.

Q. Okay. If there are no further questions, you can step down, thank you.

[The witness stood down]

Mr Hogman: Madam, there are no further witnesses on behalf of Mr Kelly so I would be making some submissions to you but perhaps now may be an opportune time to have a look at these references, because I would wish to refer to them in my closing submissions. Perhaps it may be best to start with R2, the reference from Mr Kelly's partner. I would certainly submit that this is relevant in its entirety. Clearly she was the victim of the actions that resulted in the caution and it is perhaps fair to say that she knows Mr Kelly particularly well, of course, given the nature of their relationship together and I think what she has to say about the one-off nature of the incident itself and his general manner can only be seen as relevant to this matter. I don't know if the best way forward is for you to read the reference and then we can perhaps go on from there?

Ms Jeyasingham: Yes. I am just thinking about the transcript, if we need to? That would be fine then. So you are inviting us to read the reference and then - ?

Mr Hogman: I am not sure if Mr Hepworth has anything to say on that?

Mr Hepworth: Madam, the Council accepts that R2 is relevant at impairment in its entirety. The only issue that I raise which no doubt can be dealt with but because it is on the papers I ought to raise is the name of the person that signs R2 appears to be different from the person identified as the AP at page 4 of the hearing bundle.

Mr Hogman: Mr Kelly informs me that 'T' is LT's maiden name. The name which you see at page 4 – B – is her married name, which she no longer uses.

Ms Jeyasingham: I just wonder if we should make no reference to her. Is that correct, Mr Milne? Or is it fine to have her name in the record?

Mr Milne: It may be, given the nature of this, that the record simply refers to her by initials, if both parties are content with that, to avoid any embarrassment to the lady, since this will be published in every other regard. So if the transcript could simply –

Ms Jeyasingham: Which initials?

Mr Hogman: I think 'LT' would be the appropriate one, as the surname now used.

Ms Jeyasingham: Okay, thank you.

Mr Hogman: If we can turn to R1?

Ms Jeyasingham: I just want to make sure that we have had a chance to read R2. Just give us a few moments.

Mr Hogman: Of course.

[Pause while documents read]

Ms Jeyasingham: Okay, we can continue.

Mr Hogman: Madam, thinking about the practicalities of this. We can certainly deal – or I can deal – with each reference as it comes up and of course, my submissions will be broadly the same in each respect. But as Mr Hepworth has outlined, the main concern of the Council, if I can put it like that, is that Mr Kelly will be violent in some manner towards patients, perhaps to a work colleague or even I think perhaps just to act violently in another setting which may of course again result in a caution which of course would bring us back here. So it is my submission that, for example, the one we have – the first one here from Mr Doyle, who is an academic colleague and socialises with Mr Kelly – I would say it is relevant in its entirety because he can speak about how Mr Kelly behaves himself in these social settings and of course as an academic colleague, in those settings as well.

Ms Jeyasingham: I think you are inviting us just to read it as well?

Mr Hogman: Madam, I am, unless there is a suggestion perhaps of a more efficient way of doing it? Certainly for my part I cannot think of another route we can follow at present.

Mr Hepworth: Madam, I am content for us to deal with it on a reference by reference basis, so can I say that in relation to Mr Doyle's statement, I don't object to you reading and taking into account the whole of that as far as this decision is concerned.

[Pause while document read]

Ms Jeyasingham: Okay, I think we have all had a chance to read that.

Mr Hogman: Thank you, Madam. Turning to the next reference, which is from Mr Swift, Mr Swift knows Mr Kelly as a friend and also as a former patient. Therefore I would submit of course that what he has to say is particularly on points with regard to how patients are treated and also, of course, how Mr Kelly behaves in a social setting.

Ms Jeyasingham: Right. Mr Hepworth, anything particular that you want to - ?

Mr Hepworth: Madam, the fourth paragraph relates to the registrant's competence as an optometrist. There is an issue about whether or not this witness can give evidence in any event but it is not relevant, in my submission, to the issues that you have to decide today. But perhaps being generous, I am content for the rest of the letter to go in because that at least deals with Mr Kelly's character and I don't want to get in a position where I am asking you take into account half a sentence or half a paragraph, but, Madam, that fourth paragraph is one that I object to.

Ms Jeyasingham: Thank you.

Mr Hogman: Madam, I will just say this about the fourth paragraph: I quite agree, of course, Mr Swift is not in a position perhaps to judge Mr Kelly's professional ability as a colleague would but certainly, if we can take his view from a patient's point of view, then it must be relevant.

Mr Hepworth: Madam, I think there we come down to the nub of it: how is Mr Kelly's competence as an optometrist relevant to the issue that you have to decide today? No-one has asserted on behalf of the Council that Mr Kelly is anything other than competent as an optometrist. That is not the reason why he is before you today. Madam, that is the principle behind the submissions that I am making in relation to the relevance of these passages of the references.

Mr Milne: Can I assist? I do not know if it will help. Having had an opportunity to read very quickly through these, it is clear that they do contain a variety of character evidence which strays, in some cases as Counsel rightly points out, into comments upon the professional skill. As far as the character evidence is concerned, it would be my advice that it is admissible at this stage, in the

same way that, for example, if someone stood trial before magistrates or the Crown court, somebody of good character can place character evidence before a jury and it can influence them in deciding whether or not to find guilty or not guilty. The weight that is attached is entirely a matter for the panel. As far as professional skill is concerned, as Counsel rightly points out, it does go rather beyond that. That does not in my advice render it inadmissible but it may simply be of such limited weight, of such limited relevance, that the panel may not feel that they would wish to attach anything very much to it. If Counsel wishes to argue further than that, that it should be, as it were, struck from this -?

Mr Hepworth: Madam, what I do not want to do is take up a large point of the hearing with what is, essentially, a narrow point. In my submission, that paragraph – taking that as an example – is inadmissible at this stage but I am content, because I think we get to the same endpoint, if you find it of very little weight when you are judging impairment. Madam, I do not necessarily need to get into a long argument about whether it is legally inadmissible or just carries very little weight. In my view, practically, they end at the same place.

Mr Hogman: Madam, if I may just respond? I do think it is – or that we do know if it is – inadmissible or not. Certainly, I think as we all appear to be in agreement that Mr Kelly is professionally competent, then it does not seem to be a major point as such; we are not going to be arguing on his clinical abilities. So there is no mischief in it being in there and admissible, although you may be considering, when taking public confidence into your deliberations, whether, of course, the fact that he is clinically competent is surely a factor that you will want to have in your mind, although there appears to be no dispute that he is competent.

Mr Hepworth: Madam, I have made my point. His competence is just simply not an issue before you.

Ms Jeyasingham: Thank you, Mr Hepworth. [*Pause*] I take it we can move on to the next reference?

Mr Hogman: Madam, thank you. The next one you will find is from Mr Morgan, who is an academic colleague and again, I think it merely sets out how he knows Mr Kelly and then goes on to speak about how he has interacted with him in a social setting and indeed in an academic setting. In that sense, again, these parts are relevant if we are concerned about his general behaviour.

Mr Hepworth: Madam, in the Council's submission at most the only paragraph which is relevant is paragraph 3, which deals in general terms about, if you like, the personal relationship that the author has had with the registrant and refers to him socialising with the registrant. It does not speak specifically about whether or not he poses any risk of violence. But, Madam, I am prepared to accept that that could be relevant but the rest, surely, is not because it does not go to the issue itself.

Ms Jeyasingham: Okay, thank you, Mr Hepworth.

Mr Hogman: Well again, Madam, I say it is just a matter of context. It explains how Mr Morgan knows Mr Kelly which, otherwise, we would just have a series of references which would seem rather odd if they just stated, 'I meet him socially and he behaves very well'. I submit that they would be rather odd references and these introductory parts just set the scene. So they are relevant in that sense but of course we agree we are not talking about his professional abilities.

Ms Jeyasingham: I think you can take us to the next one then.

Mr Hogman: Thank you. Again, an academic colleague, Dr Murray. Clearly, paragraph 3 talks about the social setting but I take you to paragraph 2, which is also particularly relevant. It does talk about Mr Kelly being "an excellent ambassador" for the university.

Mr Hepworth: Madam for the same reason as before, the character submission: it is only paragraph 3 that is potentially relevant, although I accept, of course, that paragraph 4 is something which you will want to take into account because it sets the context in which this reference has been given.

Ms Jeyasingham: Thank you. I think we can move on to the next one.

Mr Hogman: Madam, the next one is John Horsfall, who works in practice with Mr Kelly now. I see that of course it does mention parts about, he has no misgivings about Mr Kelly's clinical competence, which is about half a sentence but you will see in there the sentences about Mr Kelly's enthusiasm and his personal contact towards patients and how he works with colleagues. I say they are relevant. I think there is no need to redact the parts talking of his clinical ability, they just do not need overly to concern you at this stage.

Mr Hepworth: Madam, I agree with the dividing line, certainly, and on that basis, the first two paragraphs are relevant. The third paragraph is relevant up until the end of the sentence which ends, "personal conduct towards his Patients". Then the next relevant part is the fifth paragraph.

Ms Jeyasingham: Okay, thank you. Mr Hogman, if you would take us to the next one?

Mr Hogman: Madam, yes. Again, from Catherine Black, again a work colleague. Certainly, this does again mention clinical competence which, as has been agreed, is not something you are concerned about today. But certainly, the line considering Mr Kelly's enthusiasm and his enthusiasm towards patients, I would say, is relevant for this matter. And of course, there is the paragraph below that saying that this matter comes as a shock and Mr Kelly's patients in clinical situations, again I would submit is relevant.

Mr Hepworth: Madam, in the Council's submission, the fourth paragraph is not relevant but I accept the rest is. And by the fourth paragraph, I mean those five lines that are together.

Ms Jeyasingham: Okay. Mr Hogman, the final reference, please.

Mr Hogman: And finally, Alannah Ward, again a colleague. I would say that perhaps where there is one mention of getting a valued opinion from him, which obviously strays into competence, is it all relevant. But I would also submit that the fact that he is considered someone you can approach and take professional opinion from is indicative that he is not someone people are wary of or uncomfortable being in the company of but a trusted and valued colleague, which again stems back to whether he poses a risk of violence in the future.

Mr Hepworth: Madam, the only part that I maintain is not relevant is the sentence which is, "He is very knowledgeable in the field of Optometry" – that sentence, for the reason that we have outlined previously.

Ms Jeyasingham: Thank you.

Mr Hogman: Madam, thank you. The Committee is today to consider whether Mr Kelly's past conduct – ie the caution – is so significant and so serious that it impairs Mr Kelly's current fitness to practise. Now, it is only upon this caution that the Council base their case against him and of course, it is only on that basis that you may find impairment. I hope that is agreed?

Mr Hepworth: Yes, it is.

Mr Hogman: You will, Madam, and your colleagues, no doubt consider the nature of Mr Kelly's conduct that prompted the caution, why this happened, his behaviour since and, in short, will it be repeated?

Madam, in my submission, the matter that has brought about this hearing today is a single isolated incident, a moment of madness, if you will. Mr Kelly has never acted remotely like this before; he has done nothing since remotely like this and he is confident that he will never act like this in the future, as indeed, his partner is confident he will never act like this again in the future. He admitted his wrongdoing to police officers in interview, without qualification or evasiveness. He of course reported this matter to the Council himself and he has never tried to minimise or hide his culpability. It is very clear, Madam, from what you heard from Mr Kelly today and from what is said in the transcripts of the police interview, the deep shame and remorse felt by Mr Kelly over his actions. I would submit, it is this very shame and remorse that will help Mr Kelly not to act like that again in the future. He is clearly horrified at his own behaviour and he has sat down and analysed why he behaved like this to prevent it happening again. You have heard it was a uniquely stressful time in his personal life. He did not understand how to cope with those stresses and, on that evening, alcohol was a factor. I don't think that can be disputed. That combination prompted this completely out of character behaviour.

Having established the root of the problem, Mr Kelly set about ensuring that such an incident could not happen again. He has gone on something of a journey or self-analysis, if you will. He understood why he behaved as he did, how he felt at the time and why he felt like that and considered alcohol to be a factor, has reduced his consumption significantly and certainly, as you have heard, would not take alcohol to deal with matters of stress or anxiety should they arise. But, Madam, I do make it clear, there is no suggestion that Mr Kelly suffers from any form of alcohol dependency or alcohol abuse problems. In my submission, he acts with an abundance of caution and that is simply to ensure that he maintains the high standards he sets for himself, his professional demands and of course, out of love and respect for his partner, to ensure that such behaviour never occurs again.

I will say something about the offending itself, in this way. The CPS and the police, of course, take domestic violence matters very seriously indeed and, in my submission, it is rare for such matters to be disposed of with a caution. Mr Kelly did make full admissions at interview, he admitted his guilt, but the decision was made not to prosecute. Madam, I submit that is because, in accordance with the CPS guidance on domestic violence, they were satisfied that such an incident had not occurred before and I further submit they were further satisfied that such an incident would not happen again. Now, of course, I do not have anyone here from the CPS to call and to question on their decision-making process. Those are simply my submissions on the matter. I do have a copy of the CPS guidance on domestic violence here. It is a very old document; I do not propose to adduce it in evidence. It would simply take up valuable time on what is a small point. I certainly do not say this to trivialise the incident. Mr Kelly is, rightly, ashamed and horrified by his actions, despite the forgiveness of his partner, but I do seek to put the matter of course in some perspective.

Madam, at the risk of repeating myself, I would say that it is Mr Kelly's partner who perhaps knows him best of anyone and she is confident, apparent from the reference before you, that that has been a one off incident that will never be repeated.

You have seen those references from Mr Kelly's partner, a friend, professional colleagues and academic colleagues. They all know Mr Kelly. They have worked with him or interacted with him in different ways in professional and in social settings and it is clear that they do not believe that Mr Kelly poses a risk to anyone. Clearly not a clinical risk, that is all agreed, and not a risk of violence, either actual or threatened. Madam, of course, in making your deliberations today, you and your colleagues must consider whether the man before you today is impaired. You are not considering Mr Kelly as at 13 March 2009. Clinical competence I will say no more about, you have seen the esteem that his colleagues hold him in. Are patients or colleagues at risk from Mr Kelly? I would say that the answer is a resounding no, Madam. There is no suggestion that any colleague in practice or in academia has ever been under threat. Indeed, he is thought of as someone you can go to and ask for help. As for patients: well, I have pointed out Alannah Ward's reference talks of his excellent rapport with patients. Mr Horsforth's reference talks of Mr

Kelly's patience towards his patients with challenging personalities and communication difficulties.

In respect of damage done to the standards of the profession and indeed the possibility of erosion of public confidence, I would certainly say this: Mr Kelly does not have a conviction, he has a caution. There is a very real difference between those two and the distinction is an important one. Secondly, this is not an instance of an act of dishonesty, not an instance where someone has been perhaps stealing money from a practice or anything along those lines and certainly, it is not an incidence of any sort of wrongdoing in respect of a patient. Mr Kelly's clinical excellence is not in question. The fact that, I would submit, Mr Kelly self-reported this matter, there has been a thorough inquiry by the Investigations Committee and now, of course, a full substantive hearing today in itself is testimony to the seriousness with which the profession takes this matter, the rigour with which it has been handled, and the public can take confidence in that process.

I therefore of course invite the Committee to find that Mr Kelly is not impaired. He has made one, isolated mistake, a mistake that has made him full of remorse, wretchedly ashamed of himself and he feels that pain today. It has caused Mr Kelly to have a long, hard look at himself - perhaps in a way that few would find pleasant. As well as his personal inquiry, he has had the anxiety of the investigation and, of course, this hearing today and he does have a police caution to his name. I would submit, let all of that be punishment enough in itself for this one-off incident on 13 March. The man before you today is not impaired. The Committee can be assured, from what they have heard from Mr Kelly that he is keen to uphold the high standards of his profession and will continue to do so. Thank you.

Ms Jeyasingham: Thank you, Mr Hogman. I have just realised that Mr Hepworth, you have not made your submissions, had you?

Mr Hepworth: Madam, I have on impairment.

Ms Jeyasingham: Thank you, okay. Just double checking that I got the order right.

Ms Jones: Excuse me, Chair, may I ask something for clarification?

Ms Jeyasingham: Yes, of course.

Ms Jones: Mr Hogman, you said that it was Mr Kelly himself who disclosed this matter?

Mr Hogman: Yes.

Ms Jones: On page 1 of C1, the document there talks about the "Notifiable Occupation Scheme". I understood that the police had informed the GOC. Is that correct?

Mr Hogman: I see that there as well but certainly, without knowledge of this letter, Mr Kelly wrote to the Council.

Ms Jones: Right. Okay.

Mr Hogman: Whether this was notified independently, I really cannot say.

Mr Hepworth: Madam, can I help on that? You will see that the date of the letter from the police is 7 April 2009, received at the Council on 9 April. I have here a copy of a call log on 29 April 2009, in which the registrant called to say that he had received a caution from the police. He said that he had not been in touch because he was waiting to get confirmation from the Council of his address change in March and he said he was going to send the details of his caution in writing. So, Madam, I think, my learned friend puts it correctly when he says that although the Council had been notified, Mr Kelly also notified the Council, it appears without knowing that the police had already done so.

Ms Jeyasingham: Thank you very much for that. That is the end of the submissions. Mr Milne, perhaps you can advise us?

Mr Milne: The allegation, as you now know, was made in this case by the GOC under Section 13D 1(a) and 2(c) of the Fitness to Practise Rules, the basis for that being that fitness to practise of the registrant as a registered optometrist is, or may be, impaired, following on from his caution at Bootle Street Police Station on 23 March 2009. The first task of the panel would have been to determine whether the facts were proved but in fact, in this case, the fact of the caution itself and the reasons for it are not in dispute and, as the panel has heard, the registrant admitted in an interview with the police that he had committed a common assault on a lady in his own home on the evening of 13 March 2009.

The panel has also been properly advised that for the police to impose a caution, the person being cautioned must first admit the facts of the alleged offence and agree to be cautioned. It was said by Mr Hogman on behalf of the registrant that the CPS may have been involved and indeed, there is guidance from the CPS although given that the interview and the caution are the same day it does not necessarily follow that the CPS were consulted. It may be that the police took that decision of their own volition, which is within their powers.

The Fitness to Practise Rules make clear that a caution is, of itself, grounds for impairment under Rule 13D2(c), that is that it is capable of being the basis for a finding of impaired fitness. So the real test of the panel is to determine whether the caution and the circumstances giving rise to it actually render the fitness to practise of the registrant impaired. That is, as has properly been pointed out, a question of judgment for the panel to determine. It is not a judgment that requires you to apply a standard of proof. So in reaching a determination, the panel is entitled to consider all of the material currently placed before it, including in this case character evidence and the explanation provided on behalf of the registrant. It is a matter for the panel to decide what

weight to attach to character evidence but clearly, it is important in putting into context what has been said.

If you were to so determine, that it did render the fitness to practise impaired, then obviously, there would be a number of options available. I will not go into those at this stage but I would remind the panel that, even if you conclude that the registrant's fitness to practise is not impaired, you are still entitled, if you choose, to give him a warning concerning his future conduct or performance. But if you to choose to do that, you would have to give the registrant, or indeed Mr Hogman as his representative, the opportunity to address you first.

Ms Jeyasingham: Thank you, Mr Milne. Can I ask the Hearings Manager then to clear the room while the Committee deliberates?

[Hearing adjourned at 10.47 am]

[Hearing resumed at 11.45 am]

Ms Jeyasingham: I will read out the Determination for the record.

DETERMINATION:

Findings in relation to the particulars of the allegation

The registrant admitted the particular of the allegation and the Committee found the allegation proved

Findings in relation to the caution

The caution has been admitted by the registrant. The Committee has before it a record of caution. On this evidence, the caution alleged is found proved.

Findings regarding impairment

The Committee found that the fitness of Mr Kelly to practise as an optometrist is not impaired.

The Committee considered all of the evidence, including the character references. The Committee concluded that whilst the incident was a serious one, it was an isolated occurrence which appeared to be out of character for the registrant. The Committee disregarded the opinions expressed as to the professional competence which were not relevant to this issue but it did take into account evidence of relationships with patients and professional colleagues in reaching its conclusion. The Committee also took into account the registrant's age and his good character throughout his period of registration as an optometrist and that there had been no previous incidents of violent behaviour.

The serious nature of the incident nevertheless is a matter of concern for the Committee and whilst it has found that the registrant's fitness to practise is not impaired, it is concerned at the potential impact that such conduct may have on the confidence of the public in the profession. The Committee is, therefore, minded to issue a warning to the registrant as to his future conduct and for the warning to remain on his record for a period of five years. The Committee invites the registrant's representative to make submission if he so wishes.

Mr Hogman: I will just take some further instructions. [*Pause*]

Ms Jeyasingham: Mr Hogman?

Mr Hogman: Thank you, Madam. Just to say this: as I understand the case against Mr Kelly, public confidence was not the issue, it was the danger of whether he may be violent again in the future and you have found that that is not the case. Public confidence was not the overriding issue. In any case, as I said in my earlier submissions to you, the rigorous nature of the investigation which took, of course, some time, and the manner of this hearing where matters again have been looked at very closely indeed will, surely, give the public confidence that any wrongdoing by any registrant is looked at thoroughly and that is sufficient to keep public confidence at the level it should be and not think that this is in any way just brushed under the table and we just carry on. The whole matter is aired in a very full and frank way and certainly, I think we cannot say that any corner was left uninvestigated with this matter today. Therefore, I say that the fact of the hearing and the investigation is sufficient to maintain public confidence.

Ms Jeyasingham: In other words, Mr Hogman, you are disputing the warning aspect of it?

Mr Hogman: Indeed, yes.

Ms Jeyasingham: Though I have to point out that, although we talked about the confidence of the public, we were also concerned about the seriousness of the offence and I would think that the Committee – actually I know that the Committee – would have given a warning anyway.

Mr Hogman: Very well. Thank you.

Ms Jeyasingham: So, Mr Hepworth, you did not want to comment on that?

Mr Hepworth: No, Madam.

Ms Jeyasingham: So I think the conclusion of the Committee is that the warning stands for five years.

[*Hearing concluded at 11.18 am*]