



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

F(09)19

GENERAL OPTICAL COUNCIL

AND

STEVEN MITCHELL (SD-2735)

WEDNESDAY, 21 APRIL 2010

SUBSTANTIVE HEARING

SUBSTANTIVE HEARING: STEVEN MITCHELL (SD-2735)
Wednesday, 21 April 2010

Committee: Sir Alistair Graham (Lay) (Chair)
Ms Abi Grute (Dispensing Optician)
Mr Peter North (Lay)
Mr Nigel Roberts (Lay)
Lady Margaret Wall (Lay)

Legal Adviser: Mr David Swinstead

Hearings Manager: Mr David Henley BEM

For the GOC: Mr John Hepworth

The Registrant did not appear and was not represented

[Proceedings commenced at 9.31 am]

Sir Alistair Graham: Good morning. My name is Alistair Graham, I am 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 dispensing opticians 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]* To my right is Mr David Swinstead, 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 my right is Mr David Henley, the Hearings Manager, who will provide administrative support to the Committee. Next to Mr Henley is 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 proceedings to be displayed on the Council's website for public viewing.

Can I now ascertain whether there are any applications this morning?

Mr Hepworth: Sir, the only application on behalf of the Council is to proceed in the absence of the registrant, and I will make that application when you are ready to hear it.

Sir Alistair Graham: I think you should make that application now.

Mr Hepworth: Certainly. Sir, the starting point perhaps is Rule 21, which governs the position where the registrant is neither present nor represented, the position in which we find ourselves today. Rule 21 reads as follows:

"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 first of those conditions is that you need to be satisfied that all reasonable efforts have been made to notify the registrant of the hearing. Can I confirm that you have been given a copy of a bundle of papers called the Service of Notice of Inquiry?

Sir Alistair Graham: Yes, we have.

Mr Hepworth: Thank you. The first page is a screen print of the registrant's entry on the register which gives an address in Penrith in Cumbria. At pages 2 to 4 you can then see a copy of the Notice of Inquiry which was sent under cover of the letter which can be found at pages 5 and 6. That letter was sent requiring a signature upon receipt, and you can see the unique serial number given to the letter at page 5 above the registrant's name. At page 7 you can see that the item bearing that serial number was delivered and signed for by Darren Mitchell; one presumes that he is a relative of the registrant. At page 8 you can see an email that was sent from the Hearings Manager to the registrant at that address at hotmail.com, which is a copy of the documents that were sent by post, and you can have confidence that that is an active email address as far as the registrant is concerned for two reasons. First of all, on page 1 it is his registered email address, according to the computer print-out. Secondly, you can see on page 9 that that is an email address apparently being used by the registrant in communicating with a member of Council staff. That was in December 2009. You can see that the registrant gives a very clear indication in that letter that he has no intention of working in the field again. He thinks that he has been removed from the register; of course, that has not happened, to give you jurisdiction to hear the case. His last comment is perhaps most important for your purposes today. He says:

"I no longer have anything to do with the GOC or the optical profession in any way."

Going back to Rule 21(a) in the Council's submission you can be satisfied that all reasonable efforts have been made to notify the registrant of the hearing. He has had the Notice of Inquiry sent to him by registered post, or whatever the term for that is these days, and the letter has been delivered, and also the documents were sent to an email address which appears to be a valid email address. So, as well as being satisfied that all reasonable efforts have been made, in the Council's submission you can also be satisfied that service has in fact been effected.

The next question for you then is whether or not in your discretion to proceed in the absence of the registrant, and you can do that if you are satisfied that it is in the public interest to do so. In the Council's submission it would be in this case in the public interest to proceed for the following reasons. The registrant has not made a request for an adjournment. He has been in some contact with me in the early stages of this case, and I can make those emails available to you if you wish to see them. One of particular importance, you may think, is an email sent by the registrant to me on 4 January this year where he says:

"I received your email regarding the Fitness to Practise hearing against me. Whilst I accept that I committed the offence relating to the hearing, I have no intention of attending the hearing. I am more than happy to be removed from the register and have actually requested this, so I apologise if your time will be wasted by the proceedings."

So he gave a clear indication then that he would not be attending today. As I have said, he has not made a request for an adjournment and there is perhaps a self-evident reason that does not need any amplification that these proceedings should be dealt with as swiftly as is compatible with justice. Given that overriding objective, given that the registrant does not ask for an adjournment, and importantly if you adjourn today has given absolutely no indication that he would attend on a future occasion, in my submission you should exercise your discretion, judging the public interest, to proceed in the registrant's absence.

Those would be my submissions unless you have any questions of me.

Sir Alistair Graham: Thank you very much. Does anybody have any questions? [*There were no questions from the Committee*] Can I ask the Legal Adviser to advise us on the issues?

Mr Swinstead: Sir, yes. Where a registrant does not attend, you may proceed to hear the matter in his absence under the provisions of Rule 21 to which Mr Hepworth has already drawn your attention.

I should indicate that there are some general principles that you should apply to this issue and I draw those from the case of *R v Jones* [2002] 2AllER 113.

"A registrant has in general a right to be present at the hearing and a right to be legally represented. Those rights can be waived separately or together, wholly or in part, by the registrant himself. They may be wholly waived if, knowing or having a means of knowledge as to when and where his hearing is to take place, he deliberately and voluntarily absents himself."

You have a discretion as to whether a hearing should take place in his absence. That discretion must be exercised with great care and in exercising that discretion fairness to the registrant is of course of prime importance but fairness to the Council and of course the public interest must also be taken into account. One of the matters of the circumstances of the case that you are invited to consider in particular is whether an adjournment might result in the registrant attending and the likely length of any adjournment, but in effect the issue really is whether an adjournment might result in his attending and, of course, you have all the material placed before you which would cover that issue.

Sir, I think those are all the matters that I need properly advise you upon.

Sir Alistair Graham: Does the Committee want to have a private meeting? You are content to proceed. I have quickly consulted the Committee and I think the Committee are satisfied that the provisions of Rule 21 have been met and that we can proceed in the absence of the registrant and the registrant's representative. So the application succeeds.

Mr Hepworth: Sir, thank you very much.

Sir Alistair Graham: I think we can now proceed.

Mr Henley: Sir, shall I read the allegation?

Sir Alistair Graham: Yes, of course.

Mr Henley:

"The Council alleges that you, Mr Steven Mitchell, a registered student dispensing optician

1. On 9 July 2008 at Parkside Police Station were formally cautioned for the offence of Assault Occasioning Actual Bodily Harm contrary to section 47 of the Offences Against the Person Act 1861;

And by virtue of the matters set out above your fitness to undertake training is impaired by reason of your caution."

Sir Alistair Graham: Thank you very much.

Mr Hepworth: Sir, there is no live evidence before you, given Mr Mitchell's indication in that email that I read out to you a few moments ago, but can I hand up to you some documents within a hearing bundle? [*Handed up*]

Sir Alistair Graham: Will the Committee need some time to read these papers or will it be enough for you to take us through them?

Mr Hepworth: My proposal is that I take you through the bundle, and if after that you feel that you need some time to read the documents, maybe that would be an appropriate time.

Sir Alistair Graham: Can we record this bundle of documents as C1?

Mr Hepworth: Yes, sir. Perhaps you will allow me to take you through the bundle and then I will address you in relation to the facts and the fact of the caution, and I will go no further for the moment.

The first document in the bundle at page 1, and although it goes over to page 2, page 2 is blank, is a letter from Cambridgeshire Police notifying the Council of the caution. The contents of that letter are contained elsewhere so I will not say anything more about that letter for the moment, but turning to page 3 that is the record of the caution for the registrant. You can see that it was given on 9 July 2008 in relation to an assault occasioning actual bodily harm, and the offence reads that:

"On 27 April 2008 at Willburton in the County of Cambridgeshire, assaulted Russell Tarbox, thereby occasioning him actual bodily harm."

Importantly in the box at the bottom you can see that there is a section which is signed which is headed "Person Cautioned" which reads as follows:

"I acknowledge I admit the [in this case offence] and agree to be cautioned. I understand that if, in the future, I should appear before a court and am found guilty of another offence, then details of this caution may be given to the court."

There is a signature underneath it which the Council ask you to accept is of Mr Mitchell, the registrant.

The next document behind tab 3 runs from page 4 to page 16 and that is a record of an interview which the registrant had, represented by a solicitor, with a DS Richardson on 4 June 2008. I do not intend to take you in detail through that interview because Mr Mitchell has a second interview which in my submission is more relevant for your purposes today, but to summarise this interview on 4 June, Mr Mitchell gave the same account as he gave later but

indicated that the force he had used against Mr Tarbox was in self-defence, so he did not make an admission to the offence in that interview.

To fill in the chronology so that the second interview makes sense, on 16 June Mr Mitchell rang the officer in the case saying that he had had a change of heart and he decided that he now wished to admit to the assault and to drop his self-defence angle. The officer said he could not talk to him about it there and then but when he came in to answer his police bail he would be re-interviewed, and the interview which you can see behind tab 4 at pages 17 to 22 is that second interview. It appears that Mr Mitchell was re-interviewed at his own request. That is with a different officer, a DC Miller, and it appears that on that occasion the registrant was not legally represented but, as you know, whenever a suspect is in the police station he would have the right to independent legal advice and you can see at page 17, the first part of that record, that the registrant is offered a solicitor and he said he did not want one. When he was asked why that was he said it was because he was admitting to the offence. As the officer quite rightly pointed out, he is still entitled to one and he decided he did not need one.

I am going to summarise this interview, because when the caution was given – of course, a caution can only be given if the suspect admits the offence and agrees to be cautioned, and because a caution can only be given if there is an admission - in the Council's submission you will have to take as the facts in this case the registrant's own version of events, and that is why the contents of this interview in my submission are important.

Going to page 18, and fortunately the numbering at the bottom of the page, although there are two different systems of numbering, they coincide, about half way down Mr Mitchell is talking about what happened prior to this party where the assault took place. He says:

“Two weeks prior to the incident Caroline [that is his girlfriend] was visiting a friend in London by the name of Paul Silver and that's where she met Russell Tarbox. I was under the impression that that evening he raped her.”

Because that word is mentioned I should say, and I will point you to the reference as we go through it, that when Caroline made a statement she said that she did not consider herself to have been raped but, although she felt she had been taken advantage of, it was no more than that. But I think it is important that at the time this incident took place Mr Mitchell appears to have been under the impression, however erroneous, that Mr Tarbox had perhaps raped his girlfriend previously.

He said the reason why he thought that he had raped her was because Caroline had told him previously, and that would have been about a week before the night of the incident where Mr Mitchell says “I assaulted him.”

After that he describes the conversations that he had with Caroline about that, and then he talks about the party at which the offence took place. Moving to

page 19 towards the middle of the page, you can see that Mr Mitchell makes reference to a website called beta.com, which is described elsewhere as an alternative comedy site, or something similar, and it appears that people that frequent that site decided to have a social get-together. You can see on page 19 it was a 55th birthday party at an address in Cambridgeshire. What Mr Mitchell says at that point on page 19 is:

“I didn’t actually know that Russell Tarbox was going to be there that night. I was quite surprised when he did arrive. Over the course of the evening, myself and Caroline actively avoided any sort of confrontation or any sort of interaction with him whatsoever. At approximately 2.30 in the morning of the 27th Caroline left the room that we were in to go to the kitchen to get a drink. After she’d been gone a few minutes I went looking for her and I found her, Russell Tarbox and Paul Silver just outside the conservatory. Now, he had an arm either side of her so it looked to me as though he was pinning her up against a wall [he is referring to Russell Tarbox at this point]. She was stood with her back to, sort of, the window next to the door.”

He says that Mr Tarbox had a can of lager in one hand which was resting on the doorframe and his other hand on the other side of her. He then goes on to say:

“She looked quite distressed at the time. When I got there he dropped his arms and took a step back. He was being quite aggressive towards her. She didn’t want to talk to him at all. She just wanted to go away and basically have nothing to do with him. He suggested putting everything behind us and moving on with our lives, at which point I asked him to apologise. He got quite aggressive at that point, started snarling at me, and his exact words were, ‘Oh, for what?’ I felt quite threatened at that point. I was quite scared for my own safety as well as Caroline’s so I then pushed him away so that Caroline could get away from him and so that we could leave. As I pushed him I don’t know whether he lost his footing because he was drunk or he tripped on something ... but he fell over. As he fell over he dropped the can. I didn’t pursue that any further, I actually backed away. I wasn’t seeking a fight or a confrontation or anything. I just wanted him out of the way. As he got up he was still being quite aggressive. He came at me at that point and actually punched me in the left arm. As he punched me, I grabbed his arm so he couldn’t hit me again, at which point he tried to hit me with his other arm. I grabbed that arm so that at that point I had hold of both of his wrists and he was still pushing against me being quite aggressive, trying to sort of push me backwards or push me over, I don’t know. That was the point at which I head butted him. After I hit him he backed off. He was obviously quite stunned. I backed off myself as well. As I noticed he was bleeding, I sort of turned to walk away because I didn’t want to pursue it any further. As I turned my back to him, he actually pushed me in the back to the point where I almost fell. At that point the other people that were at the party came out of the house, separated us and took him indoors.”

He says he did not retaliate when he was pushed as he was walking away. He was asked:

“How do you feel now about what happened and what went on there?”

He replied:

“I won’t deny that I am still quite angry about it all. I do regret what I did.”

He is asked what he is angry about and he says:

“The whole incident, everything add up to it the night. The altercation, all of it. I wish none of it had ever happened, but I do understand that I was quite excessive in what I did.”

The officer says that he understood that the injury to Mr Tarbox was a broken nose and Mr Mitchell said:

“Yeah.”

He says:

“As a result of the incident he got a cut to his head and he thinks that was from head butting him.”

He says on page 21 at the top:

“I think that was just the impact. I didn’t actually know I was bleeding until somebody pointed out that I was bleeding, so I don’t know when it happened. I assume it was from the impact because I wasn’t hit in the head at any other point.”

He then goes on to say that after other people had intervened, he and Caroline went to a bed in a room separate to the rest of the house and the morning after Mr Tarbox left first and then he and Caroline left at about two o’clock in the afternoon. He said a bit further down page 21:

“I’ve attempted to apologise to him on a couple of occasions but I didn’t receive any response.”

Sir, the officer then, as happens in police interviews, recapped what he had said, and the next relevant section is at page 22 about two-thirds of the way down the page. The officer again is recapping what Mr Mitchell had previously told him and said:

“You’ve said you’re obviously quite angry about the whole incident, the whole lead up to the incident and what occurred that evening but you’re quite sorry for the outcome in that you didn’t intend to – ”

And Mr Mitchell says:

“Yes, I am. No, I had no idea that I’d broken his nose until he’d actually been looked at.”

The officer says:

“And you’re sorry for hurting him?”

Mr Mitchell says:

“Yeah.”

The officer then says:

“And you feel that you’ve used excessive force against him?”

Mr Mitchell says:

“Yeah, I could have handled the situation better.”

The next section of the bundle behind tab 5 runs from page 23 to page 41. It is a heavily redacted by the police series of police investigation documents. The first part of that section of the bundle appears to be for the police investigation management system giving a chronology of what happened. One matter in particular I will bring to your attention at page 28, to entries 20 and 21. That confirms what I have already said, which is in the first interview Mr Mitchell claimed that what he did was self-defence, and you can see reference to that phone call that I have mentioned where Mr Mitchell rings the officer and says he now wishes to admit to the assault and to drop his self-defence angle. At page 29 at entry 24 you can see a brief summary of the interview which I have just gone through, and the confirmation there that in the officer’s summary opinion Mr Mitchell had realised that what he had done was excessive force and had since tried to apologise.

The next part of that part of the bundle, which runs from page 30 to page 33 is an extract from a statement. This is the only information that the Council was provided with by the police. Reading through the statement, it is clearly the statement of Mr Tarbox, and the only part of that statement that I wish to bring to your attention is where he describes his injuries, and you can find that at page 32 going over to page 33. He says at the bottom of page 32:

“Since this assault I have suffered from difficulty breathing through my nose, swelling and pain around my eyes and bridge of my nose. I have been to the A&E at Guildford Hospital, to my GP, and referred to the ENT Clinic at [somewhere]. My nose is broken and I may need surgery in the future.”

The next document in the bundle runs from page 34 through to page 41. Again, it is an extract from a statement, and the author of the statement is not made clear but from the contents of the statement this is clearly Caroline's statement. In her statement I wish to bring the following matters to your attention. At page 38 towards the top of the page she indicates what alcohol she, and importantly Mr Mitchell, drank on the night of the relevant party. She said she did not drink any alcohol. She says:

"I think Steve, my boyfriend, maybe had one, possibly two bottles of beer, but throughout the night he was sober."

She then goes on to describe what happened but, as I have said, because I am asking you to proceed on the basis of what Mr Mitchell himself admits, I do not plan to bring any further details in her statement to your attention.

Sir, that is the bundle and those are the documents. The first stage, of course, is whether or not you find the facts proved, and of course the allegation is that the registrant received a caution. You can see at page 3 behind tab 2 of the bundle the record of the caution, signed for by Mr Mitchell. Clearly I would hope that you consider that that is sufficient evidence of the fact of the caution, and if you need any reinforcement I can hand up again the email that I have already read out to you that Mr Mitchell sent to me in which he said: "I accept that I committed the offence relating to the hearing." The allegation alleges that he was cautioned; you find the evidence for that at page 3, and if you need reinforcement you have at pages 1 and 2 the letter that was sent to the Council under the relevant scheme, because when he was cautioned you can see that Mr Mitchell gave his occupation as a student dispensing optician.

I will say no more at this point. I do have some further submissions to make in relation to impairment, but so that matters can be properly compartmentalised I will not say anything else at the moment and I will wait for the Legal Adviser to address you further.

Sir Alistair Graham: Can I just check whether there are any questions anybody might like to ask to clarify any points? No. Thank you very much. Perhaps I can invite the Legal Adviser to advise us about this stage of the process.

Mr Swinstead: Sir, I think there is very little I need advise you upon save to remind you that of course the burden of proof remains throughout on the Council at this stage of the proceedings and that the standard of proof is that the Council must satisfy you on the balance of probabilities that it has proved the case against the registrant.

Sir, you have the documents in the bundle. It is a matter for you simply whether or not the caution is proved.

I am not sure unless Mr Hepworth invites me to say anything further that there is anything I need further say. Is there, Mr Hepworth?

Mr Hepworth: I do not think so, no.

Mr Swinstead: Thank you, Mr Hepworth. Sir that then is my advice to the Committee.

Sir Alistair Graham: And you do not wish to say anything further at this stage?

Mr Hepworth: Sir, not in relation to the facts, no.

Sir Alistair Graham: Mr Henley, can I ask to clear the room?

[Proceedings adjourned at 10.07 am]

[Proceedings resumed at 10.19]

Sir Alistair Graham: Mr Hepworth, we have brought you back because his technically was a proper caution that was administered, but if you turn behind tab 2 you have the record of the caution there, it does not give the name of the police officer, who is normally different from the police officer who has done the interview, who administered the caution. No police officer signed the document. The actual person who was cautioned has signed it. We wondered if you could help us on this matter.

Mr Hepworth: Sir, you are right that the cautioning officer has not signed the form. In my submission you can be content that the caution was properly administered because had a caution not been approved and administered this form at page 3 would not have been created. One imagines that that only gets created by the police computer system once that particular disposal has been approved of.

I think you can find some comfort in the letter at pages 1 and 2.

Sir Alistair Graham: Even letter 1 does not tell us who was the police officer who administered the caution, does it?

Mr Hepworth: Sir, it does not, but it gives you hopefully some comfort that the caution was a proper police caution, if I can use that phrase, that this was not some sort of informal stitch-up because, of course, the letter which is on official headed notepaper indicates that the registrant was cautioned at that police station on 9 July.

I do not think on the paperwork I can take you any further, other than refer you to page 29, again back to the police investigation computerised management system, to item 24. You can see that there is a blacked out bit and then "Decision to caution". One presumes that that was the person who made the decision, although of course I am only guessing because it is blacked out. Then there is reference to the registrant being cautioned for actual bodily harm, assault.

There is something that I remember having read which may help you or may not, but I just need to find it so I wonder if you would give me just one moment.

Sir Alistair Graham: Yes, of course.

Mr Hepworth: It is at page 28, and this is item 19. This is clearly the content of a conversation between the officer in the case and Mr Tarbox. Mr Tarbox says that he would be happy if the offence was admitted and genuine remorse was shown for the suspect to be cautioned. He says he does not want financial compensation and he repeats that he would be happy for the suspect to receive a caution, and that appears to be the route down which the police were planning to go before the first interview.

It would appear therefore that there is nothing unusual in the circumstances of this case that a caution was imposed. The registrant does not claim that the caution was in any way improperly given, and so in those circumstances in my submission you can safely conclude that the caution was properly given because all the documentation and the police letters support that conclusion.

Of course, if you wish I can ask for an enquiry to be made and if the cautioning police officer is available, and I could certainly speak with him on the phone, but I would hope that in the circumstances of this case and the information which you have you can be content that the caution was properly given.

I do not know if that has even answered the question which you asked, but if it has then of course I will be delighted to answer any further questions.

Sir Alistair Graham: Thank you very much. Can I just check whether my colleagues have anything?

Lade Wall: First of all, one of my colleagues has pointed out that the caution itself on page 3 is also page 3 apparently of a document.

Mr Hepworth: I will need to go through my file if you need to have a definitive answer but I think that was the Council's evidence bundle which was served on the registrant as part of the normal process during the life of the case.

Lady Wall: Secondly, it is not clear from the letter from the police which was received on 12 February whether this actually enclosed the documentary evidence of the caution. It says "was cautioned"; it does not say "caution enclosed", and the caution itself is not date-stamped as far as I can see, although it is a very bad photocopy.

Mr Hepworth: If you wish for that answer to be given then I would be able to check the Council's file. Of course, I do not have the Council's file with me, I have my own file, but I can ask for that enquiry to be made as to whether or not the caution form was enclosed with the letter. But I cannot give you that information without first making the enquiry.

Lady Wall: The third question is, and this is just from recollection of similar cases, I think I have seen caution forms from other police forces in which there has to be approval and a counter-signature by an inspector in order for the caution to be valid. I cannot give you any evidence of that; it is just general recollection, that because the caution constitutes part of someone's criminal record it is very important that it is documented properly.

Mr Hepworth: I agree with your final sentiments. I have to say that I have no previous experience of Cambridgeshire Police so I do not know what their cautioning paperwork should look like, whether this is perfectly appropriate or in some way deficient.

On that basis, I am not sure I can take you much further unless you wish for me to make a specific enquiry of the police – of course, something that I will be happy to do. I do not know if, again, that has answered your question, and if you wish for me to make some further enquiries then I will make those enquiries.

Sir Alistair Graham: Thank you very much, Mr Hepworth. We will perhaps retire again and consider whether we want you to make any further enquiries on this matter or whether we are satisfied with the evidence.

Mr Swinstead: Mr Hepworth, can I confirm that I have a copy of the evidence bundle and indeed the document that we are referring to also appears in that as page 3, and looking at all the documents, the document number in the bottom centre of each page would appear to be the number from that bundle, and the number to the right at the bottom of each page in the bundle before the Committee would appear to be the number for the bundle that is before the Committee, if I can put it that way.

Mr Hepworth: That is right.

Mr Swinstead: The second point I think properly I should suggest, and is this what you are inviting the Committee to do. One can see that that appears, or the Committee may infer that there appears to be a part of the document that may have been in some way blacked out because there is a darker patch towards the bottom. Whether it is on this page or on a separate page, are you inviting the Committee to infer that this document was properly completed, and if a signature from the inspector who administered the caution was required, that such a signature would appear on the document but it has not been copied to the Council when the document was sent to it? Is that the inference you would be inviting the Committee to draw? I certainly invite the Committee to draw the inference that the caution was properly administered. I cannot say at this stage whether or not that is a complete document or if there is something missing. In my submission it appears to be a full document but the matter of the dark material at page 3 seems to me to be just a photocopying issue which does not necessarily mean that there is something missing that ought to be there.

Mr Swinstead: Thank you, Mr Hepworth. Sir, I would simply therefore remind you that as to your approach to individual pieces of evidence, you are entitled to draw inferences but you must not speculate. If you feel it is proper, you can draw an inference provided that you consider there is an evidential basis for it. On the other hand, it would not be right for you to speculate.

Unless Mr Hepworth considers I should say anything further or correct what I have said, I think that is the proper piece of advice to give to the Committee with regard to this piece of evidence, is it not?

Mr Hepworth: There is nothing else that I would wish your legal adviser to say, sir.

Sir Alistair Graham: Can I just clarify one more point?

“Summary caution ... to be made and signed by the person being cautioned and the appropriate adult.”

Are they two separate people?

Mr Hepworth: Sir, yes. I will try and go back in my memory for my knowledge of an appropriate adult. Anyone who is under 17 in custody has to have an appropriate adult, as does someone who is older but, for whatever reason, needs someone to look after their interests whilst in custody. But it is not usual for an adult to have an appropriate adult.

Sir Alistair Graham: I understand. It is not relevant in this particular case.

Mr North: Could I just add for the record before we go into consideration of the matter that at page 23 of the bundle there is the crime file which appears to be the contemporaneous record of the progress of the investigation and that includes at detective status on page 23, caution.

Sir Alistair Graham: I am sure we can know about further information. I think those are all the questions we wanted to ask you. I am grateful to you for coming back to clarify as far as you were able to do so, and the offer, if we want to press it further, to make further enquiry. Thank you very much.

[Hearing adjourned at 10.32 am]

[Hearing resumed at 10.59 am]

Sir Alistair Graham: The Committee has taken a decision as far as Particular 1 of the allegation.

DETERMINATION

Findings in relation to the particulars of the allegation

The Committee find Particular 1 of the allegation proved.

Reasons for the finding in relation to the caution.

The Committee has considered the evidence placed before it on behalf of the Council by Mr Hepworth and the submissions he has made. It has also taken account of the advice of the Legal Adviser. It has, in particular, considered the Record of Caution. It noted that although it shows the signature of the registrant, it does not show who cautioned him and there is no signature of the Cautioning Officer. The Committee reminded itself of the standard of proof that it should apply to the evidence and the further advice of the Legal Adviser that it could draw inferences from evidence if it was appropriate to do so. It is satisfied on the balance of probabilities that the registrant was cautioned by the Cambridgeshire Police.

I think we now move on to the impairment stage. Do you want to kick off, Mr Hepworth?

Mr Hepworth: Thank you. Of course, at this stage you leave behind matters such as burdens and standards of proof and when you are assessing impairment of course you use your professional judgment. The question of impairment is to be judged in the present tense as of today, rather than at the time of the offence or the time of the caution.

In my submission there can be no doubt that the offence which led to the caution involved an episode of serious violence. Of course, you will be aware that in the criminal law there are three levels of assault: common assault or battery where no or little harm is done; then actual bodily harm assault; going up to a grievous bodily harm assault. This was clearly serious enough for it to fall within the category of actual bodily harm, and you have had read to you from the aggrieved's statement that he received a broken nose as a result of the violence meted out by the registrant.

You have before you no evidence from the registrant about the steps which he has taken to address his issues in relation to violence. In my submission you cannot be satisfied that his tendency to violence has been addressed and has dissipated by now.

You have before you no evidence of the registrant's general character or any testimonials on his behalf. He has not put those before you.

Clearly, sir, in 2008 the registrant had a tendency towards violence, and in my submission you cannot be satisfied that today that tendency is no more. The risk remains, in brief.

When you are assessing impairment, of course, you will do that against three criteria. First of all, the need to protect the public, the need to maintain public confidence in the profession, and the need to declare and uphold proper standards of conduct and behaviour.

Clearly there is a risk to the public of someone who is prone to violence. Proper standards of behaviour as far as a student dispensing optician is concerned would, in my submission, not include episodes of violence, whether or not that took place out of work.

As far as public confidence is concerned, I know that your legal adviser is going to talk to you about the principles from the case of *GMC v Yeong* [2009] EWHC 1923 (Admin). Perhaps I can summarise that in two principles. The first is that where a case involves a fundamental breach of the principles behind being a student dispensing optician, the public and the public confidence may be adversely affected if the conduct and the extreme disapproval of the conduct is not marked by the registrant's professional body. Secondly, sir, in such cases any remedial steps which may have been taken would have less effect, perhaps, than if we were dealing with a case involving deficiencies in clinical practice. But in this case, sir, you have no evidence that any remedial steps at all have been taken.

Sir, those are my submissions. I am not sure that I can help you any further unless you have any questions for me.

Sir Alistair Graham: Do the members of the Committee have any questions they wish to put to Mr Hepworth? [*There were no questions from the Committee*] I do not think we have any questions.

I now invite the Legal Adviser to advise the Committee on the legal issues.

Mr Swinstead: Mr Hepworth, can I just pose this question? One of the issues that the Committee have to consider is the context of the misconduct which effectively forms the background of the caution. For that it would be proper for them to consider within the papers matters which might include the lady called Caroline's involvement in the sense of what had happened before and what she said about it in her statement, and indeed what she herself says at the conclusion of her statement from a contextual point of view.

Mr Hepworth: Yes.

Mr Swinstead: That is perfectly reasonable, is it not, and the Committee are entitled to do that in considering the issue of impairment as a whole.

Mr Hepworth: Sir, I think that is right, because of course there is here an episode of violence and that took place within a context, and I think when you are assessing the registrant's conduct it is absolutely right that you assess the context. I am happy to take you, at your Legal Advisor's invitation perhaps, to the statement made by Caroline, which can be found at pages 34 to 41 of the bundle.

Can I take you, first of all, to page 36 towards the bottom of that page? At this point she is referring to what has happened the week before the party at which the assault took place. She said that she was very drunk. She says that she does not remember having any intercourse but she woke up the next

morning and she and Mr Tarbox were naked in bed together. Towards the bottom of that page she says:

“In relation to this incident I don’t feel that I have been raped. I believe I was taken advantage of due to my drunkenness but not raped.”

I think as far as that is concerned, I just need to remind you of what Mr Mitchell’s feeling was and what his view was, however erroneously, at the time of the party at which the assault took place.

Your Legal Adviser has also asked me to refer you to the last part of Caroline’s statement and that is at page 41. What she says is:

“As a result of this incident I feel really guilty for the act that triggered the whole thing. I don’t think Steve meant to hit [I think that must mean Mr Tarbox]. He was just trying to protect me and himself.”

Put in that context, of course, it is Mr Mitchell’s admissions himself that form the basis of the caution and it is on the basis of his admissions that the Council puts its case forward.

Mr Swinstead: Sir, the advice I give you is that of course it is a matter of judgment for you to consider whether the registrant’s fitness to practise is impaired, and with regard to the issue of impairment you should have regard to a number of matters which may have greater or lesser relevance to the particular facts of this case.

You should of course consider the conduct or misconduct which provides the background to the caution as being the matters that you consider when deciding on the issue of impairment. The matters that you should have regard to include the way in which the registrant has acted in the past, both before and after the misconduct. There may be little evidence before you on that matter but that is one of the matters you should consider. You must consider the context of his behaviour and his current level of insight, and, if appropriate, his current level of skill, but again I think that is a matter that you would not be considering particularly in this case.

Of relevance, you must consider whether the misconduct is remediable and what steps, if any, the registrant has taken to remedy the shortcomings which led to the findings that you have made.

Finally, you must consider what the risk of the misconduct being repeated is.

Your task is to consider whether, by reason of the misconduct, the registrant’s fitness to practise is impaired today and looking forward from today. In other words, has it been so serious that looking forward you are persuaded that he is simply unfit to practise without restrictions or at all. Alternatively, the misconduct may be such that, seen within the context of an otherwise unblemished record, and bearing in mind, if relevant, any steps he has taken

towards remediation, you may conclude that looking forward his fitness to practise is unimpaired, the misconduct notwithstanding.

It may be that the conduct falls into a category that is not of itself susceptible to remediation or any steps taken towards remediation are of less significance, and that by reason of the misconduct his fitness to practise may be impaired, and if no steps are taken to bring to his attention the unacceptability of his conduct, the consequence may be that public confidence in the profession would be reduced.

I remind you particularly, as Mr Hepworth has done, that with regard to the public interest in the issue of impairment, you must of course consider the protection of the public, the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct in the profession.

Sir, that is all the advice I think I need give you, unless Mr Hepworth would invite me to say anything further or, more importantly, to correct anything that I have said.

Mr Hepworth: Sir, nothing from the Council.

Sir Alistair Graham: Thank you very much. Mr Henley, can you clear the room?

[Hearing adjourned at 11.12 am]

[Hearing resumed at 12.10 pm]

Sir Alistair Graham:

Findings regarding impairment

The Committee found that the fitness of Mr Mitchell to undertake training as a dispensing optician is impaired.

The Committee has considered the submissions made by Mr Hepworth, on behalf of the Council. It has accepted the advice of the Legal Adviser. It has taken account of all the evidence placed before it. In reaching its decision, it took particular account of the serious nature of the assault which involved the registrant head butting the victim causing him to suffer a broken nose. This was a reckless and impulsive act, which the registrant accepted to the Police involved an excessive use of force. The Committee accepts that there was some background to this incident, but it was concerned that a student in training, planning a professional career, should have demonstrated such a lack of judgment and self-control in allowing himself to become involved in an incident such as this. It noted that he did offer an apology to the victim and that he admitted the offence for the purposes of accepting the caution, but he has not attended this hearing and the Committee has no evidence of his current level of insight into this

matter and has no up to date evidence as to any steps he has taken to remedy the lack of self-control that he demonstrated in committing this assault. The Committee, in particular, bore in mind its responsibility to uphold and declare proper standards of behaviour within the profession and it concluded that on all the evidence before it, in its judgment, the registrant's fitness to undertake training is impaired today and looking into the future.

I think we can now move to the question of sanction.

Mr Hepworth: Sir, of course the choice of sanction must be one for you and your colleagues exercising your professional judgment. I think anything which I have said about the incident itself would be an unnecessary repetition of that which I have already said at the impairment stage, and so I do not plan to repeat that which I have already said.

Can I say that, according to the Council's record, Mr Mitchell has no previous fitness to practise history with the Council?

I am not sure there is much else that I need to add, unless there is any other part of the case on which you need me to address you.

Sir Alistair Graham: Are there any questions that any members of the Committee wish to put to Mr Hepworth? [*There were no questions from the Committee*] Mr Swinstead, do you have any questions you want to raise?

Mr Swinstead: No, sir.

Sir Alistair Graham: Perhaps you could tell us your advice.

Mr Swinstead: Sir, at this stage of the proceedings you shall deliberate and decide whether to make any direction or order under Sections 13F to 13I of the Opticians Act 1989 and you should announce your decision under the provisions of Rule 54(1) and 54(2) of your Rules.

You should move from one direction to the next in ascending order of seriousness, and you should move only if you are satisfied that the direction which you are considering is insufficient in all the circumstances. You should give full reasons explaining why you have reached the decision which you have.

I remind you that you have the power under Section 13H, when you have a power to impose a direction under Section 13F to impose, either in addition to or instead of a direction, a financial penalty order, and you may impose a financial penalty order up to but not exceeding the maximum penalty of £50,000.

When you are deliberating as to whether the particular direction that you are considering is the appropriate direction, you should have in mind the following matters with regard to the public interest - I have dealt with this already - the

protection of the public, the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct in the profession.

In deciding the appropriate sanction you should consider proportionality, weighing the interests of the public against those of the registrant.

Coming to your decision, you should take account of the seriousness of the case and the matters put before you on behalf of the Council, and you should ensure that the determination which you reach is a proportionate response to the facts presented to you and all the matters put before you, and is the lowest direction in the hierarchy that, in all the circumstances, meets the justice of the case.

I remind you finally that any direction you pass or impose should not be punitive but it may have that effect.

Mr Hepworth that is the advice I give unless you wish me to add anything or, more importantly, to correct anything I have said.

Mr Hepworth: No, nothing from the Council. Thank you, sir.

Sir Alistair Graham: The Committee will retire to consider this.

[Hearing adjourned at 12.12 pm]

[Hearing resumed at 13.12 pm]

Sir Alistair Graham:

Sanction

The Committee orders that the name of the registrant be erased from the student register.

The Committee has taken account of the submissions made by Mr Hepworth on behalf of the Council and it has accepted the advice of the Legal Adviser. It has reminded itself that any direction it makes must be proportionate.

It first considered whether it should impose that the registrant's registration should be conditional but it concluded that there was no appropriate conditions that could be devised and that the matter was too serious to warrant the imposition of such a sanction. It then considered whether it should impose an order for the suspension of his registration. The Committee was concerned that the violent conduct involved in this case is incompatible with any registrant in the profession. It concluded that the conduct involved in this case was incompatible with the registrant remaining on the register. It considered that its duty in maintaining public confidence in the

profession required it to impose a direction of erasure. In reaching its decision, it considered that if the registrant had engaged with the process and had presented mitigation to the Committee, this may have permitted it to consider an alternative sanction. But faced with the matters before, it considered that the sanction of erasure was the proportionate and appropriate direction to make in this case. It did not consider that a financial penalty was appropriate in the circumstances of this case.

The Committee went on to consider whether to make an order of immediate suspension of the registrant's registration. It is satisfied that it is necessary in order to protect the public and in the public interest that his registration be suspended immediately.

Mr Hepworth: Sir, just in relation to that, can I confirm that the order of immediate suspension which you have made is the order under Section 13I to cover the period of the appeal and then any appeal which is lodged.

Mr Swinstead: Yes, that is right, yes. Mr Hepworth, it appears that the Committee can go on to make that order as part of its direction on sanction without hearing further submissions from you, and that is the order that it has made.

Mr Hepworth: Indeed, sir. I was just confirming it was under that section, but there is nothing I wish to say in relation to it.

Sir Alistair Graham: That concludes this hearing.

[Hearing concluded at 1.17 pm]