



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

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IO(10)03

AND

LYNDON CLARKE (SD-3865)

Thursday, 17 February 2011

SECOND REVIEW OF AN INTERIM ORDER

SECOND REVIEW OF AN INTERIM ORDER: LYNDON CLARKE (SD-3865)

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Fitness to Practise Committee: Ms Margaret Hallendorff MBE (Lay) (Chair)
Mr Rod Varley (Lay)
Mr Richard Hensley (Dispensing Optician)

Legal Adviser: Mr David Swinstead

Clinical Adviser: Dr Nicholas Seivewright

Hearings Manager: Mr David Henley BEM

For the GOC: Ms Nicole Curtis

The registrant neither appeared nor was legally represented

[Hearing commenced at 09.29]

Ms Hallendorff: Good morning. I am Margaret Hallendorff and I have been elected to Chair today's review of the current interim suspension order. The Committee today is made up of one dispensing optician and two lay members. I will ask the members to introduce themselves and the capacity in which they sit. [Introductions]

To my left is the Council's Clinical Adviser, Dr Nicholas Seivewright, who will provide clinical advice to the Committee on any matters of health which may arise in the course of the Hearing. The Clinical Adviser may accompany the Committee should it sit in private to deliberate.

To my right is Mr 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 your right is Mr David Henley, the Hearings Manager, who will provide administrative support to the Committee. Next to Mr Henley is Mr Charles Nisbet, the transcriber, who will keep 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 room, rather than in 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 a transcript of proceedings to be displayed on the Council's website for public viewing, but when matters of health have been discussed, the determination and transcript will be redacted accordingly. Ms Curtis, do you have any applications?

Ms Curtis: I do, thank you. I represent the Council in relation to this matter. The Committee can see Mr Clarke, the registrant, is neither here nor represented. My first application will be to proceed with the review hearing in the registrant's absence and if I am successful in relation to that, I will then go on to ask that matters be heard in private before going on to the main part of the application itself.

My first application is to proceed in the absence of the registrant. I have for the assistance of the Committee provided some written submissions which I shall go through and I wonder if I could perhaps ask those to be handed out to you.
[C3 is distributed]

Ms Hallendorff: Thank you. Does that cover service of notice?

Ms Curtis: It does. I understand there is also a separate pack Mr Henley has provided and I think the Committee members have seen that.

Ms Hallendorff: We have indeed.

Ms Curtis: I am very grateful. If I may turn to those submissions. In essence we would submit that the matter should proceed in the absence of the registrant this morning. By way of general introduction I can inform the Committee that on Monday, 14 February, the registrant confirmed over the telephone in a conversation with the Council's solicitors that he would not be attending at the hearing today and he was content for the hearing to proceed in his absence. He indicated that it would be difficult for him to attend, as it is difficult to take a day off work.

Against that background, if I turn to the Rules and what they say about whether or not the Committee can proceed. It is Rule 21, which is applicable to interim orders, such as this, by virtue of Rule 19. Rule 21 indicates that

"Where the registrant is neither present nor represented at a hearing the Committee may nevertheless proceed if –

- (a) they are satisfied that all reasonable efforts have been made to notify the registrant of the hearing;
- (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."

Taking those two parts in stages, we would refer firstly to the Notice of Hearing, which was issued by the Hearings Manager, dated 13 December 2010. It is included in the main bundle and I understand the Committee have had an opportunity to look at that. The registrant having consented to that course of action is at page 99, helpfully copied in the Notice of Hearing service pack that Mr Henley provided this morning, at page 2.

If I pause there for a moment just to turn to that small bundle relating to service, the first page sets out the registrant's registered address in Cardiff and one can see, if one turns to page 2, that was indeed the address on which the Notice was served. It was served by Special Delivery and also by email and you can see the covering email from Mr Henley at page 4, the Notice itself at page 5 and at page 6 the Royal Mail Track and Trace document which does, if I may suggest, someone had signed in the name L Clarke to indicate that it has been received on 14 December 2010.

In addition, on 1 February of this year, solicitors from the Council wrote to Mr Clarke enclosing a copy of the bundle for the hearing and reminding him of the date of his hearing. As I have already indicated, on 14 February 2011 he spoke with me on the telephone to indicate that he was aware of today's hearing and that he had received the bundle and that it would be difficult for him to attend because it would be difficult for him to take a day off work. I have prepared an attendance note of that. It is on its way to the Council, so if the Committee do wish to see that attendance note of the call then, of course, I am happy to provide it. What we say in relation to that is that the Committee may, therefore, be satisfied in relation to that first part of Rule 21 that all reasonable efforts have been made to notify the registrant of the hearing.

If I turn to the second part of the rule, whether you are satisfied that it is in the public interest to proceed, I have set out here the criteria that were referred to in the House of Lords judgment in the case of *R v Jones* [2002] UKHL 5, which was a criminal law decision. The House of Lords there upheld a number of criteria, which had been listed by the Court of Appeal as being relevant to the consideration of proceeding in the absence of the defendant in a criminal trial on indictment. That approach has been adopted in relation to regulatory proceedings. I pause just to note that of course perhaps that authority on those criteria may be more pertinent to a matter which is due for a substantive hearing where the registrant has not appeared and the ultimate issue is faulty, determined by a committee. Nonetheless I will submit that it may be helpful when determining whether it is in the public interest to proceed with an interim review order. It may be of assistance to look at those criteria, in particular, the fact that the Court said that tribunal ought to proceed with caution and care, but if the defendant is of full age and sound mind, with full knowledge of the forthcoming trial voluntarily absents himself, there is no reason, in principle, why the court should not proceed in his absence.

Looking at those factors which were set out in the *Jones* case, the first one was what the circumstances and nature of the defendant's behaviour in absencing himself were and whether the behaviour was deliberate and

voluntary and, as such, plainly waived his right to appear. We would submit that in this particular incident the registrant's absence is truly voluntary: he knows about the hearing and he has chosen not to attend, albeit it an indication that it is difficult to take a day off work, we would submit that is, indeed a voluntary decision on his part. There has been no suggestion, for example, from him in writing that he would like the matter to be moved to a more convenient date.

Secondly, the likely length of any adjournment. In relation to this Committee it, of course, has not the power, unlike the criminal courts, in *Jones*, to compel the registrant's attendance, so the likely length of any adjournment could not be realistically assessed, given that he may well choose to absent himself from any future hearing.

Whether the defendant, though absent, wishes to be legally represented, he has certainly not indicated, as far as we are aware, that he wishes to be legally represented and the Committee would perhaps note that the criteria in *Jones* were drawn up against a context of criminal proceedings, where legal aid is widely available and is not in relation to these proceedings.

The fourth criterion is not, I would suggest, relevant here. The fifth is the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him. It may be that the registrant may be prejudiced to some extent in not attending in relation to this matter and not presenting submissions, but in relation to that we would make two points. Firstly, any prejudice is going to be much less severe, given that this is an interim hearing, rather than a final hearing determining his fitness to practise, and secondly the prejudice, if any, is entirely of his own making as he has voluntarily absented himself. We would say he could have written submissions and sent them through for the Committee's consideration in order to attempt to minimise any prejudice, but he has not done so.

The next factor is the risk of a jury reaching an improper conclusion about the absence of a defendant. We would submit that is not relevant here and, in any event, the Committee should be considered to be more akin to a judge than a lay jury.

The seventh is not upheld. The eighth is a general public interest and the particular interest of victims and witnesses that a trial takes place within a reasonable time of the events to which it relates and the Council would submit that there is a clear public interest. Here it tallies with the Rule itself in this matter being dealt with as soon as possible, particularly given the submissions that the Council would make and that we have made in the past in relation to this interim suspension order, that it is necessary for the protection of members of the public and indeed in the public interest, for the interim suspension order to continue in the terms in which it was imposed in March of last year.

The final two factors listed by the court in *Jones I* would suggest are not relevant to this Committee, but in all the circumstances they are set out, we would invite the Committee to consider that firstly the registrant has indeed been notified and all reasonable efforts have been made to notify him of the hearing and that it would be in the public interest to continue with this morning's hearing in his absence.

Ms Hallendorff: Do you have written information from the Legal department here of the telephone conversation with Mr Clarke?

Ms Curtis: It is an attendance note of the call between Mr Clarke and me.

Ms Hallendorff: Sorry, I didn't realise.

Ms Curtis: That's quite alright and I do have an attendance note; it is on the computer system. I have asked for it to be emailed over and it should be here within the next few minutes, so I can certainly hand that through to the Committee if you would like to see that.

Ms Hallendorff: It is quite important that it is here, for the record. Thank you. Do you feel we should discuss it? [*Confers*]

Mr Swinstead: Do you want some advice from me?

Ms Hallendorff: Yes, please.

Mr Swinstead: Can I just raise an issue? Ms Curtis, it is not perhaps relevant to this case so much because this appears to be at page 6 of the service bundle, there is a signature which appears to be L Clarke, you have also made submissions about your conversation with him, but if one looks at that last page, page 6, there is a reference number there to the particular delivery of that letter. It doesn't appear in the bundle, but there is the corresponding document which demonstrates that on posting that was the number given.

Ms Hallendorff: There is one there.

Mr Swinstead: Sorry, forgive me; I have just had one pointed out.

Ms Hallendorff: On page 2; above Mr Clarke's name is the reference number.

Mr Swinstead: I apologise, thank you. That is my fault. I knew it would be there somewhere and I was expecting it to be pointed out to me because I was pretty sure I couldn't see it. Thank you.

Continuing with my advice, Rule 21 is the relevant rule and as Ms Curtis has said you must firstly be satisfied all reasonable efforts have been made to notify the registrant of the hearing and, Madam, you have the service bundle with regard to that. Rule 21(b) provides that you may proceed to hear the matter in the absence of the registrant if you are satisfied that it is in the public interest to do so and you have heard from Ms Curtis about her conversation

with the registrant that he would not be attending and he was content for it to proceed. In those circumstances and, I would suggest, more generally, specific issues raised in the case of *Jones* are, I would suggest, probably more relevant to a final or substantive hearing and are less relevant to your consideration today, bearing in mind that this is an application for the continuation of an order that has already been made and that it is in a time limit that it must be reviewed and considered. Further, that your Rule, in simple terms, provides the registrant with the safeguard that you may only proceed if you are satisfied in the public interest having considered any reasons that you have received for the absence of the registrant. Madam, that is the advice, subject to anything Ms Curtis would wish me to say.

Ms Hallendorff: Good. We are content that the proceedings should continue in the absence of the registrant.

Ms Curtis: I am grateful. I can attempt to fetch that note now and I can perhaps search for it later.

Ms Hallendorff: That's fine.

Ms Curtis: I then turn to my next application, which would be for the matter to be heard in private. Again, I have made some written submissions both in relation to that and the application in general terms and I wonder if I can have that handed to the Committee as well, please? [*C4 is distributed*]

Ms Hallendorff: We will call the main bundle, which has Penningtons' name on the front, as C1. For the second bundle, which is the larger bundle, C2. We will call your first application C3 and the second application C4.

Ms Curtis: I am sorry. I am not sure I know which is C1 and C2.

Ms Hallendorff: C1 is the one you produced with the plastic cover.

Ms Curtis: The main hearing bundle. C2 was the service bundle. I understand that the Committee has also seen a copy of the transcript of the last review hearing, which was in September 2010, which was not included in the hearing bundle itself.

Ms Hallendorff: That's right.

Ms Curtis: May I just confirm again for the record that the Committee has had an opportunity of reading through the hearing bundle? I see people nodding; I am grateful. If I could turn to my submissions. Just by way of background, as the Committee will be aware from the bundle and the transcripts that they have seen, on 18 March of last year the Committee directed that there should be an interim suspension order in relation to the registrant for a period of 18 months and that decision is set out in the bundle on pages 20 to 21. I don't ask you to turn to it, but it is, of course, there for reference if you do require to look at it. That order was to be reviewed within six months. On 10 September 2010 at a review hearing the Committee directed that an interim

order should continue, again to be reviewed within six months and that is that set out in a separate transcript.

It is the Council's submission today that the Committee direct that interim suspension order continue from today's date. As I have indicated I would ask that the hearing continue in private from this stage. On both those previous occasions, on 18 March and on 10 September last year, the Committee decided that as there were some matters which might touch upon the registrant's health, it would be prudent to proceed in the absence of members of the public in accordance with Rule 23(3) of the Rules. I understand it may be academic here, but for the sake of the transcript when it is prepared, I do make that application. I set Rule 23 out there, which indicates that hearings should be in public, but the Committee may determine that the public should be excluded from any part of the proceedings and the factors to be considered there, firstly the interest of the maker of the allegation, secondly the interest of any patient or witness, thirdly the interest of the registrant, or fourthly in all the circumstances, including the public interest. Section 23(3), which is, perhaps the most pertinent part of that Rule is that:

"Subject to paragraph (4) the Fitness to Practise Committee shall sit in private where they are considering the physical or mental health of a registrant."

23(4) goes on to provide that:

"Where the Committee are considering matters referred to in paragraph (3) -"

In relation to the registrant's health;

"- they may meet in public where they consider it would be appropriate to do so, having regard to the matters set out in 2(a), (b), (c) and (d)."

Of course you may, at any time, deliberate in the absence of the parties, the representatives and the public. It is Rule 19 that makes it clear that that Rule 23 and the principles therein are applicable to applications such as this interim order and we would submit very simply that given that there do continue to be matters pertinent to this application which touch on the registrant's health, as the Committee will have seen in the bundle in previous transcripts, that it would be appropriate and in the public interest to proceed in private. That is the application I make at this stage.

Ms Hallendorff: Does our Legal Adviser have any advice?

Mr Swinstead: No. You have been referred particularly to Rule 23(3) and obviously must consider that in light of the matters put before you by Ms Curtis and, indeed, what you have read in your bundle concerning the case as a whole and the matters which consider the physical or mental health of the registrant.

Ms Hallendorff: Thank you. We are agreed the matter should continue to be held in private.

[Hearing in camera]

[Hearing in public]

Ms Hallendorff:

Determination

The Fitness to Practise Committee reviewed an 18 month interim suspension order in respect of Lyndon Clarke made on 18 March 2010 and which was reviewed on 10 September 2010.

Service

The Committee is satisfied that all reasonable efforts have been made to notify the registrant of the hearing. The Committee further determined that it would be in the public interest for the hearing to proceed in the registrant's absence.

The Committee considered all of the submissions on behalf of the Council and the history of these proceedings in coming to that decision.

Private hearing

After hearing submissions from the Council, the Committee agreed to hear this matter in private.

Decision

The Committee took account of the submissions made by Ms Curtis on behalf of the Council and accepted the advice of its legal adviser.

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

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

In December 2009 it came to the Council's attention that the registrant had also received a fixed penalty notice for disorder in October 2005 and that he was then

(December 2009) on bail in relation to an allegation of causing actual bodily harm. On the 21st December 2009 he pleaded guilty to the charge of assault by beating and was sentenced on 19th February 2010 to a Community Order and made the subject of a Restraining Order. The Committee has seen a summary of the facts relating to this case which is one of domestic violence following alcohol consumption.

All of these circumstances led to the Committee to be satisfied that there are substantial concerns over the safety of his continuing to have contact with the public in pursuing his professional training.

The Committee considered the other issue of public interest and confidence in the profession and found that this conduct is not compatible with the standards expected by both the profession and the public.

The Committee noted that the registrant has now received an appointment for a health assessment which will take place on the 3rd March 2011. This may well assist in resolving this issue at a future hearing.

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

Thank you. That concludes the hearing.

[Hearing concluded at 11.06]