

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

F(11)19

**GENERAL OPTICAL COUNCIL
AND
LYNDON CLARKE (SD-3865)**

**SUBSTANTIVE HEARING
Tuesday, 24 January 2012**

SUBSTANTIVE HEARING: LYNDON CLARKE (SD-3865)
Tuesday, 24 January 2012

Fitness to Practise Committee: Lady Margaret Wall (Lay) (Chair)
Mr Nigel Roberts (Dispensing Optician)
Mrs Geraldine Huka (Lay)
Mr Duncan Counter (Dispensing Optician)
Dr Dozie Azubike (Lay)

Legal Adviser: Mr James Watson QC

Hearings Manager: Mr David Henley BEM

For the Council: Ms Sarah Harris

The Registrant was neither represented nor present

[Hearing commenced at 09.50]

Lady Wall: Good morning, 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. I will ask the members to introduce themselves and the capacity in which they sit.
[Introductions]

To my right is James Watson 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 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 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 for the proceedings to be displayed on the

Council's website for public viewing, but where matters of health have been discussed, the determination and transcript will be redacted accordingly.

The matter today has been listed as a procedural hearing, but I understand that the parties have agreed that it can proceed directly to a substantive hearing, so unless anything has changed, then I will announce the procedural as having commenced and we now move to the substantive element of the hearing.

I assume that no application is being made at this point?

Ms Harris: Madam, in relation to proceeding in absence, there will be an application.

Lady Wall: But there will be no other application.

Ms Harris: Madam, no.

Lady Wall: Right, thank you.

Mr Henley:

Allegation

The Council alleges that in relation to you, Lyndon Clarke (a registered student dispensing optician):

1. On 29 October 2005 you urinated in the street, for which you received a fixed penalty notice for disorder.
2. On 9 March 2007 at Cardiff Magistrates' Court you were convicted of driving a motor vehicle after consuming so much alcohol that the proportion of it in your breath, namely 88 micrograms of alcohol in 100 millilitres of breath exceeded the prescribed limit contrary to Sections 5(1)(A) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988.
3. On 19 February 2010 at Barry Magistrates' Court you were convicted of assault by beating (battery) contrary to Section 39 of the Criminal Justice Act 1988.

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

- a) conviction (in relation to paragraphs 2 and 3 above)
- b) misconduct (in relation to paragraph 1 above)

Lady Wall: We will move now to the opening statements. We invite you to present evidence that all reasonable efforts have been made to notify the Registrant and consider whether the Committee is satisfied that it is in the public interest to proceed.

Ms Harris: Yes, Madam. Perhaps I can begin by checking that everyone has all of the papers before them. First is obviously the service bundle which I am sure that the panel have and that runs to some eight pages. There is also the General Optical Council bundle which starts with small Roman numeral i and moves through to page 57. The reason that I check that is because there was an addition to this bundle of the small Roman numeral numbers so I wanted to check that the panel members do have those documents within their bundles.

Lady Wall: Right.

Mr Watson: I think that not only do they have that bundle with i to iv, followed by pages 1 to 57, but they have all been labelled C1 already.

Ms Harris: I am grateful for that indication.

Lady Wall: Do the Roman numeral pages indicate anything different from what has been sent out previously because that is the copy which I have read.

Ms Harris: They are essentially the questions to Registrant and the reason why they are in small Roman numerals is because the pagination had already started at page 1 and they are simply documents which the panel members needed to have before them: they are the questions to Registrant and the letter from the Registrant.

Lady Wall: Which are the additional pages?

Ms Harris: Roman numerals i, ii, iii and iv.

Mr Watson: So those first four documents have been added to the original bundle.

Ms Harris: That is right.

Lady Wall: Right, I am with you.

Ms Harris: The only other documents are those which the Registrant has invited the panel to consider, which consisted of two reports and I understand those have been handed up to the panel this morning.

Lady Wall: Yes, and these are the same as the ones which have been emailed to us, I hope and therefore read by panel members in advance.

Ms Harris: The only other document which I wish to hand up to you, Madam – and the reason for my doing so while I am in the hearing rather than before coming in is to explain what they are – are the signed or certified copies of the memorandums of conviction. These are not new documents: you will see in your General Optical Council bundle at number 4, the Memorandum of Conviction relating to the 2007 drink-driving offence and at number 7, the Memorandum of Conviction for the assault. They are essentially exactly the same, but they have been certified by the Court as being a true copy. I hand those up to you with the explanation that they are no different from those you have, other than that they have been certified and I can confirm that they have also been sent to Mr Clarke.

Lady Wall: Thank you. We will designate these C2.

Ms Harris: I am grateful. Madam, moving then onto service, if I can ask you to look at the service bundle you will note that there is a screen print of the Registrant's entry in the Register at page 1 – you can see the address at the top right of that page, it is an address in Cardiff. The notice of inquiry dated 18 November is at pages 2 to 4 and the letter to the Registrant which is dated 18 November is also at pages 5 to 6. Perhaps more importantly for your purposes is page 7 which is a copy of the Royal Mail 'track and trace' which has electronic proof of delivery of the item to the registered address. In my submission, in this case, the papers have been properly served. The panel should find, in my submission that there has been a good service in this case.

Lady Wall: We should ask whether you have had any response.

Ms Harris: Madam, in this case we have had the questions from the Registrant which are at pages ii and iii and we have received the letter which is at page iv states this:

“Dear Sarah Harris

After reading the Proposed Notice of Directions I can confirm that I am in agreement. I also confirm that each of the allegations numbered 1-3 in the proposed notice of directions are true. As far as I can tell I have no objections to the bundle of documents.

I am not providing any evidence with this letter to be placed before the panel, as I am assuming you have access to all the necessary documentation, including two separate psychology reports. I'm happy with what both Doctors concluded.”

In addition to that, Madam, I can say this: given that there was perhaps a lack of response initially, I in fact made contact with Mr Clarke personally. Without wishing to give evidence about that, I can confirm that I invited him

to consider very carefully the documents before he responded as he did, as to there not being an objection. So I can confirm that he has had those.

Lady Wall: Thank you and can you give us some idea as to the date when you did that?

Ms Harris: Madam, I can. I spoke to Mr Clarke on 21 September, 1 November and 16 December, so on three occasions.

Mr Watson: For clarification, may I ask whether 16 December would have been before receipt of his letter at iv?

Ms Harris: That is absolutely right.

Mr Watson: So that was on email as well as being sent?

Ms Harris: Yes.

Mr Watson: So when he says on the first line, 'Proposed Notice of Directions', is that, in fact, the Notice of Inquiry which we see in the service bundle?

Ms Harris: Sir, no. As you will know, there was going to be a procedural hearing separately which was listed 2 November. I drafted some proposed notices of direction and it is to that which he refers there. But I can confirm that when the conversation was had about whether he objected to the bundle, it was in reference to the hearing bundle which had been sent both as part of the procedural hearing bundle and the final hearing bundle, and those bundles were the same.

Lady Wall: In terms of the letter dated 16 December, was this written following your telephone conversation?

Ms Harris: Madam, yes. I invited Mr Clarke to commit to writing a number of questions that I had asked of him and, in my submission, it would seem that his answers are within that letter which was post- the conversation that I had with him.

Lady Wall: Thank you. That is very satisfactory. Do any of the other members of the panel have any questions about the proper service? [*No further questions*]

Mr Watson: Perhaps for final clarification, I know that Mr Henley has sent the attached papers for this hearing on page 8 to the same email address as the Registrant's entry on page 1. I presume that there has been no, as it were, automated response indicating that that has not been received? In other words, the assumption is that that email was received?

Ms Harris: I have corresponded with Mr Clarke via that email address, as and until more than two weeks ago.

Lady Wall: Does that satisfy everybody that Mr Clarke has been properly informed of today's proceedings and we can safely go ahead without any prejudice to him?

Mr Watson: I only intervene for the purpose of the record because the Committee is sufficiently experienced to have these guidelines already in its mind. For the record, I note that service of documents is dealt with under Rule 65 and if you are satisfied that a notice or document has been proved by confirmation of posting, then that will suffice.

Your power to proceed in the absence of the Registrant is Rule 21 and that requires you first to be satisfied that all reasonable efforts have been made to notify the Registrant which is the issue which has just been discussed. Secondly, Rule 21, asks you to decide whether, having regard to any reasons for absence which have been provided, you are satisfied that it is in the public interest to proceed. The Committee is, I am sure, well aware of the case of *R v Jones* [2002] 2AllER 113 and the matters set out: the balance of public interest as against any reasons which have been provided. In this case, you may feel perfectly satisfied that the Registrant has been given notice. That is a matter for you. The documentation is before you and you may also be satisfied that no specific reason has been advanced as to why you should not proceed. Indeed, it would appear, from the letter at page iv, that the Registrant is expecting a panel to have regard for material which he has already provided. That is all that I tender for the record.

Lady Wall: Thank you. Are we then satisfied that, in terms of the public interest and the particular questions in *Jones* that we can proceed in this matter and that it is in the public interest to do so?

Dr Azubike: Madam, can we break and discuss it *in camera*, is that possible?

Lady Wall: Yes, perhaps you could all withdraw.

[Hearing adjourned at 10.03]

[Hearing resumed at 10.10]

Lady Wall: The Committee has had further discussion but we have reached the same conclusion that we had already reached. Thank you, so would you like to go ahead?

Ms Harris: Yes, Madam, before I do, I will respectfully submit that, given that Mr Clarke is not here, although of course each of the stages which the panel will need to consider will be considered separately, but that I deal with all of those stages in my submissions in one go, rather than separating them out.

Obviously subject to the learned Legal Adviser, that is my respectful submission that I deal with it in that way.

Lady Wall: This suggestion was made to the panel before we started. Perhaps you would like to put your advice on record?

Mr Watson: The panel has a discretion as to how it may proceed. I take it, from the way in which the matter has been opened in terms of documentation that, in effect, both the submissions and the body of evidence which will be called on the first stages – that is determination of facts, determination of misconduct (in shorthand) and determination of whether impairment arises – those three stages will attract the same submissions and the same body of evidence. On that basis, it seems to me entirely within the Committee's discretion to decide to deal with those three stages as it were in one phase, with the proviso that when they retire, they give each of those questions and stages separate and successive consideration before moving onto the next. If, and only if, the Committee members find that those three stages amount to a determination which takes the hearing further – to the territory of sanctions – then that stage would have to be a separate stage.

Lady Wall: Thank you for your advice. Are we content to hear those stages together and then take further advice and consider before we move onto the following stages? [*Committee agreed*]

Ms Harris: Thank you, I am grateful. The Committee, in this case, is being invited to consider the fitness of a student Registrant, Mr Lyndon Clarke, to undertake training as an optometrist or dispensing optician. The particulars of the allegation are at page i and I would invite the panel to have that open as I go through.

The panel members will, of course, be more than aware of the grounds upon which they can find fitness to practise impaired. It is at Section 13D of the Opticians Act 1989:

“The only grounds upon which the fitness to practise of a registered optometrist or registered dispensing optician, or the fitness to undertake training of a student registrant, is ‘impaired’ for the purposes of this Act are:

- (a) misconduct;
- (b) except in the case of a student registrant, deficient professional performance;
- (c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence, which if committed in England and Wales, would constitute a criminal offence”.

I do not propose to go through the rest as they are not relevant to our purposes. However, the reason why I draw the panel's attention to that is this: if we look at the allegations in turn, in relation to particulars 2 and 3, which are conviction matters, those are in fact grounds in and of themselves that a panel can – if they properly consider – find fitness to practise currently impaired. In relation to particular 1, the fixed penalty notice, that is not a caution or conviction and therefore there will be the stage of whether that amounts to misconduct. So, in relation to particulars 2 and 3, there is perhaps the stage of whether that amounts to misconduct leapfrogs, so to speak, as a ground in and of itself, and is a conviction or caution of British Isles.

I hope that makes sense. They are under separate grounds, hence why, at the bottom of the allegations that you have, 'by virtue of your conviction' in relation to 2 and 3 and 'by reason of misconduct' in relation to paragraph 1.

Lady Wall: Right.

Ms Harris: In terms of dealing with the first stage, whether the factual particulars, as outlined, have been proven, in relation to facts, it is the General Optical Council which brings this case and it is the Council which has to prove it. The burden remains with them. The standard is the civil standard which is the balance of probabilities. That is, whether it is more likely than not that the facts, as outlined in the particulars, occurred as they are outlined.

By way of background, Mr Clarke sent the Optical Council his application to be registered as a first year student dispensing optician on 24 June 2009 and the panel has that application at page 53 of their bundle.

On this application, Mr Clarke declared a drink-driving conviction dated March 2007. On 21 October 2009, the Registrar invited Mr Clarke to undergo a health assessment prior to deciding whether to admit him to the Register. The Council received a report in November 2009 from Mr Clarke's GP stating that he was satisfied that there was no evidence of alcohol abuse or any other drug related abuse and therefore Mr Clarke was duly registered as a student dispensing optician on 17 November 2009.

Further investigation by the Fitness to Practise department with the South Wales Police revealed that Mr Clarke in fact had three matters of interest to the police and the letter that they sent to the Council is at page 1 of your bundle.

Dealing with each of those in turn, one of those matters was a fixed penalty notice which was given to Mr Clarke by the police on 29 October 2005 after he was seen by officers to urinate in the street at 12.55 am. The ticket in relation to this is at page 3 of your bundle, Madam and at page 4 you are assisted with the details from the officer outlining the circumstances. He says this:

“On Saturday 29 October 2005, I was on duty in full police uniform as the passenger of a marked police car. At 00.49 hours I was travelling along Church Street. At this time, I saw a male, who I know now to be Lyndon Clarke with his penis exposed, urinating. I got out of the police car and spoke with Clarke. Clarke was drunk. I then issued Clarke with a penalty notice for disorder. I then said, ‘I am reporting you for being drunk and disorderly’. I cautioned Clarke to which he gave no reply.”

It is dated and signed there. That is the fixed penalty notice matter to which particular 1 pertains.

The second matter was a conviction on 9 March 2007 for drink-driving which had, of course, been declared. Mr Clarke had pleaded guilty to this offence at Cardiff Magistrates Court. The level of alcohol in his blood was 88 micrograms in 100ml, the legal limit being 35 in 100. He was sentenced to a 12 month community order with an unpaid work requirement of 100 hours and was disqualified from driving for 24 months. The Memorandum of Conviction for that is at page 7 and I have also handed you this morning a certified copy of that. That is the matter to which particular 2 pertains.

Thirdly, and lastly, this: the police made the Council aware of a conviction for battery on 19 February 2010 relating to a domestic incident, whereby it was alleged that Mr Clarke had assaulted his girlfriend on 8 November 2009. The Memorandum of Conviction in relation to that matter is at page 28 of your bundle. In addition you are also assisted by the summary on the MG5 document which starts at page 20 which is the police summary of the incident outlining the circumstances of the offence. I know that the panel will read that in full and I do not propose to read all of it but I will very briefly outline the circumstances of that event:

“At 01.37 in the morning on Sunday 8th November 2009, Officers were called to [an address] following a report of a violent domestic ongoing at the address by a neighbour and a witness.

On arrival [the complainant in this case, with whom Mr Clarke had been in a relationship for the past three years], was on the doorstep and informed officers that she was too afraid to go back into the address as her boyfriend had assaulted her.”

I will continue to summarise the details of that police summary: officers entered that address and could see that the complainant was very distressed and had reddening to her throat, face and arms. She stated that when the defendant – or Mr Clarke – had come home, his mood had changed over her wanting to lock the front door and a verbal argument ensued. That escalated and the defendant grabbed the victim around the

face and body and prevented her from walking away from him. The assault moved onto the landing and stairs and the complainant stated that he had slapped her across the face and hit her repeatedly several times with a clenched fist to the top of her head. He also pushed her about and pinned her down to the floor, causing her to hit her head against the skirting board. Throughout the incident it was said that the defendant shouted in her face and stopped her from moving away from him.

Obviously, of course, that is a summary. The panel will only have read the police report but also the statements of the complainant herself and the panel is also assisted by Mr Clarke's interview so you are able to see what he said in relation to the incident. I will not read through that. In summary, he essentially states that it was, to some extent, in self defence, but of course the panel will read that in full.

Lady Wall: Yes, you are aware, of course, that these papers were sent to us in advance and that is always very helpful because we can then read through the details, so it is only really necessary for you to address us on the main issues.

Ms Harris: I am grateful for that indication, Madam. I will move on, then, to deal briefly with Mr Clarke's responses to date in relation to the factual particulars. Mr Clarke has not, it is fair to say, in substance commented on the matter, save to say that – by way of letter, dated 28 August 2009 – he accepted that he received a 24-month ban from the drink-driving offence, stating that it was 'a one-off offence and one that would never happen again' and that is at page 46 of your bundle. He also wrote to the Council on 8 January 2010 confirming that at that stage he was charged with 'common assault and not ABH', and that document is at page 43.

More importantly, Madam, for your purposes are the admissions which are within the questions to the Registrant document. You will note that Mr Clarke circled 'Yes' and, in addition, he has stated in his letter of 16 December at page iv, that he accepts the factual particulars.

Moving on to the second limb of the test in relation to particular 1, the panel will have to decide whether the facts, as found proved – if found proved – at particular 1, amount to misconduct. That is not a matter of proof. That is a matter for the professional judgement of this panel. There is no burden or standard of proof in relation to that. There is no definition of misconduct. It is simply an act or omission which falls short of what is proper in the circumstances. It can be deliberate or it can be reckless. Now, of course, the actions in this case were not in the course of Mr Clarke's profession. However, a panel will have due regard to the reputation of the profession. Even as a student, members are bound by the Code of Conduct, essentially ensuring that your conduct – whether or not connected to your professional practice – does not damage public confidence in the profession. Whether that amounts to misconduct is a matter entirely for you.

In relation to impairment, again it is a matter for your professional judgement. The test for impairment is drafted in the present tense: 'is the practice currently impaired?' so there must be some negative subsisting impact. As the Court of Appeal noted in the case of *General Medical Council v Meadow* [2007] QB 462, the purpose of Fitness to Practise proceedings is not to punish the practitioner for past misdoings, but to protect the public against the acts and omissions of those who are not fit to practise. The panel thus looks forward and not back. However, in order to form a view as to the fitness of a person to practise today, it is evidence that it will have to take account of the way in which the person has acted or failed to act in the past.

Now, in considering fitness to practise, I would submit that the panel needs to consider two separate components: the first is this, the personal component. That is, the current competence and behaviour of the individual registrant. Now, in this case, at this stage, the panel may be in some difficulty because you have not heard from the Registrant. He has not engaged with the process save to the very limited extent that you have seen within the papers. You are unable to ascertain his attitude in relation to the events nor do you know whether he has shown any insight into his actions or indeed any remorse in relation to them, save for the letter to which I referred earlier.

The panel is also not assisted with what in fact is going on now, currently, or what has been done since in terms of attempting to remedy behaviour. The panel members simply do not know.

The second component is the public component. That is this: the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession.

I very briefly and lastly draw the attention of the panel to their guidance document at page 18 which deals with the definition of impaired fitness to practise and over the page at page 19 there is a quotation from the case of *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council & Paula Grant* [2011] EWHC 927 (Admin) which in paragraph 101. In that case, the High Court said this in deciding whether fitness to practise is impaired:

"The Committee should have asked themselves not only whether the Registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the Registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case."

In my submission, what that means is this: the panel cannot take a simplistic approach and say that since the matters in question the Registrant has learned his or her lesson. There is a consideration of what the public confidence would be in the profession if no finding were made. Again, it is entirely a matter for your professional judgement.

Unless I can be of any further assistance in terms of clarifying anything or answering any questions, I do not propose to say anything else.

Mr Watson: I would like to ask for clarification on two matters. First, bearing in mind the fact that the Registrant is not present and we are proceeding in his absence, can you assist the Committee as to how they should approach item 2 on the chart, that is the drink-drive conviction, bearing in mind that that was declared to the Registrar when applying for registration in June 2009 and presumably there was a determination at that stage that he should be allowed on the Register, having declared what appears to be exactly the same incident prior to registration?

Ms Harris: I can confirm that that is exactly the same conviction that he has declared on the form. I will find the relevant document and page.

Mr Watson: At page 51, the Registration team acknowledge the declaration for the application for registration and they indicate, in that letter on page 51, that considering the application:

“Please provide with me with a statement setting out the nature of this offence and a copy of the conviction documentation.”

There is no suggestion that that information was not provided prior to the decision being made to register him. For that reason, I invite you to ask the Committee how they should approach that matter, given that it might be said that the question of whether or not his fitness to practise, or his fitness to be on the Register in the first place, had been determined by the Registrar, in that respect.

Ms Harris: Perhaps I can suggest this: while that is absolutely right that, of course, Mr Clarke was admitted to the Register, what the panel must consider today is that that piece of the jigsaw being now part of a wider picture there are, of course, two other matters which the panel will need to consider, whether at the fitness to practise stage, perhaps in and of itself not being something that prevented Mr Clarke from being on the Register, the panel will have to consider that in conjunction with both of the other matters which have been placed before them. While in and of itself it cannot be the basis of a fitness to practise restriction, simply on that particular, it can, in my submission, form part of the background information to a course of conduct which comprises all three of those particulars. I hope that I have put that fairly but I am more than happy to be corrected by the learned Legal Adviser if he feels that approach is an unfair one.

Mr Watson: You would presumably want to draw attention at page 20 and 21 to the summary of evidence of the later matter that occurred after registration, that is to say the assault and battery which occurred in November 2009. It seems that was after the registration process and decision and the conviction which was certainly a year after. Albeit that is of a different kind of behaviour from that at paragraph 2, it appears to have involved a degree of intoxication as well; there is that similarity. That is at page 21, in the second paragraph, the evidence of the officer was that ‘the defendant sustained no visible injuries and was intoxicated’.

Ms Harris: Sir, yes, as was the other incident that emerged, the fixed penalty notice.

Mr Watson: I am sorry to intervene but the other matter over which I wanted clarification was this: in your opening submissions, clearly submissions on behalf of the Council, I do not think that you have dealt expressly with the Registrant’s documents. My understanding of the matter, in the way in which you opened it, was that the Registrant would wish these documents to be taken into account by the Committee. Clearly they cannot have a bearing on the facts but they may have a bearing on the issue of misconduct and certainly on the issue of impairment.

Ms Harris: Sir, yes, they were not documents relied on by the Council, they were of course served on Mr Clarke in unused material and he wished them to be before the panel. They were compiled during the process by which this matter was going to go down the health route.

Mr Watson: To ensure that we are not at cross purposes, what I am fishing for is this: I am aware, and the panel will be aware, from page iv of the bundle that the Registrant said that he assumed,

“That all necessary documentation was available, including two separate psychology reports. I’m happy with what both Doctors concluded.”

I am fishing really for whether or not there is any other submission or point which you are aware that the Registrant would wish to make in relation to these reports?

Ms Harris: Sir, no.

[Pause, Committee confers]

Lady Wall: We would like to put to you that in addition to the three allegations, the specific incidents with which you are dealing – the penalty notice, the excess

alcohol and the assault – that following the assault, the Court also made a restraining order which is still actually in force, until 19 February.

Mr Watson: The Chair is looking at C2 and on the right hand side the penalty, the results of the Court Orders which are the same as the memorandum, as you have said. The Restraining Order made in February 2010, following the plea of guilty in December, the Order has been made to last until 19 February which means that it has three or four weeks to run.

Ms Harris: Sir, yes.

Lady Wall: I mention this because the Court has obviously made that Order, in order to protect the victim. It is not necessary to make such an Order following an assault and it does indicate that they perceived that there was still a degree of risk from him, from which they thought that she needed protection until the end of February. That goes towards the quality and seriousness of the assault. It is obviously not a punishment, but it is a consequence.

Are there any other questions?

Dr Azubike: There are two matters on which I require some clarification. In terms of the fixed penalty notice in 2005; there is a Code dated 2005, so the appropriate Code which applies to Mr Clarke is the 2005 Code – is that correct?

Ms Harris: That is correct.

Dr Azubike: Is he required, under that Code, to declare that fixed penalty?

Ms Harris: The matter of whether to declare that fixed penalty on the form was, in fact, before the Investigating Committee and has not been referred on to this panel. The reason for that is this: the finding of that panel was that the form was insufficiently clear as to whether that needed to be declared. So I would suggest that the particulars, as outlined, are simply the matters which the panel needs to consider, whether he should have declared that is not a matter before this panel and I hope I have explained why.

Mr Watson: I would intervene to say that this panel should approach this matter on the basis that he had no obligation to declare it. Page 55 of the application form which he filled in asked whether he had ever been convicted or cautioned in relation to a criminal offence and, as has been opened before you, a fixed penalty notice does not amount to a conviction in law. Although it has not been addressed – there is no need – I think that it would also be conceded that neither does it amount to a caution. The three creatures are very separate entities. So, please approach the matter on the basis that he declared on the form all that which he was obliged to declare.

Ms Harris: There is no suggestion that he failed to declare that which he should have done.

Lady Wall: Thank you, are there any other questions? [*No further questions*]

Could we ask our Legal Adviser to advise us?

Mr Watson: I tender advice to the panel as to the way in which they should approach the three successive determinations which they have to make. I have invited the panel to hear these three determinations together. In reality, what the panel is doing, under Rule 50 of the Rules, is to determine its findings as to fact and as to whether or not the allegation is proven and they are doing that in – as it were – having heard one body of evidence. As I remind you, I would advise that you determine each of the questions successively and separately.

As to the facts, it has been correctly indicated in opening that the burden of proof lies on the Council and that the standard of proof is the civil standard to the standard of probability. It is an unvarying standard. It does not vary in relation either to any question as to the seriousness or otherwise of the charge. It is a single standard. As to how you should apply it, although the facts are ultimately a matter for you, you may take into account, in determining whether the facts are proven the following considerations.

First, whether or not they are disputed and, in relation to that, I advise you that you are entitled to take into account the fact that page ii and iii, the factual particulars – which as I have understood the matter in the way in which it was opened – the factual particulars have remained the same throughout the process of the procedural hearing and now the substantive hearing. The Registrant indicated that he admitted the particulars on two successive occasions. You may take that into account.

If you are satisfied that the facts, set out in the charge, at paragraphs 1, 2 and 3 are proven, then you will go on to consider whether or not you consider that there was misconduct in relation to the first paragraph. Misconduct does not mean any error or mistake or falling short, but – in the context of the deliberations of this Committee – it connotes misconduct which has a bearing on the fitness to practise of a registrant. It is therefore serious misconduct to which you should be having regard. If you conclude that paragraph 1 – because this is the only paragraph to which misconduct attaches – amounts to misconduct, then you may go on to consider the question of impairment. You would already – at this stage – have found both the facts proven and the convictions proven.

In determining impairment, you will have regard, first of all, I would advise you, to your own guidance which sets out the context in which impairment should be considered. It has rightly been indicated that impairment is not a

matter on which burdens of proof and strict determinations of facts have any normal bearing. Nevertheless, the panel – in order to make a finding of impairment – must have been satisfied that, in their judgement, the misconduct and/or the convictions alleged in this case, taken either individually or collectively, do give rise to an impairment in the sense that the Registrant's conduct means that he should not be permitted to remain on the Register without any qualification. It is impairment in that sense to which you must have regard.

There are helpful passages, to which I draw your attention, at the bottom of page 4 of your Fitness to Practise guidance. Although the guidance is ultimately focussed on a later stage – the question of sanction – it is helpful to bear in mind that fitness to practise has to be judged against the fitness of a registrant to remain on the Register in the public interest and the public interest factors to which you will have regard, are the protection of patients, the maintenance of public confidence in the profession and declaring and upholding proper standards of conduct.

It is settled law, as it were, now, that the question of impairment is not something which you judge as it were by some fixed point in the past. It must be judged by reference to the present. It is to the present and the future that the concept of impairment is directed. In determining whether the fitness to practise of a Registrant is now impaired, and looking forward rather than backwards in answering that question, you are, however, entitled to have regard to his conduct in the past. You are entitled to have regard to the extent to which the conduct and the underlying facts and context of the convictions in this case have given rise to a state of impairment today. The quotation that was read to you from the case of *Grant* is in point. In judging, by reference to those past indications of misconduct and the past events of conviction, if you have found them proven, by reference to those acts in the past, the panel should consider not only whether the practitioner continues to represent a risk to members of the public in his current role, now, but also – and this is a separate limb – whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.

What I must urge upon the panel, in the context of this case, where the Registrant is not present and it seems has chosen not to be present, but does indicate that he wishes you to have regard to the contents of R1 – the two medical reports produced – is that they should consider any evidence which casts any light on the Registrant's fitness to practise since the dates on which the convictions and alleged incident of misconduct occurred. The only evidence which has been advanced before you is that in the medical reports, or psychological reports, in R1. In your deliberations, you will please remind yourselves of the contents of those reports in determining impairment in the present tense.

The only final matter, which does arise in this case, is the question of how to treat paragraph 2 of the allegation, bearing in mind that it is a conviction on which the Council relies as part of – and I emphasise ‘part of’ – its case, that the Registrant’s fitness to undertake training is now impaired. It is right that I draw attention, in my advice to you formally, to those matters which were discussed during the opening of the case, that is to say that this conviction was itself declared to the Registrar when the Registrant was applying to come onto the Register as a student, as I understand it, in June 2009. You may assume, and you must assume, that full particulars in relation to that conviction, which were requested by letter on page 51 and 52, were indeed provided and taken into account when the Registrar made a determination that this Registrant was fit to undertake training as a student despite the occurrence of that single conviction. Nevertheless, while that decision was made, you are entitled now to take into account the extent to which that conviction and the context of that conviction, taken together with paragraphs 1 and 3, if you find them proven, do now render the Registrant impaired in relation to his fitness to be on the Register.

Unless I am reminded that I have overlooked any matters by way of advice or unless correction is required, that is the advice which I tender to the Committee at this stage.

Lady Wall: Are there any points made by any members of the Committee or any further requests for clarification?

[No further questions or requests]

We will adjourn so that the Committee can make its decision.

[Hearing adjourned at 10.50]

[Hearing recommenced at 12.25]

Lady Wall:

Findings in relation to the particulars of the allegation

The Committee finds the facts alleged in paragraphs 1–3 of the Notice of Inquiry proven. In doing so it had regard to the burden and standard of proof. It has also noted that the Registrant has indicated at the procedural stage of this hearing that he admitted those facts.

Findings in relation to the convictions

The Committee has had sight of the Memorandum of Convictions and therefore found the convictions proved.

Findings in relation to misconduct

The Committee has heard submissions on behalf of the Council and the Registrant. It has accepted the advice given to it by the Legal Adviser.

The Committee notes in relation to paragraph 1 of the allegation that the event took place in October 2005 and involved urinating in the street while in an intoxicated condition in the early hours of the morning. Whilst it involved clearly unacceptable behaviour, in itself that event would not represent misconduct of a sufficiently serious degree to found an allegation of misconduct. However it does not stand alone.

The Committee found Lyndon Clarke guilty of misconduct subject to that qualification.

Findings regarding impairment

The Committee has heard submissions on behalf of the Council and the Registrant. It has accepted the advice given to it by the Legal Adviser.

In addition to the penalty notice incident and the conviction for drinking and driving with excess alcohol the Committee has had to consider the impact of the additional conviction in February 2010 and has looked at the three allegations as a whole.

In doing so the Committee has borne in mind that the drink drive conviction was declared and considered by the Registrar when the Registrant applied for student status on the Register in June 2009. The Committee notes that the conviction gave rise to a disqualification for 2 years and involved driving with a level of excess alcohol which was more than twice the legal limit. Again the Committee accepts that in the light of the Registrar's determination this episode alone, although it involved a very serious act of misconduct, does not represent a conviction which, in itself, would entitle the Committee to find impairment.

However, the additional impact of the February 2010 conviction is, in the Committee's view, significant and substantial. It was a conviction for assault by beating his partner. It gave rise to a Community Order and a Restraining Order, the latter Order still being in force today. It also arose in the context of significant consumption of alcohol. The Registrant himself told the police that he had drunk between six and eight pints before the incident.

In considering the issue of impairment the Committee has therefore looked at the allegations collectively and has asked itself whether they give rise to impairment. The Registrant has not appeared and the Committee has no evidence as to his conduct or insight since these events other than the contents of the reports in Bundle R1 both dated in April 2011. Those reports, each based on a single interview, maintain that the Registrant did not appear to have a continuing drink problem. That may be correct. However, it cannot escape comment and concern, when considering the Registrant's overall fitness to practise, that each of these three separate incidents has indicated a lack of self control connected with the excessive consumption of alcohol. The Committee has also noted the assertions in the reports that the Registrant was in a difficult relationship up to 2008, that his previous partner had been violent towards him, and that, since 2010, he has been in a more stable relationship. These assertions have not been supported or updated by oral evidence. They do not appear to convey a cogent degree of insight bearing in mind his pleas of guilty to the two conviction matters and the fact that the assault conviction arose from an incident in November 2009.

The Committee concludes overall that a finding of impairment should be made to reflect the need to uphold public confidence in the standards of behaviour of this profession. In the light of the Registrant's pattern of conduct, a finding of impairment is also appropriate, in the Committee's judgment, to reflect its continuing and unresolved concern regarding the need to maintain confidence that patients will be protected from departures from those standards.

The Committee therefore found that the fitness of Lyndon Clarke to undertake training as a dispensing optician is impaired.

We will move onto the next stage and we think that it is possible that you may address us before lunch, although if you would prefer to take lunch and address us afterwards, we will, of course, consider that.

Ms Harris: Not at all, Madam, I am happy to continue now. I do not propose to address you for long. If I can take you to page 20 of your guidance document which outlines the available sanctions to you.

"Where fitness to practise is found to be impaired, the Fitness to Practise Committee may impose a sanction. The purpose of any sanction is not to punish the registrant but to protect patients and the wider public interest."

The sanctions available to the Committee in ascending order are stated there, those being financial penalty, conditions – for up to three years, suspension for up to 12 months and erasure. Any sanction must be

proportionate and must balance the rights of a registrant to continue in their chosen profession unhindered against the need to protect the public and the wider public interest.

Panels must also taken into account public confidence in the profession, deterrents to other registered practitioners, public confidence in the regulatory process and the reputation of the profession as a whole. As Lord Bingham said, in the case of *Bolton v The Law Society* [1993] EWCA Civ 32:

“The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”

More specifically, the guidance which you have deals with the sanctions or the approach to sanction in cases involving conviction, caution or determination by another regulatory body. That is at page 28 of your guidance. I am not going to read it in full but I draw your attention to this part:

“In cases involving convictions, cautions or determinations by another regulatory body, the purpose of the hearing is not to punish the Registrant a second time for the offences committed. The purpose is to consider whether the Registrant’s fitness to practise is impaired and, if so, whether there is a need to impose a sanction in order to protect the public or in the wider public interest, for example to maintain public confidence in the profession.”

It then goes on to outline guidance that the panel can properly bear in mind in cases of this sort. The panel has it so I do not propose to read from it but I commend that document to you.

Mr Watson: Just for the panel’s advantage, I have downloaded the edition 18 January 2011?

Ms Harris: There is a revised copy, as I understand it, printed off the website, 3 January 2012?

Dr Azubike: That is correct.

Mr Watson: Thank you, in that case, the pages which I give will have to be subject to yours.

Ms Harris: Yes, the section on conviction and caution cases is at page 28 in the new version.

Mr Watson: Thank you.

Ms Harris: I will deal very briefly with aggravating and mitigating features. In terms of aggravating features of this case, of course there are three separate

incidents where the behaviour of the Registrant has been brought into question. Each of those have been serious, but of course, the assault conviction is particularly so. The panel has also found that it was due to significant consumptions of alcohol on all three occasions and a lack of self control stemming from that. The panel has also found that there was no cogent degree of insight which you may feel is another aggravating factor.

There is also a failure to engage with the Fitness to Practise process and that is a matter which, in my submission, you can properly bear in mind as an aggravating factor.

In relation to mitigating factors, the matters have been admitted in the sense that it was factually admitted that those convictions did take place. Of course that is subject to what I have already said about it being an aggravating feature and perhaps is limited.

In terms of personal mitigation, the Registrant is not here and I therefore cannot assist you in relation to that, and he has not put any information before you in relation to his personal mitigation.

As I say, I do not propose to read from the guidance. I commend the document to you and I do not propose to say anything else unless I can answer any questions?

Lady Wall: Are there any questions for Ms Harris? [*No questions*]

I will ask our Legal Adviser to give us some formal advice.

Mr Watson: Again, I tender advice to the Committee and it is for the Committee members to decide ultimately how they must and should approach the matter. In addition to my guidance, the Committee will bear in mind the published guidance, as updated, of the General Optical Council, which I believe is before you.

Your attention has been drawn to the relevant sections, as to how to deal with the concepts and the touchstones of the public interest factors which must guide your conclusions as to what is the appropriate sanction in this case, if any. I say 'if any', because you may find it helpful to remind yourself, first of all, that you must determine, on the basis of the findings that you have already made, whether any sanction is appropriate and, if so, you should then consider, in ascending order, the appropriate sanctions that may meet the case, having regard, primarily, to those public interest factors which have been identified and which are familiar to you and stated in the guidance. You should also have regard to the principles of proportionality which must be set in the balance when considering what is appropriate.

You may find it helpful not only to consider what sanction is appropriate but also, in your reasoning, to set against your instincts and your reasoning as to that appropriate sanction, the reasons why you reject other sanctions which might have been worthy of consideration.

In relation to misconduct and convictions which are the basis of a finding of impairment, you may, of course, both have full regard to the fact that you have found that there was a pattern of behaviour and also have regard to the time and date of those events and have regard to the period of time since those events and convictions arose.

I urge caution, if I may do so, in terms of the way in which you treat the absence of the Registrant today. It has been said on behalf of the Council that there has been a failure to engage in the process. The reason why I urge caution is that it is clear from the documentation that you have before you that this Registrant has engaged in the process to the extent that he has responded to the questionnaires which were sent out and that he has responded by way of admissions. He has also responded to the need to provide medical reports at an earlier stage. Those reports are before you as well as the Registrant's own request that those reports be placed before the panel and his implicit request that they take the contents of those reports into account.

It is right to say that since the Registrant has neither attended himself today nor has amplified or supplemented those reports which are now nearly a year old – emanating from last April – with further evidence, it is a matter of common sense that there is no further personal mitigation or circumstances for you to bear in mind on his behalf today other than the contents of those reports. I do advise you that you should be careful and cautious and reluctant before you reach any adverse conclusions to the Registrant from the fact that he is not before you today.

That, I think, is all that I wish to draw to your attention, unless the Council wishes to make any representations as to my advice.

Ms Harris: Madam, no.

Lady Wall: Thank you. The Committee will break for lunch and then engage in discussions and then produce reasons. I think that it will be very unlikely that we will reach that stage before two o'clock and it may be later. We will adjourn.

[Hearing adjourned at 12.45]

[Hearing resumed at 14.45]

Lady Wall: The Committee has reached its decision over sanction.

Sanction

The Committee considered the sanctions available to it from the least necessary to the most severe.

In doing so the Committee has again considered the evidence provided by the Council in bundle C1 and the reports in R1. The assertions made in those reports are now nine months old and have not been verified, updated or tested. There is no evidence before the Committee whatsoever as to the Registrant's current conduct, employment or professional activities. The failure of the Registrant to attend and take an active part in these proceedings increases the concerns which the Committee has formed in its determination on impairment.

In these circumstances the Committee considered that the seriousness of this matter and the concerns referred to warranted a substantive sanction, and that neither a financial penalty nor conditions were appropriate or, in the case of conditions, feasible. Not only would it be difficult to devise conditions which were workable and appropriate to address the nature of the Registrant's past misconduct but his failure to appear before the Committee or provide evidence other than the reports referred to makes that task inappropriate.

The Committee has therefore determined that a sanction of suspension is appropriate and proportionate. Not only do the allegations represent a pattern of misconduct but the Committee is mindful that the Registrant has, despite ample opportunity to do so, made no real effort to demonstrate that he has put this behaviour firmly behind him, or that it does not indicate deep-seated personality or attitudinal problems. Nor, in these circumstances, can the Committee form an objectively based conclusion that there is no persisting risk of repetition of his past behaviour. In short, the Committee concludes that in the light of insufficient evidence of either insight or remediation a period of suspension for nine months is appropriate and proportionate.

In reaching this determination the Committee has considered the possible sanction of erasure. Although serious, the Committee concluded that such a sanction would be unduly punitive and disproportionate.

The Committee directs that there should be a review hearing held before the end of that period. At that hearing, the Committee will need to consider the factors outlined in the GOC Indicative Sanction Guidance, page 24; namely that the Registrant has fully appreciated

the gravity of his conduct, has not re-offended, has maintained his aptitude for undertaking training and, finally, that his re-instatement to the Register will not place patients at risk.

We determined that it was necessary to spell out all of those conditions rather than simply refer to them.

We now invite submissions on immediacy.

Ms Harris: Madam, you will be more than aware, I am sure, that Rule 13I of the Opticians Act 1989 provides the panel with the power to order immediate suspension after a finding of impairment of fitness to practise. That would essentially cover the 28-day appeal period or as and until the end of any appeal proceedings, up to a maximum – and I stand corrected, I am wrong – of 18 months.

The test which the panel must consider when considering whether to impose immediate suspension is that it must only do so if it is satisfied that it is necessary for the protection of the members of the public, otherwise in the public interest or in the best interest of the individual or the body corporate. It would be my submission that this case would fall within the first two limbs of that test, namely necessary for the protection of members of the public and otherwise in the public interest. Essentially, I rely on the findings which the panel has just given, namely that it has found a pattern of misconduct, no real effort to demonstrate that that behaviour is behind him or shown that it is not a deep-seated problem. The panel also found that there may be the risk of repetition and insufficient evidence of insight. Essentially, therefore, I rely on the findings of the panel in relation to impairment and suggest that the test is satisfied on the first two limbs.

Lady Wall: Thank you. Would you like to give us any advice, Mr Watson?

Mr Watson: I simply advise the Committee that the basis for your discretion has been fairly outlined by the prosecution, that there are three grounds which you may take into account when deciding whether the suspension order should be immediate, during what might be described simply as the ‘appeal period’ – that is the period before an appeal is either launched or determined.

The third limb, namely the best interests of the Registrant himself, does not, I suggest appear to be applicable, although ultimately that is a matter for you. But if you decide that, in the absence of any evidence to satisfy you that the risk which you have identified has been ameliorated or addressed, that makes it necessary for the protection of members of the public or otherwise in the public interest, then you may exercise your discretion to grant such an order.

Lady Wall: Thank you.

[Hearing adjourned at 14.55]

[Hearing resumed at 15.00]

Lady Wall: The Committee has reached a decision on the immediacy of the order.

Immediate order

The Committee has determined that an immediate order of suspension should be made. It repeats and takes into account the findings which it has already made in relation to its concerns and it considers therefore that that such an order is desirable both to protect patients and in the public interest.

Thank you.

[The Hearing concluded at 15.02]