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

GENERAL OPTICAL COUNCIL

MARK MORGAN (01-19963)

Thursday, 24 March 2011

INTERIM ORDER APPLICATION

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FTP Committee: Ms Margaret Hallendorff MBE (Lay - Chair)
Mr Rod Varley (Lay)
Ms Lisa O'Donoghue (Optometrist)

Legal Adviser: Mr James Watson QC

Hearings Manager: Mr David Henley BEM

For the GOC: Mr Guy Micklewright

For the Registrant: Mr Sandesh Singh
Ms Gerda Goldinger

[The hearing commenced at 09.47]

Ms Hallendorff: Good morning. I am Margaret Hallendorff and I have been elected to Chair today's hearing of the Council's application for an interim order. The Committee today is made up of one optometrist and two lay members, and I will ask the members of the Committee to introduce themselves and to explain the capacity in which sit. *[Introductions made]*

To my right is Mr 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 and 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 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 room rather than in the public and Press areas are members of the respective legal teams.

Please note that in accordance with the Council's protocols the identity of the Registrant will not be revealed until such a time that the Committee announces its decision. Whenever a Committee decides that an order should be made then the Registrant's details will be revealed, but alternatively if the Committee decide that an order should not be made then the Registrant will remain anonymous. Throughout the hearing the Registrant will be referred to

as “the Registrant”. You should be aware that it is Council’s policy for the determination of the Committee and a transcript of 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.

Are there are any applications other than the interim order application which are to be made at this stage – Mr Micklewright?

Mr Micklewright: Madam, thank you. Madam, I wonder if I might ask for a further five minutes, in respect of instructions which I am seeking. I know this comes late in the day, and I will explain why that is. Madam, my learned friend has kindly on behalf of his client offered a selection of conditions which he submits, and doubtless will submit in due course, would adequately meet the concerns of the Council and any concerns which the Committee have.

I was provided with that very shortly before we came before you, and at the time at which we were called in I was seeking instructions from the General Optical Council. The advantage I would suggest for the Committee is that if the Council are not opposed to such a way forward, and presently there is a divergence in view as to what orders should be put forward, then clearly it may be easier for the Committee to feel that time could be saved, and their decision may be an easier one to make.

I am informed that I should have an answer telephoned to me within five minutes, and so therefore Madam I would ask for your indulgence for five minutes in which to receive those instructions.

Ms Hallendorff: Yes, indeed. I saw somebody come in with a piece of paper and put it just inside the door; I don’t know whether that refers to what you have mentioned?

Mr Micklewright: I suspect it is unlikely as my cell phone is still in my bag!

Ms Hallendorff: Thank you. Mr Singh?

Mr Singh: Madam, no, nothing to add to that. It may assist, but can I just make it clear that it is not Mr Micklewright’s fault at all. Discussions have been taking place for some time this morning. I have not given him very long to consider the conditions, in fairness to him, and I would ask for five minutes to take his instructions.

Ms Hallendorff: Thank you; Mr Watson?

Mr Watson: I have no advice to give save the world-weary advice that five minutes, with the best of intentions, may in fact not be five minutes. You may wish to consider, Madam, an adjournment and asking informally for an update within 15 minutes, and indicating when you will sit again at a particular time, unless there is further news.

Ms Hallendorff: Thank you, in that case that is agreed. Shall we say we shall reconvene at 10.15 unless have something earlier than that?

Mr Micklewright: I am obliged Madam, thank you very much.

[Committee adjourned at 09.52]

[Committee reconvened at 09.58]

Ms Hallendorff: Yes, Mr Micklewright?

Mr Micklewright: Madam, this is the Council's application for an interim suspension order against the Registrant, and we ask that that order is for 18 months. The Council puts its application on two heads, and those are contained within Section 13L of the Opticians Act 1989, a section with which I know the Committee will be very familiar.

Firstly, the Council say that it is necessary in order to protect the public for an order to be imposed, and for that order to be one of suspension. Secondly, it also says that an order should be imposed as it is otherwise in the public interest for it to be imposed, and that again the appropriate and proportionate order is one of suspension.

Just forgive me whilst I move that back. Madam, the facts are as follows: the Registrant is a registrant optometrist –

Ms Hallendorff: Can I interrupt, just before we start? For ease of reference can we refer to your bundle, which is headed 'The General Optical Council and (M)' [*name excised*] as C1, and Mr Singh, yours headed 'The Association of Optometrists file note' as R1? Thank you. Sorry Mr Micklewright, do carry on.

Mr Micklewright: Thank you. Madam, as I say the Registrant is a registered optometrist, and so far as the subject matter of the complaint is concerned the complaint features in your bundle at page 1 through to page 6. This was a complaint submitted by Mr Ian Sheppard dated 31 August 2010, and it followed a period of employment by the Registrant with the organisation he worked for, which was an opticians named Wilton *i*. The Registrant commenced employment there on or before 11 May 2010, and he was as I say employed as a locum.

You will have seen from the nature of the complaint submitted that during his time there he indicated that he had a preference for non-contact tonometry. He was advised, Mr Sheppard says, that this was something which was not available at Wilton *i*, and it was therefore a matter for him to deal with it through contact methodology.

It is right to say that there is a divergence in the accounts given as to what happened next, by Mr Sheppard and by the Registrant. Mr Sheppard says in his document that the matter was no further discussed between the Registrant

and him. The Registrant has in a letter dated 13 July 2010 on page 74 in C1 evidenced that he has made a more formal complaint to Wilton *i* in respect of that issue, and indeed others. Notwithstanding that, and clearly it is not for you at this stage, Madam, as the Committee I am aware will know well, to resolve disputes of fact. Nevertheless, no further action seems to have been taken to resolve the issue one way or the other.

It is therefore the case that as at the time through which the Registrant was employed and carrying out optometry at Wilton *i*, he would have understood – and it is made clear by Mr Sheppard – that the expectation was that he would be carrying out contact tonometry.

You will have seen that in the second paragraph on page 3, and you may wish to remind yourselves of the figures contained therein [*Pause*]. Mr Sheppard has indicated that up until and including 7 August 2010 the Registrant conducted 67 examinations at his practice, which represented a total he said of 62 per cent of all examinations conducted since they opened on 1 May 2010. He says that 50 of those were on patients aged 40 or over, and he calculates that this amounts to some 75 per cent of the examinations which were done by the Registrant, and he says that he recorded tonometry readings on 36 of those, which are one assumes 72 per cent of the 75 per cent of the examinations that he has carried out. However, what you can see there, Madam, clearly is without thinking too closely about the maths that certainly there were a significant number of examinations carried out on patients aged 40 and over, and in respect of the vast majority of those tonometry readings were recorded.

However, Madam, the nature of the allegation which the Council makes and the thrust of the complaint put forward by Mr Sheppard is that on the vast majority of occasions, tonometry was simply not being carried out when it should have been; and secondly, that the readings which featured on those records are, for the most part, fabricated. Indeed as you will come to see shortly, it is right to say that this Registrant accepts that he has fabricated tonometry readings on patient records.

During the time at which the Registrant was working for Mr Sheppard there were various factors which started to give him cause for concern about the nature of the practice of the Registrant. You will see there on page 3 that he has detailed those in the final and penultimate paragraph. By way of example, he has said that he noticed few patients coming out of the test room with what he describes as “fluorescein tears”. Madam, I understand, and I am sure the Committee may well understand it better than I, that you have a slightly orange-y coloured tear having had dye inserted during tests (that is my experience at the optician in any event); also a number of other products which have not been replenished, or at least as often as Mr Sheppard implies they should have been, less of what he describes as “clinical detritus”, and a number of other issues.

On 5 August 2010 matters came to something of a head in respect of a comment made by Patient A, Patient A being a recently-retired clinical

pharmacist. A discussion appears to have taken place about what was done, and it seems that no form of tonometry took place. All that did take place was a discussion of Patient A's history of glaucoma within the family. However, what certainly did take place was that a record was made of intraocular pressures of Patient A.

Madam, if you would please turn in your bundles to page 11, what you have there is a copy of the patient records of Patient A. You can see, Madam, at the bottom of that page in handwriting it has been marked as being an appointment where the cost and VAT were submitted on 5 October, but these are the records for the appointment on 5 August. What you can see if you look down the boxes on the left-hand side, under the large box entitled "Ophthalmoscopy" there is another box there for tonometry readings. You can see that there is a reading of the figure 12 in respect of both the right and the left eyes which have been recorded. It is not in issue, Madam, that the tonometry was not carried out, and that those readings do not represent any tonometry which had been carried out.

The Registrant was challenged about this by Mr Sheppard the following day, and he stated during the course of that conversation that there had been an error. He describes it as being just a mistake, and that in fact those intraocular pressures were records of a previous patient, who we shall be referring to as Patient B.

As you might imagine Mr Sheppard took steps to contact Patient B and seek to discover whether or not in fact that was the case. His description of the discussion which took place features on page 5 of the bundle in the top paragraph there, following what he describes as his examination of the patient in these notes. She reported that she was asked about family history of glaucoma. She had no eye drops instilled, and no puff of air test was conducted. Apparently intraocular pressures were briefly discussed but she declined a measurement as the Registrant told her that her eyes looked healthy.

It then goes on to state that a separate set of intraocular pressures were recorded on Patient B's notes. Therefore the obvious inference from that is that the assertion made on 6 August by the Registrant, that he had made a mistake and simply inserted a previous patient's readings into Patient A's notes, was entirely incorrect, because firstly Patient B has intraocular pressures recorded on her notes; and secondly, they are quite different. Further to that of course is the fact that, so far as Patient B was concerned, no tonometry was carried out, and again in her case a set of intraocular pressures have been recorded.

It was as a result of that investigation ultimately, Madam, that Mr Sheppard and the Board of Directors at Wilton / took the decision in due course to cease using the Registrant's services. Following that they then made the referral that they have to the General Optical Council.

Prior to doing that, though, and subsequent to having informed the Registrant that they no longer wished to continue using his services, additional investigations were carried out. You will see on page 7 in a document dated 6 August evidence of an audit of the amount of materials held within their stores was carried out. The inference which the Council is invited to draw from that by Mr Sheppard is that that demonstrates, to him at least, that fewer amounts of materials are being used by this optometrist than would ordinarily be expected for the number of examinations he has been carrying out.

Having made the referral he considered it his obligation to continue his investigations, and you will have seen the documents which begin at page 20. They are, the Council say, of particular importance. The documents appear behind the document on page 20, which is a covering letter dated 29 October 2010. Mr Sheppard says that he arranged for all patients over the age of 40 to be recalled to the practice and to have their intraocular pressures measured by another optometrist. They were asked, he says, to sign a statement saying whether or not the Registrant had used the Goldmann tonometer to measure their intraocular pressures during the original examination which they had had with him prior to being recalled. Thirty one patients were examined, and he observes that 30 of those said that tonometry was not done by the Registrant during their original examination.

Madam, I do not propose to take you through that, but no doubt in due course should you wish to go through those in more detail you can see how it is that those signed documents appear at page 21 through to page 51 in your bundle.

Following the referral the Registrant provided some extensive representations to the GOC, and they are here from page 55 in your bundle. He sets out initially his background and his training, and he details where it was that he was working initially, and the fact that he had spent four years working as an optometrist for Vision Express Joint Partnership where he was, he says, a pre-registration supervisor. He then goes on to explain the health difficulties experienced by his wife and also the result of those. He states that in hindsight he did not deal with matters in the best possible manner –

Mr Singh: Sorry, Madam, may I just interject for a moment? I know that my learned friend is being very careful about the way he phrases matters, and obviously we are in public session. I should just like it put on record that if he intends to go into any health matters I would ask that they be heard in private. I do not know if you want me to explain the reasons for that now? I do not want to interrupt my friend for too long while he is in full flow, but you will see that there are references to health matters in the documents and if they are referred to I would ask that this is complied with.

Ms Hallendorff: Yes, we will accept that Mr Singh. Can we suggest that you refer to the relevant passage without reading it out?

Mr Micklewright: Yes Madam; what I was attempting to do as my learned friend has kindly acknowledged is to refer to matters in such a way as firstly does

not impinge on the mischief which he is keen to avoid, but secondly, I was also keen to avoid us having to unnecessarily keep on dipping into private session and then to come back out to say one or two lines, if it could be dealt with I hoped in a way which avoided the specific facts of the matter being mentioned. It was simply for attractiveness of presentation, and I think if we got into any matters of substance which related to health in my submissions then I would invite the Committee to go into private session. But Madam, of course how we approach that is entirely a matter for you, and I am in your hands.

Mr Singh: It is a matter of the transcript obviously, but we do not have any members of the public in here, so dipping in and out of public and private is much easier. We do not have to wait for people to go in and out. It would simply be if matters of a private nature or a health nature are going to be referred to, all that would have to be said is 'This matter is private' and you would declare that. It would not break up matters too much, and I would certainly be happier doing it that way. That is just an observation.

Mr Watson: Given the practical point that there is no member of the public here to hear any untoward remarks, a way forward which I have adopted in other forums is simply for the matter to continue on and then, if there are subject areas that need to be retrospectively put into a private section, for the transcript to be redacted as it were at the end of each session. It is difficult if it is simply dipping in and out for a second or two, but if there is a section where you will deal with matters that may infringe on health then that can simply be marked, as it were, on the transcript while it is being taken and extracted afterwards by agreement.

Mr Henley: But you would need to indicate that you were going into private beforehand?

Mr Watson: Yes.

Mr Singh: That is the only thing; I do not know if we just have an indication from whomever is mentioned it -?

Mr Watson: It might help the Panel if both advocates could give thought as to whether or not it is possible simply to take a stage as to when you are entering into any area that may be necessary to be redacted, and to keep that in a block rather than simply trying to deal with it on a sentence-by-sentence basis.

Mr Singh: In my submission I have two blocks where I would ask for it to be in private.

Ms Hallendorff: Yes; Mr Micklewright?

Mr Micklewright: I hope I should be able to deal with this in that way, Madam, so yes, I am happy to approach it in that manner.

Ms Hallendorff: Thank you; if you would like then to continue?

Mr Micklewright: Thank you Madam. The Registrant then goes on to detail how it was that he was having trouble paying his mortgage, and how he clearly felt at that stage under a financial imperative to take as many jobs as he could. He describes that he took locum jobs in many areas and he details those at the bottom of page 55. He says on page 56 that he did not have at that time much support from his immediate family, and details that he was struggling. He says that he was involved in a very bad car accident at that time as well, and he says that the driver in that case admitted careless driving.

Madam, we are now moving into matters relating to the Registrant's health.

[Hearing in private]

[Hearing in public]

I think it is pronounced in that way – and my learned friend is indicating that I got that right.

In short Madam, and then perhaps if I may indicate that we are moving away from matters which are health-related, the Registrant in his submissions and to a great extent today comes before you saying 'I accept that what I have done was wrong. I understand I should not have done it, that it was caused by the health issues I was having at the time to a great extent, and that as the situation has now changed there is no ongoing risk for you to feel it appropriate to impose such a severe order as the Council invite you to impose'. The Council, however, say that notwithstanding all of this there still exists an ongoing risk to the public, for which the proportionate way to deal with it requires an order for suspension, and indeed the very nature of the conduct which is complained of is such that it is for the prevention of damage to the reputation of the profession that an order is also needed for suspension under the heading of 'otherwise in the public interest'.

Dealing firstly with the test which you need to apply, Madam, as the Committee will know so far as Section 13L is concerned to deal with the first head under which the Council apply for an interim order, you need to be satisfied firstly that it is necessary for the protection of the public to impose any order at all. Having considered that, if you decide that it is appropriate for an order to be imposed, then you need to decide what order it is appropriate to impose. The order must be a proportionate one, and as a result it must not go beyond that which is necessary to give effect to that which is required to protect the public.

My learned friend is likely to invite you at that stage to consider a selection of conditions which he will say will be sufficient to deal with any concerns which the Committee may have. In our submission in this case they are such that they will not fully satisfy the concerns which we suggest the Committee will have.

In respect of the second limb of the Council's application, the section itself does not impose any requirement of necessity in order to impose an order as being otherwise in the public interest, and as you know a legitimate reason is to protect the reputation of the profession. You do not have to cross the hurdle of necessity to decide whether or not it is appropriate to impose any order at all. However, you do need to decide I would suggest that it is desirable to impose an order of some description, and having crossed that hurdle you then need to decide what the appropriate order is to impose.

Once again you will need to consider what is the appropriate and proportionate order in the circumstances and in due course I will be submitting that in the nature of the circumstances in this case the only order which really can be in contention has to be one of whether to suspend or simply not to suspend.

Dealing firstly with the question of the protection of the public, this Registrant has admitted a sustained period of dishonest conduct, and a sustained period of conduct which has put a substantial number of patients at clinical risk. The importance of measuring intraocular pressures on patients on a regular basis, particularly those patients who are over the age of 40, is well-known. You are I know an experienced Committee, and it is regularly the case that practitioners come before the General Optical Council Fitness to Practise Committee faced with allegations arising from a failure to properly monitor intraocular pressures.

The reason is simply that intraocular pressures, as I know the Committee is aware, are an indicator of potential glaucoma, which is a very serious and progressive disease that can lead to the loss of sight in patients. It is often one of the most serious things of which an optometrist needs to be mindful. As a result any failure to measure intraocular pressures, where it would ordinarily be clinically indicated, is invariably I would suggest going to put the patients at risk. However, to then compound that fact by deliberately fabricating records demonstrating that that has in fact taken place renders the risk far greater than even it would have been before.

There are a number of reasons for that. The first is that any subsequent clinician coming across the records will assume that the intraocular pressures have been measured on a previous occasion. They will react accordingly, and if they carry out a measurement of intraocular pressures they will be basing their assessment as to whether or not they are appropriate one would imagine, to some extent, on previous recordings which feature in that particular patient's notes. What they would be looking at would be completely misrepresenting the position.

The second point is that it was really perhaps by virtue only of the fact that Mr Sheppard was such an astute individual that what was going on was discovered in the first place. By fabricating these records anybody who happened to cast a casual eye over these records of even a variety of patients within the practice would assume that the Registrant was doing his job. This was not something which it would appear would ever come to a

voluntary end as a result of any action on the part of the Registrant. Whilst it may be right to say that in his representations to the General Optical Council he is professing a large amount of insight, and I have no doubt that he will continue to do so today, nevertheless it is right to say that during the course of last year he appeared to have very little insight indeed into what it was he was doing, but nevertheless sufficient insight to understand that what he was doing was dishonest.

My learned friend, in the conditions which he has kindly informed me he will be proposing, is going to be suggesting that any concerns which the Committee have can be dealt with by way of remote supervision of the Registrant by a colleague within Scrivens Opticians with whom he now has a contract. That will be used in conjunction with, he will suggest, the condition that he should remain with Scrivens Opticians only under the supervision of the Southern Regional Manager, that he should remain under the care of his present general practitioner, and that as part and parcel of the supervision being carried out there should be a monthly audit of a random collection of records, and that the results of that audit should be passed on to the General Optical Council. On the face of it, that is an impressive set of conditions, which in many cases clearly would satisfy most of the concerns that a Committee might have in a case not dissimilar to this.

However, the key feature of this case Madam is the extended period of dishonest conduct. One needs, I would suggest, to view any proposed conditions through the prism of the trust which one can place in the Registrant to properly engage and abide by those conditions. A question mark has to be raised where there is demonstrable and extended dishonest conduct by that Registrant.

How does one deal with that? Well, sometimes it is possible to deal with that by having a particularly stringent set of conditions, not allowing the Registrant in that way any room really for manoeuvre. That unfortunately I would suggest is a weakness of the set of conditions which is being proposed. The set-up of Scrivens Opticians is that there are a number of different branches so far as we are concerned here across the South Eastern part of England. I understand it extends further than that, but there is a gentleman by the name of Paul Smith who is the Manager of that particular area, and it is that area with which you are invited to be concerned.

However, he has stated in his witness statement that it is not financially viable for them to have more than one optometrist within any one branch at any given time. There therefore cannot possibly be any day-to-day supervision of this Registrant. It has to be carried out, as you will hear, remotely and that means therefore that the supervision will be more a case of being on hand should there be a problem, and having regular discussions perhaps, and formalised discussions once a month.

The safeguard to any adjustment of records or anything of that nature, it is said, will be the auditing of the records which will occur once a month. However, in my submission that should not necessarily be sufficient to satisfy

you that these problems can be averted. It is only a sample. There will not be a thorough audit of each and every record filled in by this Registrant. The long and the short of it Madam, in my submission, is that the intensity of the proposed conditions are not sufficient to be able to avert the very real risk which this Registrant has demonstrated he is quite happy to put patients under, and quite happy to lie about and to be deceitful about in order to avoid being discovered.

If you accept that submission Madam, then the only fall-back from there I suggest is to impose an order for suspension.

Moving on now to deal with the question of whether or not an order should be imposed in order to protect the reputation of the profession, in my submission this is one of those very serious cases where, perhaps some might say unusually, it is appropriate for an order for suspension to be imposed to protect the reputation of the profession. I said earlier on during the course of my submissions that it is not possible for this aspect of the Council's application to be dealt with by way of conditions.

The reason is this: the core point which the Council rely on, as saying that the actions of this Registrant and the allowing of his continued registration and ability to practise pending a full hearing, is the extensive nature of his dishonesty. Were it to have been focused more on the creation of clinical risk then that is something which I of course accept in principle is capable of being ameliorated by the imposition of conditions, but dishonesty is something very much different. In my submission dishonesty does not render itself capable of being dealt with on this limb by the imposition of conditions. Therefore whilst you have to go through the process of deciding firstly whether it is appropriate to impose an order, and secondly then what the appropriate and proportionate order should be, in effect what you would be doing is whipping through the first stage of that very quickly, because really it comes down to 'Is it appropriate and proportionate to impose an order for suspension, or alternatively are we simply left with it not being appropriate to impose an order at all?'

In my submission this is a case where it is appropriate to impose such an order on such a ground.

I rely in that respect on the case which I gather you have had handed up to you prior to coming in. I will call it "*Sathananthan*" [*GMC v Kanagaratnam Sathananthan* [2008] EWHC 872 (Admin)] because I cannot remember what the correct pronunciation is, and I hope you will forgive me for that.

Ms Hallendorff: Let us call it C2.

Mr Micklewright: Thank you Madam. The key point about this case was that it was made expressly clear by the High Court that it approved the approach of imposing an order purely on the grounds of the public interest against this practitioner, and purely on the reputation and profession in that case, notwithstanding the fact that this was a case where there was no

demonstrable dishonesty. It was a case which concerned primarily inappropriate prescribing over a long period of time by the respondent practitioner. Madam, you will have seen that this is a very long judgment, and there is a very long and detailed exposition of the facts given here by the Judge; so I will endeavour to go through it as briefly as I possibly can. I hope it will not take me very long.

It is important, however, for me to detail the facts because the key point in this case I would suggest is that it is in comparing the facts of this case against the facts of the case which is presented before the Registrant, that I can submit effectively that this really is one of those cases where it is appropriate to impose such an order.

Dr Sathanathan was a registered psychiatrist, and it is right to say that there had been allegations all the way back in 1985 made against him in relation to inappropriate prescribing of controlled drugs. He appeared before a Panel at the General Medical Council, which found those allegations proved, albeit they did not find him guilty of any serious professional misconduct.

Nothing then happened until a complaint was received at the GMC in February 2006 from another psychiatrist, saying that he was (in essence) very concerned about a vulnerable client of Dr Sathanathan who was a drug addict and had been attending a clinic called "Options". He was concerned in particular about the treatment that individual had received at the doctor's private addiction clinic.

Another letter of concern - and this is now at paragraph 7 in that judgment - was received by the GMC just over a month later, from a different consultant psychiatrist, and he was submitting that letter as supporting evidence regarding the concerns which had been raised by the original psychiatrist. On paragraph 8 you will see there that in June of 2006 there was a letter received by the GMC from the police concerning their involvement with that doctor.

If one then goes over the page again on to paragraph 11 and 12, you can see there in very brief terms from the Interim Orders Panel why it was that they decided to impose the order they did. They said:

"In the light of the information from Options Drug and Alcohol Service and Horsham Police regarding prescribing of controlled drugs to Mr A without assessing or monitoring him adequately and the information from the Crawley Substance Misuse Team concerning your prescribing for Miss C without seeing her in person, the Panel is satisfied that an injury order is necessary."

So their concerns were assessment, monitoring, and prescription of drugs to those two patients.

Over on paragraph 12 there is then a subsequent complaint which relates to the prescription of opiate drugs to an addict, and an inappropriate suggestion

by Dr Sathanathan that he would be happy to give the drugs to that individual who would not ordinarily be entitled to them if he was paying.

Various further information, which I will not trouble you with was received by the General Medical Council, and that then led to a further hearing before an Interim Orders Panel on 13 December 2007; that is at paragraph 50 in the judgment.

Hitherto at that point the GMC's Interim Orders Panel had imposed an order for conditions, but at the invitation of Counsel for the General Medical Council they changed that order to one of suspension. That was on the basis that counsel for the GMC raised two new concerns. The first was an act of co-operation by Dr Sathanathan in dealing with the local investigation being carried out into his practice; and secondly, the fact that he had written post-dated prescriptions prior to the hearing in August 2006 and therefore effectively breached conditions that had been imposed on 18 August 2006.

Madam, that is as swiftly as I think I can reasonably set out the facts in that case.

So what you are left with in that case was a situation whereby you had inappropriate prescribing to vulnerable patients, and thus the creation of clinical risk, aggravated by an apparent disregard for the conditions which were imposed by the Interim Orders Panel to deal with the concerns which had been raised as a result of that.

The key point, and the key passage to which I direct you, is then paragraph 32. Mr Justice Thorne says:

"I also agree with Ms Plaschkes' further submission that, in any event, it was necessary to suspend Dr Sathanathan's registration in the public interest. Irresponsible prescribing of controlled drugs is a serious abuse of a doctor's professional position and one that can lead to the misuse of such drugs by not only the patient but by others via the illicit market. The misuse and/or abuse of controlled drugs are understandably a matter of significant public concern. The irresponsible prescribing of such drugs, particularly in large amounts (as in this case), is plainly liable to bring the profession into disrepute. I accept that if the allegations are prove, there is a realistic prospect of the Fitness to Practise Panel directing the erasure of Dr Sathanathan's name from the Medical Register. In my view, in view of the prescribing history in this case, this is one of the 'relatively rare' cases envisaged by Davis J in *Shiekh* where an interim suspension order is appropriate."

Now, notwithstanding the subsequent cases of *Sandler v General Medical Council* [2010] EWHC 1029 (Admin), and as I know you will be advised in due course on *Bradshaw v General Medical Council* [2010] EWHC 1296 (Admin), *The Queen on the Application of Shiekh v General Dental Council* [2007] EWHC 2972 (Admin) is essentially good law, and it was the basis on which Mr

Justice Forbes in this case was basing his judgment. Whilst it is right to say that each case must turn on its own particular facts, what is particularly instructive about this case is the fact, as I have already detailed, of inappropriate prescribing, and also an apparent breach of an Interim Order set of conditions.

The issue with dishonesty had never, at least at that stage, been brought up, but dishonesty is very much a central feature of this case. Dishonesty is a central feature not only in a discrete sense, but it is a central feature in that it is something which has significantly, in our submission, aggravated the clinical risk at which this Registrant had put his patients for a protracted period of time.

The Committee will know that insofar as the indicative sanctions guidance is concerned, which of course reflects current case law, dishonesty is something that within a professional regulatory context is considered to be very serious indeed. Indeed, it would not be over-stating it to say that the general rule is that one is more than likely to be looking at an order for erasure or striking-off or whatever the order which the particular Regulator in question happens to use if one is found to be guilty of quite low-level dishonesty.

Therefore in my submission the facts of this particular case which you are considering are considerably more serious than the facts which were considered by Mr Justice Forbes in *Sathanathan*. The risk to the reputation of the profession, which has been caused by the actions of this registrant, are significant and substantial. Therefore, notwithstanding the fact that you may even be satisfied that the conditions which he submits would ameliorate any risk to the public, notwithstanding the fact that you may well be satisfied that he is starting to show insight into his previous actions, and notwithstanding the fact that you may feel that the risk to the public in due course is something which is likely to decrease, nevertheless you are left with a set of actions which are so fundamentally incompatible with professional registration and the maintenance of public confidence in the profession that it would not be proper to allow the Registrant to continue in practice.

In my submission this is one of those cases where it is quite proper and proportionate to impose an order for suspension on the grounds that it is otherwise in the public interest to do so within the meaning of Section 13L of the Opticians Act 1989.

Madam, unless I can be of any further assistance at this stage those are my submissions.

Ms Hallendorff: Thank you. [No questions from Panel] Thank you. Mr Singh?

Mr Singh: Madam, thank you. The Council have put this application, as you have very ably taken us through on two limbs, on the protection of the public and public interest. They are obviously separate limbs to be considered, to consider them individually and to consider the tests individually.

I will come back to the tests in a moment, and I think there is broadly agreement between us as to the tests to be applied on each. Can I just set out in summary what the Registrant's position is on this? In relation to protection of the public, quite clearly from the evidence that you have seen, significant steps have been taken which reduce the risk to the public, but we will accept, and the Registrant will accept, that you may well have residual concerns about the protection of the public and about the way in which he will conduct himself in a clinical setting.

You will no doubt want to be absolutely sure that record keeping is done properly, that tonometry is being conducted, and that his clinical practice is properly conducted in every way, so we would concede that on that basis an order is necessary to protect the public. However, because the risk is reduced over the last number of months we are not dealing with him in August 2010, we are dealing here with him in March 2011, and a lot has happened since then. You are dealing with the position today, and we would submit that the risk to the public can be adequately met by conditions. They have been summarised by my learned friend, but I will take you through those in some more detail in conjunction with the evidence that we have handed up.

That is what we would say in relation to protection of the public.

In relation to the public interest, we would submit that an order is not required on the basis that my learned friend has set out. There is a separate and distinct ground, we would submit, on what is on any view a high bar, necessity being the appropriate yardstick. That high bar is not reached in this case.

The facts of the other two cases, *Sathanathan* and *Sandler* (and you were not referred specifically to *Sandler* but you were to *Sathanathan*) I will refer to them both. There are some quite significant factors in relation to both of those which would take them into a slightly different league, if I can put them that way, from this case. There is also the point to be made that in neither of those cases it would seem is there the kind of progress over time which can be seen in this case from August last year through to March of this year.

No doubt these are serious matters, and that is accepted, and I hope it is clear from the Registrant's letter to the Investigating Committee that he accepts completely that these are serious matters, and that he was completely in the wrong to do what he did. However, we would submit that they do not reach the very high bar that there exists to impose an interim order for suspension on a public interest basis.

What we would invite you to do is to impose a conditional registration order on the basis that it is necessary to protect the public, on the terms that I am about to lay before you, if they find favour with you.

Madam, can I just deal with the facts and background? There will be one block within this that I would like to go into in private session to deal with health matters.

You will have seen from the evidence before you that the Registrant came before the optometric profession later in life, qualifying in his forties in 2003. He first registered as an optometrist at that stage. He lived with his wife and daughter, started to work as an optometrist in a number of locations in the South West and on the South Coast. As you will have seen he was a pre-registration supervisor at Vision Express. It was hard work, and it no doubt took its toll on him over time, but nevertheless he did a good job. He was reliable and competent, and there were no complaints about his clinical practice whatsoever.

Could I just go into private now for a short block to deal with personal and health matters?

Ms Hallendorff: Indeed.

[Hearing in private]

[Hearing in public]

Can we go back into public session now while I deal with some other matters, please?

Around the time that all this was going on there were other pressures at home, which you have seen in the representations: financial in relation to his daughter, and also what he was suffering emotionally. There was a huge amount of travel all over the South of England, and again no complaints whatsoever about his practice, but things as you can see were getting worse emotionally.

Just to give you an idea, if you turn on just a couple of pages in the bundle to page 63 there is a reference there from Vision Express in Gosport. You can read it but no doubt you had a chance to consider it earlier, but you will note the date of it: 1 May 2010. That is just before he moved to Wilton *i*. He moved there in May 2010 and stayed there until August 2010, so really that gives you some general idea of how he was conducting himself immediately before that.

That was the position when he started at Wilton *i*, then, in 2007, and the second block that I would like to deal with in private is now, please, if I may.

[Hearing in private]

[Hearing in public]

All of what I have said adds context. It is something that the Registrant bitterly regrets doing, completely irrational and completely out of character for him. I say nothing about the Council's outline of the facts in relation to this, nor any submissions about how serious about it is, and clearly it is, and that is something that is accepted and has been accepted now for some months by the Registrant.

You will have seen that from his letter, and can I just ask you to turn to that briefly? It is page 56 of C1. I would simply draw your attention to them rather than reading them out again; if you go to page 56, just under the “Problem - Steps taken/situation self resolved” headings, those two paragraphs, certainly the last paragraph:

“I am not in any way trying to minimise what I did. I however feel that I was under a huge amount of pressure.”

That is his attitude to it, and has been his attitude and remains his attitude. He accepts full responsibility for doing this.

What I urge on you are three matters as a result of that walk through the facts there. The first is this: that the actions that he took during that stage of his life were entirely out of character. We have a raft of testimonials there which I hope from that you can be satisfied that was completely out of character. Secondly, that these matters were brought on in the specific situation he found himself in at Wilton *i*, i.e. problems with the equipment, a perception that they were not sufficient for carrying out tonometry. He made absolutely the wrong choice, and I do not justify the choice, but it arises out of those circumstances at the particular time. Thirdly, for the reasons that I have set out it was a time of extreme stress and emotional turmoil for him, which as I say may go some way to finding an explanation for what he did.

So Madam, that is all I say on the factual background of it. We do not and cannot see that this a serious matter, but whether it is a serious matter or not you have to be satisfied of two things: that it is necessary to make an order to protect the public, and/or that it is desirable taking necessity as the appropriate yardstick to make an order in the public interest. The action that you are taking is obviously today in March 2011. One could perhaps understand a decision to impose a suspension order if this case came before you in August of 2010; it may be rather different because at that stage you would be faced with someone apparently displaying no insight into what has happened, and able to provide no meaningful assurance that this kind of thing will not happen again.

But of course things have moved on quite significantly since August 2010, particularly in three ways, and could I just highlight them for you? First of all, there is no doubt about the insight shown by the Registrant into what happened. That goes directly in my submission to the question of risk, for this reason: because someone who has acknowledged their wrongdoing and someone who has acknowledged the potential consequences to the public can take steps to ensure it does not happen again, and can offer a much more convincing and reliable assurance that it will not happen again. If someone has not accepted it you may disregard any assurance that it will not happen again, so that insight is all-important when considering future risk, which is what we are concerned with.

The second point is this: that the 'health position' as I call it globally, and I will not go into details of it, has improved remarkably. You have the letter from the Registrant's GP at pages 60 and 61. There was obviously quite a lot of hope then of this position improving, and you can see at the bottom of page 61 the second-to-last paragraph expresses that hope.

We have in R1 obtained some further information which may be of assistance to you today, and it should be four pages from the back of R1; in fact the third document is a letter dated 21 March from the Registrant's general practitioner and I would just draw your attention to that, the last part of that, "I am very pleased with his progress", so obviously Madam, matters have moved on in that way.

The third matter is the domestic situation which has improved dramatically as well. There were worries just in general terms about his daughter's education and matters of that sort. There were worries about financial matters, but those have in large part been addressed. Part of that was the Registrant accepting that there were issues and moving on to address them. I will not take you through them in detail because you will have seen them, but they are really his representations to the Investigating Committee at pages 56 and 57. You may think that setting-out of problems and solutions really does show quite a lot of insight into his position at the time and an understanding of what the problems were, but hopefully you can also accept that on the home front as it were things have improved dramatically.

He also has the support of a partner who now lives with him and his daughter. There is a reference from her in the bundle, and I will not go through that in detail as well, but that is hugely important because combined with his GP, who has really been a rock for him as well as his partner, the situation that he was in between May and August of last year is certainly not the situation that he is in now.

Why is all of that important? Because you are considering risk to the public today and if you are considering risk to the public today you have to take into account his present circumstances compared with his previous circumstances. They are in my submission very different, and for that reason the risk is lower today than it would have been in August of 2010. It must follow that that is the case.

In those circumstances we would submit that the risk can be addressed by conditions. It is not at such a high level given the insight and the other factors that suspension is the only possible order you can impose. You must consider proportionality and that in a nutshell as you know means taking the least measure to achieve the aim that you need to achieve. You need to protect the public, so what is the least that you can do in order to do that, and in our submission it is to impose these conditions, which are relatively stringent, which would address all of the areas which have been raised.

Can I just run through the conditions that we suggest? I have made reference to your red *Handbook*; I do not know whether you have copies of those?

Ms Hallendorff: I do not have one in front of me.

Mr Singh: It is an experienced Committee; I probably do not need to take you specifically to them. Can I just give you a flavour of them? The first condition that we would propose is this: that the Registrant place himself under the supervision of a specified supervisor, agreed of course by the General Optical Council, who would be prepared to monitor the conditions he is under and provide a report to the Registrar each month on his general progress in his position.

I should probably deal at this stage by the witness statement of Paul Smith, which is in the small bundle R1 which I provided to you. The current position is that the Registrant is working at two branches of Scrivens Opticians. Two branches are all that he is working in at the moment; there are a number of branches in the Southern regional area which is managed by Paul Smith. If I may just indicate, it is in the statement at paragraph 3, but Paul Smith is not a clinician he is the Regional Manager, so he is not an optometrist. I just want to make that clear.

What is clear from this statement in my submission is that first of all he is fully aware of the allegations and of the Registrant's response to them, i.e. that he admits them and he has been shown various documents. One of the concerns which was raised in the Statement of Facts which was put before you by Mr Micklewright very helpfully before the Hearing obviously cannot apply. He is fully aware of the situation.

The second point is this: that really your consideration comes down to the second page and paragraph 5:

“The Registrant works in branches in small towns. From a financial point of view we are unable to put two opticians into any one branch, and therefore if the GOC imposes conditions on his registration that required him to have direct supervision I would not be able to continue to employ Mr Morgan. If conditions are considered to be an appropriate way for [the Registrant] to be reviewed for the time being I would be able to offer supervision by the way of remote contact, and I can also make the offer for the records to be audited every month.”

Can I explain how it would work if you were minded to impose this kind of supervision condition? We have had further conversations with Mr Smith this morning after the statement had been received which goes to you now. There are a number of branches in the Southern regional area; each one would have an optometrist in them. The supervisor would be most likely the named person whom he has in mind at the moment, but there is a meeting at which he will be asked tomorrow, who is based at one of the Bournemouth branches, so relatively close to where the Registrant lives and would be able to travel to regularly. So the supervisor would be based at that branch, and would be able to provide supervision remotely in terms of support on the telephone or whatever as required.

It would also be possible, in your discretion really, to have meetings at whatever interval you felt appropriate; it could be fortnightly, it could be monthly, but to review his progress in his job, so the supervision would be remote in that sense but there would be face-to-face contact, so there could certainly be that, and you would be able to impose it at whatever interval you felt appropriate.

The second part of it would be the auditing. The Council do not have to get involved in the auditing, it would happen independently within the company. It is something that they are able to do, and a service that they have said they can offer. We would suggest that it would be a random auditing of records, in that the Registrant would provide the initials of all the patients that he had examined during the one month period before each audit. The names would be provided to Mr Smith, and Mr Smith would pick a selection, for example 10 or whatever you and your colleagues felt was the appropriate number. Those would then be provided to the clinician and also to his supervisor, and they would then be audited and a report prepared, and then any issues would be raised in a meeting with his supervisor, so although it is not direct supervision it is still stringent enough in our submission for any concerns you may have.

Can I just make this point as well: what is not suggested is that this practitioner is deficient in multiple areas of his performance, or that he needs someone standing over his shoulder ensuring that he does everything right, if I can put it that way? It may need a slightly defer touch with something that is stringent enough to allow you and your colleagues to be satisfied that things will not be missed, because what is the concern here? The concern is to ensure that everything is being recorded properly and that in particular tonometry is being carried out where it should be. If audits are done every month and there are meetings every two weeks or month, whatever you decide, that will be sufficient in our submission to ensure that any issues are picked up quickly, they are picked up efficiently, and that a report is prepared on any deficiency at all. If there is any deficiency of course it can be brought back before this Committee for a review by the Council and the Council will be kept in the loop at all stages.

So Madam, that is really the object of it, and why we put these conditions forward.

Can I just go back to the conditions then? First of all, placing himself under the supervision of a specified supervisor with the agreement of the Council, who would monitor the conditions and provide a report to the Registrar each month or fortnightly on his progress. It may be helpful for you to expand on that condition, and the suggestion from our point of view is this: 'Your supervisor need not be based at the same practice as you, but must meet with you at least once a month or every two weeks, and be available to you to contact as and when any issues arise', something along those lines, so that you can define the ambit of the supervision as well in a proper way.

The third condition we propose is that you must confine your practice to positions within Scrivens Opticians, and limited to the area managed by the Southern Regional Area Manager Paul Smith. The reason for that is that he would be working at those two branches as I have explained, and if for any reason he were asked to go to another branch it would be under the umbrella of Paul Smith, who is aware of all of these matters. One of these concerns raised was 'Would his employer know about the conditions, and would his employer know about the allegations?' and in my submission that concern is completely addressed by that condition, because Paul Smith will have all of the information and will pass it on. In any event the Registrant has no wish to mislead anyone about it. His actions from the stage of August last year and through the Investigating Committee have been completely open, and hopefully you can accept that.

The fourth condition is that you must remain under the care of your general practitioner and inform him that you are subject to conditions, and then potentially if you felt it necessary allow the Registrar to exchange information in relation to compliance with conditions about any treatment that he is receiving. It may also be helpful for the general practitioner to provide a report as well at a later stage, but that would necessarily be on a monthly basis.

Obviously then all of the other standard conditions relating to information-sharing in relation to continuing education and training, and if you felt it necessary keeping under review his scope of practise in consultation with his GP.

That is the package of conditions that we would suggest. How would they protect the public? In these three ways, we would suggest: first of all, they would ensure that records and clinical practice is monitored. That really must be the concern, so that any issues are picked up quickly as I said earlier. Secondly, it would provide an additional layer of support. Now, it is fairly clear that the Registrant has a lot more support now than he did in the period of 2010 with which we are concerned. Support in our submission played a big part in what happened. Having a supervisor at work, in the same company and available would provide that extra layer of support, and support in a work context which is what did not happen and he did not have before. It may be if he had chosen to take matters further after the letter that he sent, and to raise matters properly, this would not have happened. He would not have made the stupid choice that he did, but having the extra layer of support at work, someone he could go to, is also another factor which in my submission you could bear in mind in determining whether there is a risk to the public if these conditions are imposed.

The third matter is that it would allow him to continue properly on his rehabilitation. He sits both clinically and health-wise under the care and supervision of other people who would be able to progress that in his best interests.

Can I just deal with the concerns that the Council had? I think what was submitted about conditions came to this: because these were offences that related to dishonesty last year, how on earth can you trust this man to comply with the conditions? That I think is what the submission was which was made. If that was it, and I may be simplifying it, that is really a last grasp in my submission to try and justify why these conditions would not meet the risk to the public. There is in my submission no strength in that submission. You can see a completely changed attitude in this practitioner since last year, and he assures you through me that he can be trusted to comply with conditions.

There is also the fact of course that Mr Smith will be the person overseeing all of this from a manager point of view, so you have that extra attention. I also wonder what 'room for manoeuvre', which I think was the phrase which Mr Micklewright used, 'there is within these conditions'. The independent audits will take place independently whether he likes it or not. The supervision will take place whether he likes it or not. He will remain under the care of his general practitioner because he has to, he wants to, and he will work only at the branches that you determine that he should, quite simply because he is employed by Scrivens Opticians and they will not let him work anywhere else.

There is actually very little room for manoeuvre, and in my submission there is nothing in the contention that you cannot trust this man to comply with conditions now, given all that has happened since August of last year.

So Madam, those are my submissions on risk to the public, which can adequately be met by conditions.

Can I now move on briefly to the public interest? First of all, the test; there are three bullet points, that in relation to public interest the test is not one of necessity, I think it is at least "desirability" as it says in the Authorities. It is agreed on all sides that it is a high bar to meet and a relatively rare case that will meet it. Thirdly, although necessity is not the test, because of proportionality necessity is an appropriate yardstick to apply. Those are not actually the words in the Statute, it is in practical terms the kind of test that you would be applying, and in practical terms it is the same or very similar to the test which you are applying on the other aspect of the case, but of course they are different considerations. Really what Mr Micklewright is saying is that the public would be outraged to know that this man was continuing to practise before the final hearing. What I would submit is that these are no doubt serious matters, without any shadow of doubt, but they can adequately be dealt with at a final hearing where there may be suspension, there may be more, but the public interest and the reputation of the profession can be safeguarded by an order at the final stage. It is not clear in my submission why an interim order suspending this person is needed.

Dealing with the two authorities, if I may, it is I think submitted that the facts of *Sathanathan* help you in determining that this case is another one of those relatively rare cases. In my submission it does not, really. That was a decision in relation to its particular facts, and indeed the important paragraph of the judgment that was read out deals with the particular facts of prescribing

controlled drugs in a position of trust. That is not what is happening here. It is a completely different set of facts. If it is being used to say that an order can be made on the basis of public interest I agree with that completely, of course it can, it just has to satisfy the high bar. The question in this case is whether the facts are sufficiently serious to justify that.

Can I deal with *Sathananthan* in just a little bit of detail, because it was dealt with in detail by my learned friend, quite properly? That case involved the prescribing of controlled drugs, in some cases to drug addicts and in some cases to people who would not be entitled to the drugs anyway. There was a police investigation of course in those circumstances, as you know it was a criminal offence to do so as well. It was something that the practitioner had done before. Although there wasn't a finding of serious professional misconduct back in the eighties, it is something that he had been before the GMC before in broad terms, so it was not someone without a history, it was someone with a history of doing almost the same thing.

There was the initial complaint of inappropriate prescribing, and there was a second complaint which is on page 12 of the judgment, if you would not mind turning to that briefly.

Mr Watson: There are no page numbers in the judgment, so perhaps you can refer to the paragraph?

Mr Singh: I am sorry, it is paragraph 12; I did say page 12 and that was my mistake. It is about half-way through the paragraph.

Mr Watson: The paragraph beginning "Subsequent to the hearing"?

Mr Singh: That is right. There was an additional complaint in that case:

"- a complaint from Mr SF, who had been a patient of Dr Sathananthan for the previous 5 years for the purposes of securing a prescription for his addiction to opiate drugs. SF alleged that he had recently told Dr Sathananthan that his liver function was back to normal, to which Dr Sathananthan replied "*I have told you before, I am not interested. If you pay me, then I am prepared to give the drugs to you*"."

It then goes on there to detail some other matters, and the patient said that Dr Sathananthan had lied to him.

The nature of the allegations and specifically that second allegation is that this person, who was either doing this or willing to do this, i.e. to supply controlled drugs to drug addicts for money and for personal gain, that certainly is the suggestion of what this person was being accused of, in an abusive position with vulnerable patients.

I do not shirk from the fact that this is obviously a serious set of circumstances that we are dealing with here, but it is not in my submission in the same category as *Sathananthan* in terms of seriousness or abuse of position. It is

noteworthy of course that the Committee initially dealt with that by way of conditions not suspension. It was after there was non-compliance and potentially a breach of conditions that suspension was imposed and it is right that the learned Judge in the High Court did say, if you would not mind just flicking forward to paragraph 32:

“I also agree with [Counsel for the GMC’s] further submission that, in any event, it was necessary to suspend Dr Sathananthan’s registration in the public interest. Irresponsible prescribing of controlled drugs is a serious abuse of a doctor’s professional position and one that can lead to the misuse of such drugs by not only the patient but by others via the illicit market.”

It goes on there to talk about how serious is the prescribing of controlled drugs, and the abuse of a position of power in large amounts brings the profession into disrepute. I do not disagree with any of that, that is absolutely true, but that does not deal with this situation with rather different facts. While this is an authority that an order can be made on the basis of public interest, it certainly is not an authority that such an order is required here. That is for you to decide on the facts.

One thing that seems notably absent in this case of *Sathananthan* is any kind of insight or acceptance or moving-on of the practitioner whatsoever. This case again is very, very different, so on the facts *Sathananthan* can be distinguished in our submission, and in any event that was a case where the Interim Orders Committee imposed conditions until there was a breach.

Mr Watson: Can I just correct you on that? In the long determination of the Committee, which is summarised starting at paragraph 19, paragraph 19 at the bottom of the page begins “Having considered all the information”, yes? Do you have that? [Yes] If you could then travel two pages on within the Determination of the Committee to the page which begins with two words, “at risk”, go to the second paragraph:

“The Panel accepts the arguments made on your behalf that you have not breached the conditions imposed.”

So I just draw attention to that; the basis on which the Panel reached its determination on the grounds of public interest were therefore confined to those outlined by the Judge at paragraph 32. That is my understanding.

Mr Singh: That is my loose use of language. It is not breach of conditions, they found in the paragraph under that. There was obviously the additional allegation that he had refused to comply with the investigation that was ongoing. That is the extra matter that was found to be relevant.

Mr Watson: There was no finding of breach of condition, there was an additional allegation.

Mr Singh: That's it. That is my loose use of language, and my fault. So in any event *Sathanathan* is a different situation, a more serious situation, for a variety of reasons, and one which in my submission does not lead to the conclusion that in this case an order for interim suspension is required on the basis of the public interest.

You have not been referred to *Sandler* in any detail factually. I do not know whether this is relied upon as a factual decision at issue, and unless it is I am not going to spend time going through it. In my submission again *Sandler* is more removed from this case –

Mr Watson: May I simply interject? Ultimately it will be a matter for the Committee. If counsel wish to address the Committee on facts of cases then the Committee will obviously give it what weight they see fit, but I will be advising the Committee that the facts of individual cases are not ordinarily relevant to the consideration of each case. Each case must depend on its own facts and the judgment they form.

Mr Singh: Thank you, I will not deal with *Sandler*.

Mr Watson: They are illustrations of where the public interest has been applied in other cases, and that is the way I would advise the Committee.

Mr Singh: Thank you; and so considering public interest the last point I have to make is this: the bar is set high, and the yardstick is necessity for reasons of proportionality. The reality is that if you were to make an order in the public interest it would be a suspension order. In our submission an order for suspension on the basis of the public interest would be entirely disproportionate in this case, for two main reasons: that the classic exposition of it in *Shiekh* is that it is a very, very significant thing for any professional to be suspended on an interim basis. I endorse that completely.

The effect it would have in this case is two-fold: first of all, it would mean that the main income in the household would be eliminated. The Registrant has the main income within the household. His partner, as you have seen from the reference from her, works as a care worker in a care home. She is not the provider of the main income or anywhere near that. His daughter is now finishing her A-levels, and she was very badly affected by the loss of her mother. She is now doing her A-levels, living at home. It is not bringing any significant income to the family, so the position is that if he is suspended financially it would ruin him and those who live with him. His mortgage is around £1,100 per month, and there is absolutely no way that he would be able to meet that without working as an optometrist. It would be a very significant step to take, and it would be a disastrous one in this case.

There is a second aspect as well; the fact that the Registrant has now embarked properly on the road to rehabilitation is a relevant factor when considering proportionality of the measure that you intend to use to protect the public interest, or to protect the public. Obviously part of the difficulties which he faced last year were financial, and him being unable to work as the result

of a suspension order would put him back in a very similar position, which then adversely affected his health. That is not to hold you to ransom, but it is one factor for you to consider in the round, because what you have to do is balance the Registrant's interest with the public interest, so it is only right that I point out to you that he is on the path of rehabilitation, and a suspension order will inevitably halt, or at the very least slow that down considerably. That is another factor for you to consider when considering whether suspension at this stage would be appropriate.

Balancing all of those interests and considering how serious the other matters were to which you have been referred, and the fact that there has been a significant move on in this case, and although serious, in our submission it was not so significant that to allow this man to practise on an interim basis would so damage the reputation of the profession that he should be suspended.

Madam, can I just turn to one side and see whether I have missed anything? If I have not, then those are my submissions. [*Confers*]

Ms Hallendorff: Thank you; do you have anything further?

Mr Singh: No, I do not, thank you. Do you have any questions?

Ms Hallendorff: In terms of the suspension you have not mentioned any time for this interim order. It can be up to 18 months with review at six monthly intervals. Mr Micklewright, do you have anything to say?

Mr Watson: Do either advocate wish to address the Committee about the appropriate period?

Mr Micklewright: I am grateful, thank you Madam. I was going to ask to address you, Madam, on that again. I omitted that on my original submissions and I am very grateful for the opportunity to do so.

Madam, you will ask as I did at the outset for an order for 18 months. I do know that Committees of the General Optical Council are sometimes minded to only order interim orders, of whatever nature, for a shorter period than the maximum. There are undeniably advantages to doing that, and I accept that. One advantage is that it is an encouragement to the Council to ensure that they do not drag their heels when it comes to listing cases and advancing investigations, and given that the registrant has had their practice inhibited in some way, shape or form.

Further it also, arguably perhaps, goes to the nature of the proportionality of the order; why an order for 18 months when clearly one is not required and a shorter length of order will do? I accept all of that. However Madam, there is a significant consequence of getting to the end of an order and the hearing, for whatever reason, not being in sight. That is that the Council, should it wish an order to continue in force, will have to make an application (and inevitably

an expensive application) using the Registrant's money, to the High Court for an extension of that order.

It is for that reason, and you may consider it instructive in that respect, that with the majority of other healthcare regulators. I think it is fair to say generally, their Interim Orders Panels will work on the basis that unless there is a good reason not to impose an order for 18 months, then an order for 18 months will be imposed. That is the approach that we invite you to take.

The reason why we say that you can feel safe in taking that course is for two reasons: firstly, it is not possible at this stage for me to say on behalf of the Council how long it will take to put all the evidence together in this case and to list it. That is because it is dependent on a number of factors. It is dependent on the evidence being correlated by the Council, and how long it will take to do that. It is dependent upon the resources of the Council and their ability to list a hearing within that 18 month period. I do not have any information to provide you with in that respect, but certainly it is a factor which it is not possible to accurately determine at this stage in any event – and indeed would not be before any Regulatory body.

Secondly, however, with regard to 18 months being in some way disproportionate or unduly onerous on the Registrant, you know well that that problem is mitigated by the existence of the ability of the Committee, indeed the obligation of the Committee, to review the order at six monthly intervals.

There is an additional safeguard overlain on to that, which is that if there is further evidence available which may in some way affect the nature of the order, or indeed the imposition of an order at all, then it is open to either party to apply to the Interim Orders Committee to seek a variation or indeed a complete removal of that order. So should, for example, my learned friend's client for whatever reason wish to present evidence to another constituted Panel that there is no longer a necessity for an order to be imposed, then he can do that at any stage.

Following on from that, after six months from the imposition of this order there would have to be a review to see whether or not it is still necessary for an order to be in place, so in reality the nature of an 18 month order is not actually an order for 18 months, it is really an order saying 'You will not have to go to the High Court for 18 months for an extension, that is the absolute limit', but in reality the order is actually only in effect for six months, because it is considered entirely afresh within a six-month period of every order being made, and indeed of every review of that order. In my submission therefore that satisfies any concerns which may exist about it being disproportionate to impose an 18 month order.

Finally, should one ever reach the stage where having imposed an 18 month order an application needs to be made to the High Court at that stage, extending it unreasonably beyond 18 months is something which in my submission the High Court has recently shown a tendency to be very reluctant to do. It has made it quite clear, and this is purely by way of example –

Mr Watson: Forgive me, this Committee's power is limited to an order up to 18 months.

Mr Micklewright: I accept that, sir, yes.

Mr Watson: Then why is it relevant for this Committee to consider what the High Court's attitude might be if that limit is reached?

Mr Micklewright: It is relevant because it is designed to demonstrate – and the reason I mention it – that by imposing an 18 month order that is not tantamount to simply giving the GOC *carte blanche* to drag its heels and list a case whenever it feels like it. It is not effectively imposing an order which allows the GOC to not appreciate and understand and react to the fact that there must be a slight degree of urgency in listing this case.

Mr Watson: But forgive me, if this Committee decides to order 18 months, if that were the outcome, then it is of no concern to this Committee at this stage, or would be, what the High Court's attitude might be if that level were reached. If this Committee on the other hand were to decide firstly to make an order but secondly to limit it to a period less than 18 months, then with respect the outcome of any application for extension were such an application to be made is entirely a matter for the High Court. It would not be again a matter to which this Committee should pay regard to whatever might be the policy, and there is no such policy as you know, it would be dealt with on the facts and the merits of the individual application. I am struggling at the moment to see why this Committee should look into the mind of a hypothetical High Court judge dealing with a hypothetical application in the future – but I simply advise you to tie in the relevance so that the Committee have it.

Mr Micklewright: Well sir, as I say it was simply to illustrate that the imposition of an 18 month order is not *carte blanche* to the General Optical Council to not seek to expedite this Registrant's case; but I will say nothing further on that.

Ms Hallendorff: Mr Singh?

Mr Singh: I have nothing to add, thank you.

Ms Hallendorff: Thank you; Mr Varley, do you have any questions?

Mr Varley: No questions, thank you.

Ms O'Donoghue: I just have a couple of questions if I may. Could you confirm for me what type of tonometers Scrivens Opticians have?

Registrant (M): What, in other practices?

Ms O'Donoghue: Do they have a standard tonometer that they use in the practices?

Registrant (M): No, they have a variety. In Lymington we have the “i care” tonometer, which is the rebound one, and we also have a Pulsair in the Hythe branch.

Ms O’Donoghue: Right; and do you know if any of the practices just have contact tonometry?

Registrant (M): Within Scrivens there is no practice that relies on contact tonometry. It is always there as a back-up but it is never as the first front-line so there is no requirement to use it.

Ms O’Donoghue: Thank you very much.

Ms Hallendorff: Mr Watson? We will now turn to our Legal Adviser for his advice.

Mr Watson: The Committee are aware of the general nature of the power that they have to consider in this application, reciting matters which are generally known to the Committee but for them to bear in the forefront of their minds. Therefore I remind them that this is an application by the Council for an interim order, and that their powers are set out in Section 13(11) of the Opticians Act, which effectively provides for three potential grounds on which such an application might be made, only two of which are relevant in this application.

The relevant section provides that where the Committee is 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, then in effect by extrapolation of subsequent sections the Committee may make either an interim suspension order or an order for conditional registration, and in either case such an order may be for a period up to 18 months. I will return to the question of the period at the end of the advice that I tender.

There are therefore three grounds on which separately or cumulatively such an order may be made, and of course if such an order is made then it may also take the form of either conditions or suspension. I mention that in that order, because there are effectively three stages to your thought process: firstly, whether one of the applicable grounds is made out; secondly, if it is made out you proceed to consider whether or not the need for an order or the desirability of an order can be met by conditions, or if it cannot then you go on to consider suspension; and lastly, you give consideration to the applicable period.

In this case there is no question advanced that such an order may be in the interests of the Registrant, and the Registrant opposes the making of the order in any event; and so the two grounds that you have to consider are firstly the ground of whether or not such an order is necessary, and that is the explicit term in the Act, “necessary for the protection of the public”, and secondly, you have to consider the alternative ground on which the order is sought, whether either independently or in addition to the previous ground, such an order is otherwise in the public interest.

If you consider that latter ground I advise you to bear in mind four particular aspects, and they emerge not only from the cases of *Sheikh* which has been referred to in the summary of the case which has been put before you, that of *Sathanathan*, but has also been a test, or a set of criteria, that have emerged in subsequent cases, notably that of *Sandler v General Medical Council* in May 2010, and the more recent reconsideration on 4 June of 2010 in the case of *Bradshaw v General Medical Council*.

The four factors I advise that the Committee should bear in mind, and I remind you that my advice is advice only and ultimately the Committee must apply the tests that it decides are appropriate, you should bear in mind these four things: firstly, although Parliament has not expressly set a test that an order based on public interest grounds must be, in quotes “necessary”, it has been observed in the cases to which I have referred that the making of such an order carries with it some implication of necessity, and certainly the implication of desirability.

Secondly, that because of the need to consider the Registrant’s own interests when weighing up the proportionality aspects that you have to consider as to whether or not such a ground is made out, and you are satisfied that it justifies an order, because of that need such an order should not be made unless it is at least desirable in the public interest.

Thirdly, however the test is expressed the bar, as it were, for you to be satisfied that such an order should be made is set high, and therefore necessity is an appropriate yardstick to apply in an ordinary case. Indeed, you will observe that “necessary” was exactly the adjective used in shorthand maybe but used by Mr Justice Forbes in the case to which you have been referred. I repeat, it is an appropriate yardstick by which you can measure whether it is both desirable and proportionate.

The fourth matter that you should bear in mind is that it has been stated and established that it is a relatively rare case where an interim order will be justified and made on this ground alone.

Putting all those four points together, my advice is that the safest course for a Committee to take is to use “necessity” as the appropriate yardstick for the making of an order on public interest grounds, as well as using it as the necessary statutory test to whether or not such an order should be made for the protection of the public, and that that is an appropriate way for the Committee to consider the matter, unless there are very special and unusual features in your consideration which should apply to the public interest test. If you decide there are such special features, it would be helpful and I would advise that the Committee should then set out its reasons why it has used a test or a yardstick which is other than that of “necessity”.

The cases that I have referred to have been placed before you not only in terms of the principle they establish but some submissions have been made to you about the application of the facts of those cases, in particular the case

of *Sathananthan*. I advise you that *Sathananthan* is an illustration of the principle of how and where the public interest test has been applied as the sole ground, or an independently-standing ground, justifying an interim order in another regulatory jurisdiction and in another case.

It is therefore an illustration. You may find it helpful or you may not, but ultimately it is a matter for you whether the facts of that case have any illustrative bearing on this case, and I would advise you to be very cautious indeed about applying the facts of one case to the facts of the case that you have to decide. Each application and each case is set ultimately in its own factual context, and the judgment that you have to form is equally based on that individual context.

Turning from matters of principle therefore to the summary of how you should proceed, you must be satisfied whether it is necessary on the material before you for the protection of the public, or whether it is both – and I use shorthand here – necessary/desirable in the public interest that the order should be made. You keep in mind, I advise, that it is not your function in deciding this application to make findings of fact or to resolve any disputes which may appear in the factual material before you. It is for you to consider and decide firstly whether there is credible evidence that establishes that there is a need for an interim order to be made. It is also right to say that this is an application brought by the Council, and that the Council advice has to satisfy you that such an order should be made; but this is not an application in which questions of proof or burdens of proof in the strict sense apply. It is rather a question of judgment for you to apply, taking into account all the information which you have before you, and taking into account the submissions that you have heard, and then ultimately applying your judgment as to whether you are satisfied that either or both of the grounds that are applicable are ones that should be applied in this case.

You must, as has been stated, have regard to the principle of proportionality. The protection of the public, in particular patients, the maintenance of confidence in optometrists and their profession, and the need to declare and uphold proper standards of conduct and behaviour in the profession, are all relevant factors to put into the balance of the public interest; but those must be balanced against the consequences for the Registrant of the making of an order, which may well interfere with his ability to practise and to earn a living generally, and which may undermine his own standing and reputation, and of course will have potentially other consequences for him.

So proportionality is firstly a principle which you must bear in mind both in considering whether there is a need for an order to protect the public, and secondly, whether there is a need or desirability for an order to be made in the public interest.

However in terms of the stages, I add and remind you of this: your consideration should be a two-stage, or indeed three-stage, process. The first stage is to start by deciding whether an interim order should be made at all on one or both of the grounds that are advanced. If you decide that it should not

then that is an end to the matter. If you are satisfied that one or both grounds do satisfy you that an order should be made, then you proceed to the second stage. At the second stage you must consider firstly whether the imposition of conditions on the Registrant's registration will suffice, bearing in mind at all times that the conditions that are imposed must be such that will meet the need to protect the public, or will meet the public interest ground that you have otherwise found to be satisfied, that they must be reasonable, workable and enforceable. It is only if you were satisfied that conditions were not such as to suffice or could not be devised that you would then go on to consider making an order of interim suspension.

In considering these questions, whether conditions should be sufficient and whether they can be imposed, or whether there is a need for a suspension order, proportionality again must be applied in this second stage. It must be applied in the sense that a practitioner's registration should not be subject to suspension if conditions would be a proportionate response, having regard to their practicability and workability.

Finally, if you have travelled past the first and the second stages, you must then also give consideration to the period for which it is appropriate for an order to be made. In considering the relevant period that you would order, up to 18 months being the maximum, you are entitled again to take into account what is the proportionate period. You will have in mind that such an order will be subject on a mandatory basis to review every six months, and that indeed there is power within the Rules for a review to take place even earlier if, after a period of three months, there is a change of circumstances and if new evidence relevant to the order becomes available.

So that review structure does exist, but ultimately you must decide whether or not this is an appropriate case to make an order up to 18 months, or whether it is appropriate to make an order for a lesser period, being aware not only of the review structure but also of the power under the Rules for the General Optical Council at the end of any period that you impose to seek an order from the High Court for a further extension, an application which will be dealt with of course on the merits of the situation at the time that it was made.

That I think concludes the matters that I wish to advise you on, unless either advocate wishes to take issue with that? [*No further comment*]

Ms Hallendorff: In that case we will clear the room and make our deliberations. I cannot give you any time limit, but we will suggest you take lunch now and we will reconvene when we are ready. Thank you.

[*Hearing adjourned at 12.04*]

[*Hearing reconvened at 13.41*]

Ms Hallendorff: Good afternoon. Before we proceed we are going to make an order, and therefore with agreement of both Counsel I will use the Registrant's name. [*Agreed*] Thank you.

DETERMINATION

The Fitness to Practise Committee considered the Council's application for an Interim Order on 24 March 2011.

Decision

The Committee has considered whether an Interim order should be made in this case under Section 13L of the Opticians Act 1989.

The Committee has reached its determination taking into account the material placed before it, the submissions of Counsel and the advice of the Legal Adviser.

It is not satisfied that such an order is necessary on the independent public interest ground. Having regard to the fact that it is a relatively rare case where the bar is met for an order on that basis the Committee is not satisfied that this ground justifies an order in this case.

Undoubtedly the nature of the allegations involve dishonesty of a serious nature and that aspect has been taken into account by the Committee in arriving at its determination that it is satisfied that an Interim Order is necessary to protect the public. The conduct alleged against the Registrant amounts to a prolonged period in which he dishonestly recorded tonometry examinations on patients which he had not carried out. He has admitted that this was the case. The Committee agrees with the submission made on behalf of the Council that such conduct gives rise to a concern that other professionals might have been misled by those records, in addition to the obvious concern that the patients themselves were put at risk. The Committee notes the context in which these events occurred and has had regard to both the circumstances prevailing at the time and since. It concludes that there is a continuing need to protect the public.

Having reached that conclusion the Committee went on to consider whether conditions would be proportionate and workable and would be sufficient to meet the need to protect the public. The Committee decided that the conditions outlined below would be sufficient.

The conditions are that:

1. The Registrant should be employed by Scrivens Opticians and should work only at branches of Scrivens within the Southern Regional Area currently managed by Mr Smith.
2. He should be supervised by a named supervisor who is a registered optometrist and acceptable to the General Optical Council.
3. He and his supervisor should meet in person not less than once each fortnight to review the standard of his work.
4. His patient records should be audited monthly by or on behalf of the supervisor using a random sample of not less than 10 patients per

- month. The audit should include review of the appropriateness of the examination and the adequacy of record keeping.
5. He should continue to comply with treatment as advised by his GP.
 6. Reports from his GP and from his supervisor should be provided prior to any review hearing of the Interim Order not less than 7 days before the Hearing date. The reports should outline his progress both professionally and medically and give details of the results of the audits.
 7. The General Optical Council will enter these conditions against your name in the Register save any conditions which relate to your health. You must allow the Registrar to share any information, including confidential information, with any employer, supervisor, professional colleague or any organisation for which you provide ophthalmic services for the duration of your conditional registration. You must also allow the Registrar to share this information with other Regulatory bodies and the Department of Health.
 8. You must inform the Registrar within 14 days of any criminal convictions, police cautions or formal disciplinary proceedings taken against you from the date of this determination.
 9. You must inform the Registrar:
 - a. If you cease working;
 - b. If your work takes you out of the United Kingdom for a significant period of time; or
 - c. Of any other employment you apply for outside of the UK (and in which countries) as conditions of registration only apply to practice undertaken in the UK (you must consider whether your time out of work or out of the UK will allow you to fulfil the conditions during the period of conditional registration). The Registrar may inform the relevant competent authorities in that country of your current conditions of UK registration.
 10. You must continue to fulfil the CET requirements under the General Optical Council CET scheme to secure appropriate points for continued inclusion in the General Optical Council Register.
 11. You must inform the following parties that your registration is subject to conditional registration:
 - a. Any organisation or person employing or contracting with you to undertake ophthalmic services (to include any locum agency);
 - b. Any prospective employer (whether within the UK or EC);
 - c. Chairman of the Local Optometric Committee;
The PCT in whose ophthalmic practitioners' list you are included or seeking inclusion.
 12. You must ensure that your General Optical Council registration is renewed by 15 March annually while you are subject to the GOC FTP conditional registration procedures. Should you fail to renew your registration a review hearing will be arranged immediately.

The Committee determined that an Interim Order should be made that the Registrant should be permitted to practise only subject to the above conditions. The Committee ordered that the Registrant's registration be subject to conditional registration for a period of 18 months from today. The

order will be reviewed within six 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.

[Hearing concluded at 13.50]