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

GENERAL OPTICAL COUNCIL

AND

ROGER ROBINSON (01-18543)

INTERIM ORDER HEARING

Monday, 5 September 2011

INTERIM ORDER HEARING: ROGER ROBINSON (01-18543)
Monday, 5 September 2011

Committee Members: Ms Fran Jones (Lay, Chair)
Dr Dozie Azubike (Lay)
Professor Stephen Taylor (Optometrist)

Legal Adviser: Mr William Hoskins

For the GOC: Mr Bradley Albuery

Hearings Manager: Mr David Henley BEM

The Registrant did not attend and was not legally represented

[Hearing commenced at 09.05]

Ms Jones: Good morning. I am Fran Jones and I have been elected by the Committee 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. I will ask the members of the Committee to introduce themselves and the capacity in which they sit commencing on my left. *[Introductions]*

To my right is Mr William Hoskins, the Committee's Legal Adviser, who will provide legal advice and assistance to the Committee and ensure that the proceedings are conducted in accordance with the Rules of Procedure, so as to arrive at a result which is fair and just. The Legal Adviser may accompany the Committee should it sit in private to deliberate. In the event that any matter arises during the course of the Committee's deliberations, upon which the Committee seeks advice, the parties will be invited to return to hear the matter which the Committee has raised and the advice to the Committee. Where advice on any issue is not accepted by the Committee, this will be indicated in the course of its decision on that issue.

To your right is Mr David Henley, the Hearings Manager, who will provide administrative support to the Committee. Next to Mr Henley is the transcriber, Mr Nisbet, who will be keeping an official record of all that is said today during the sessions of the hearing at which the parties are present. The remaining persons sitting in the hearing room, rather than in the public and press areas, are members of the respective legal teams. 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. Where the Committee decide 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 the 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 the transcript will be redacted accordingly. My understanding is there are no matters of health in today's hearing? [No]. Are there any applications other than the Interim Order? [No] In that case can I invite you to proceed, Mr Albuery.

Mr Albuery: Madam, this is an application by the Council for an interim order under Section 13L of the Opticians Act 1989. As you can see, Mr Robinson is not here and so the first matter you and your colleagues need to consider is whether you can, and if you can, you should proceed in his absence. In that regard, can I ask you to confirm whether or not you have seen this morning a service pack which comprises 12 pages?

Ms Jones: We have.

Mr Albuery: Thank you. Madam, should that be called C1?

Ms Jones: That would be excellent, thank you.

Mr Albuery: Madam, in terms of your powers, as you know under Rule 21 of the Fitness to Practise Rules you have a discretion to proceed in the absence of a registrant where you are satisfied that all reasonable efforts have been made to notify that registrant of their hearing. I deal with this in two stages: firstly, whether you can be satisfied that all reasonable efforts have been made, and then, if you can be, how you should exercise the discretion which you then have.

Madam, turning then to C1, you will see from page 1, which is an extract of the Register, that Mr Robinson's registered address is in Trinidad and Tobago; right-hand side of the page at the top. You will also see that he has given the Council an email address, a Hotmail address which appears under the postal address. Madam, at page 2 of the bundle appears the notice confirming arrangements for today's hearing and at page 3, there is a copy of a letter sent by international recorded delivery to Mr Robinson at his registered address giving him more than seven days' notice of today's hearing which is, without your agreement, the minimum period which he must be given for today's hearing. That was sent to his registered address and at page 5 there is confirmation from the Royal Mail that that letter reached its destination country. The notice was also sent – the Council doing more than is required under the Rules – by email and a copy of that email is at page 6. The Council also had another address in Gravesend for Mr Robinson and sent him a copy of the notice to that address, but as you will see from page 9,

that was returned to sender and so doesn't form, though it is in there for completeness, part of the application to proceed in absence.

Madam, in terms of what is required, the relevant statutory requirement, as I understand, is found in Section 23A of the Act and that requires that the Council serve any notices under the Act by a number of means which include the person's registered address, which occurred here, and by sending it by a postal service providing for delivery of the notice to be recorded. The notice sent to Mr Robinson at his registered address has not been returned and, in my submission, has been served in accordance with the Rules. Madam, you will appreciate that the Rules do not require proof that the Registrant has received the notices, only that they have been sent in accordance with the Rules, and obviously in that regard the Council can only rely on information given to it by Mr Robinson. In addition to that, which they had to do, they sent it also by email.

Madam, that is the first part, I think, of the application because there is no point in me dealing with the discretion you have unless you determine I have satisfied you of the first limb, so perhaps I should pause there.

Ms Jones: Okay. Thank you. Do you have any questions? [No] The Committee is happy to proceed.

Mr Albuery: Thank you. Madam, you then have to consider how to exercise your discretion, and you and your colleagues being experienced Committee members will be well aware that the Rules have given you a guidance, particularly in the case of *R v Jones* [2002] UKHL 5. I anticipate your Legal Adviser will want to deal with that so I won't trespass on matters which are more relevant perhaps to come from him than from me. What I will say is that when you hear those criteria, please bear in mind that they were from the criminal courts and unlike you, those courts can compel attendance by the issuing of warrants. Although of course the guidance reminds you that you should proceed with utmost care and caution in the absence of a registrant, here you have somebody who, in my view, has voluntarily disengaged from the proceedings because he has simply not responded, and the Council can do no more than it has done. In terms of any potential prejudice by him not being here, the matter is actually relatively straightforward and relates not to the substantive matters of fitness to practise but, simply, whether or not he has properly engaged in the retention process, and it is a matter of record upon which the Council relies. All the evidence, again, that I rely upon, has been served already on Mr Robinson.

Madam, for all those reasons, and in a keenness to move matters on expeditiously because they are matters relating to public protection here, the Council invites you to exercise your discretion to proceed, particularly in the situation where there is no application to adjourn from the Registrant and in a situation where an adjournment might achieve nothing at all.

Ms Jones: Any questions? [*No*] The Committee is happy to proceed, thank you.

Mr Hoskins: I think I ought to advise, Madam, briefly as part of the procedure, you have been properly directed to the Terms of Rule 21 of the relevant Rules so far as the matters that govern your discretion is concerned. I simply read out the terms of Rule 21 so the Committee have it at the forefront of their mind. Proceeding in the absence of the Registrant:

“Where the Registrant is neither present nor represented at a hearing, the Fitness to Practise Committee may nevertheless proceed if –

- (a) they are satisfied that all reasonable efforts have been made to notify the Registrant of the hearing; and
- (b) having regard to any reasons of absence which have been provided by the Registrant, they are satisfied that it is in the public interest to proceed.”

Madam, you have been addressed as to the efforts that have been made to serve the Registrant and the Committee have already found that the Rules have been complied with. You have heard in this case that the Council have done more than is required under the Rules. No reasons for absence have been given by the Registrant and, indeed, there has been no communication from the Registrant so the decision for the Committee is whether it is in the public interest to proceed. You bear in mind that these hearings are always best conducted when the Registrant is present but, of course, there is also a public interest in expeditiously disposing of these matters before the Committee.

Ms Jones: Thank you for that. Let me just check again with the Committee members that they are happy to proceed.

Dr Azubike: I was wondering whether we were going to be advised on *Jones*.

Mr Hoskins: I wasn't proposing to deal with *Jones* in detail. I don't know whether Mr Albuery wants to make any further reference to it.

Mr Albuery: I can, of course. I mentioned it because sometimes here the Committee want to go through all the relevant criteria and be advised by their Legal Adviser in that regard. Perhaps both the Legal Adviser and I have touched on it only because that deals particularly I think with situations where there is either an application to adjourn and/or the receipt of medical evidence, but it is of general application and I remind you, lest criticism be made elsewhere of not doing so, that where a registrant is absent you should proceed with utmost care and caution and you should consider the prejudicial effect of doing so. It asks you to take into account a number of criteria including is there an application to adjourn. There is not. Also, your Legal

Adviser has rightly reminded you of the public interest in proceeding. If you want to go through each of the criteria then I would have to obtain the copy of the decision which I do not have with me but I am sure the legal team here can do that if you think that necessary.

Ms Jones: Dr Azubike?

Dr Azubike: Obviously I don't know. He is the one who mentioned it so I don't know.

Mr Hoskins: Perhaps I can provide some further advice to the panel. The panel's judgment in this case is at the end of the day governed by Rule 21 as to which *Jones* provides valuable guidance. *Jones*, as you have heard from Mr Albuery, has particular relevance to factors which are not really in play in this particular case, so it does also have a general relevance, but the decision for the Panel in deciding whether to proceed today is at the end of the day governed by Rule 21, bearing in mind the caution that always needs to be exercised when a registrant is not here. The Panel must be satisfied that the public interest requires it to proceed in the absence of the Registrant. If the Panel is so satisfied, then the Panel should proceed.

Ms Jones: We are happy to proceed, thank you.

Mr Albuery: Thank you. Madam, we move on to the application proper. Madam, this is governed by Section 13L of the Opticians Act. For those of you who wanted to find it, it is on page 45 in your pack. There are three limbs upon which the Council can ask you to make either an interim suspension order or an interim conditional registration order and they are:

“that such an order is necessary for the protection of members of the public, is otherwise in the public interest, or is in the interests of the Registrant.”

The Council relies in this application on the first two, and so it would need to, firstly, satisfy you that such an order was necessary for the protection of members of the public, and/or – you can make the order for two reasons – is otherwise in the public interest. Bear in mind, please, that necessity is relevant only to the first limb which relates to “protection of members of the public”. Necessity is not relevant to the second limb which is “otherwise in the public interest”, although of course even in relation to that limb you must balance the effect on a registrant of imposing such an order in relation to the public interest in doing so, and not make any order which is disproportionate – more of that later, I am sure, from your Legal Adviser, but I thought it might just be helpful if I put in the context, before you hear the facts of the application, what I understand your powers to be. I shall make it clear also right at the outset that in this case the Council asks you to make, for reasons I hope will be clear, an interim suspension order rather than a conditional registration order, though of course you must first consider whether conditions

might meet the concerns of the Council before considering suspension because that is the proportionate way to proceed.

Madam I wonder if I could ask you to be given, if you haven't already, an evidence pack which we will call C2. I see you have it. Have you and your colleagues read it?

Ms Jones: We have.

Mr Albuery: Okay. Madam, I will deal with the generality of the application and then the specifics if I may. Mr Robinson faces fitness to practise proceedings and they are to be heard by your colleagues in December of this year. Those proceedings relate, I tell you by way of narrative, to concerns about clinical competence, record keeping and prescribing methods. Those concerns are not relevant to today. Indeed, in fairness to Mr Robinson, I should tell you that consideration was given to applying for an interim order in relation to those substantive matters and it was decided that there were insufficient grounds to do so, so had it not been for what I am about to tell you no application for an interim order would have been made. You concentrate therefore simply on the basis of the application which is this, that Mr Robinson did not seek retention for this current year, 2011/2012, and remains on the Register only so that the Council can retain jurisdiction over him so that the fitness to practise matters can be considered. The absence of him dealing with the retention process means that the Council has no knowledge – because Mr Robinson has provided no information – of whether or not he has insurance, whether he remains a fit and proper person to be retained on the Register – matters which will be explored in the retention process by disclosure questions – and thirdly, whether he has or has not completed the CPD requirements. All of these are clearly matters of concern, in the public interest and relate to the public protection.

If you turn with me, please, to page 1 in C2 you will find an activity log which working from the bottom up deals with the process of retention, and the first relevant entry for this year is about the seventh entry above where you will see it begins to deal with retention for 2011. Although I do not intend to go through it all with you now, you will see when you retire that the Council has made great efforts to try to engage Mr Robinson in his retention but they have failed to result in him completing the retention process. That must be completed in any year by 31 March but, if no retention paperwork has been received by 15 March, then a further retention email is sent, and was sent, to Mr Robinson, and you will see reference to that in the activity log. You will also see a further reminder sent to him on 17 March and various other letters referred to in the activity log.

If you turn over the page you will see other correspondence, and I want, if I may, to explain that to you. A danger of retaining somebody on the Register who has not completed the registration process is, as I have already indicated, the inability to check that they, if I may put it loosely, remain safe to

practise. For that reason the Council invites any such registrants who, as it were, are artificially kept on the Register to sign an undertaking confirming that they will not undertake any restricted activities. They include the testing of sight, the fitting of contact lenses and spectacles and the sale of optical appliances – all those things are restricted activities which only those who are registered with the Council can undertake, and in the absence of such an undertaking the Council has no way of ensuring that the public is protected because Mr Robinson could, at any time when he is in this country, continue to practise. In a sense, he would have an unfair advantage over all the others who had gone through the retention process because without providing any confirmation of these things, purely because of the need for jurisdiction reasons to keep him on the Register, he is able to undertake activities which are restricted.

So he was asked on 7 April 2011 in a letter that you have already read to sign an undertaking, and it is explained on page 3 why such an undertaking is required and what the effect of not agreeing to it might be for him. On page 4, you will see the terms of the undertaking which were requested by the Council. You will have seen for yourself there is an error in that undertaking in that it refers to a dispensing optician and he is a registered optometrist.

Professor Taylor: That also appears in the letter.

Mr Albuery: It does, yes. So there is an error there, but that is hardly a reason for him to ignore it. He might have rung the Council or sent an email saying “I can’t sign this undertaking but I understand your concerns. Send me the right one and I will”, but he didn’t and he has not corresponded at all with the Council. Perhaps more importantly or as importantly, he has not done any of the things that are required of him by the Act. That includes provision to the Council of insurance, a requirement of Section 10A(1) of the Opticians Act, which says:

“A registered optometrist ... must be covered by adequate and appropriate insurance throughout the period during which he is registered.”

And then goes on to say, 10A(2),

“A registered optometrist ... seeking retention of his name in the register must supply to the Council evidence that he is covered by insurance...”

By virtue of 10A(7), it states:

“If a person fails to comply with the requirements of this section, the Registrar may –”

amongst other things

“(b) refuse to retain his name on the appropriate register;”

I think it is important to remember this, isn't it, that individual registrants are accountable for their own area of practice. It is their responsibility, not the Council's, to ensure that all the relevant information is given and that correspondence with their regulator is responded to. Mr Robinson failed also to respond to the reminder letter sent to him on 6 June 2011, just as he has failed to respond to all correspondence sent to him in relation to these proceedings. So, Madam, the situation is this: you have on your Register an optometrist who can, although he is currently out of the country, at any time come back and practise. The Council has no evidence at all – because he has provided none – that he has, and I am sorry to repeat it, got, let alone provided, insurance as is required under the Act, has undertaken continual professional development or continues to be a fit and proper person. He has frustrated the proper retention process and he should not be able to benefit from his inactivity. It is necessary to protect the public that an order be granted because otherwise patients are seen by him without the protection afforded by those three things I have just mentioned, and it is desirable otherwise in the public interest and is proportionate because the regulator needs to be seen both by other members of the profession and the public to take matters relating to registration seriously, otherwise the confidence in the regulation process is undermined.

For these reasons I ask you to make an interim suspension order. Bearing in mind the nature of the application, there are no conditions which can be attached, says the Council, because of his failures. It is not a clinical concern that sometimes can be met by the imposition of appropriate conditions, and if you agree to making such an order, the Council invites you to make it for long enough to cover the substantive hearing, which is due to be in December 2011. I think that is for four months. Sometimes, Madam, if you are prepared to make the order, the Committee is prepared to make it slightly longer, perhaps for six months, to cover any period that might be caused if there are any adjournments in relation to the substantive hearing. As you know, if you do make such an order and the substantive hearing does not take place within the period of six months there will in any event have to be a review by your colleagues of the continuing need for such an order. Those are my submissions.

Ms Jones: Thank you. Do you have any questions?

Professor Taylor: Just a couple if I may. The reminder letter was also incorrect.

Mr Albuery: It was.

Professor Taylor: Is it the duty of the Registrant to notify that there is an error in that letter?

Mr Albuery: No, but it is the duty of the Registrant to provide information to the Council which is required under the Registration Rules.

Professor Taylor: I appreciate that, but in terms of that letter, that would not necessarily have triggered anything in the sense that he couldn't sign that document?

Mr Albuery: No. Well, he couldn't have signed that document. I accept that, yes.

Professor Taylor: If we were to make a condition that the Registrant notify the GOC of all that information immediately, presumably that would still put the GOC in a position where they did not want that to happen?

Mr Albuery: Well, it means he could continue to practise.

Professor Taylor: And that is, presumably, what you do not want to happen at the moment?

Mr Albuery: That is absolutely what the Council does not want to happen for the reasons I hope I have made clear.

Ms Jones: Dr Azubike?

Dr Azubike: I just want to be clear about the fact that you are saying there are no conditions that can be applied. On what basis do you make that assertion?

Mr Albuery: Well, it is not for me to suggest conditions because I don't think there are any. If you would like to suggest a condition that you think can properly meet the concerns then obviously I would be happy to respond to that. I don't want that to sound impertinent, and I hope it doesn't. It is certainly not meant to, but the difficulty here is that Mr Robinson has failed to provide any information. If you impose conditions, for example, that within a certain period he provide that information, he can continue to practise until it is provided and that causes the Council an immediate concern, particularly bearing in mind the amount of time he has had to provide it. The process started in January and we are now in September.

Dr Azubike: Technically nothing had happened until 31 March because he was still covered up to 31 March by insurers, so he started to not be properly on the Register after 31 March. Therefore it is not January.

Mr Albuery: Yes, it is, in the sense that he failed to respond from the beginning of the process which if you look in the activity log does begin in January. The point I am making is not that he should have responded in January but he has had reminders since January, and he has ignored them all.

Dr Azubike: But did you accept my colleague's point about the letters; because they are in error he could argue technically that he didn't have to sign it?

Mr Albuery: I have accepted that, yes, and continue to do so.

Professor Taylor: May I ask you a supplementary question? On the log it said that there was a receipt letter from Ferreira Optical.

Mr Albuery: I don't know what that is and I did earlier see if there was anyone from Registrations who might be able to assist me with that. There wasn't then but if that is of interest to you, then of course during the adjournment I will go and try and find a copy of that letter to see whether it is relevant because I don't know who they are. I wish I could help you with that but I can't.

Professor Taylor: I think that might be the practice he was working for in Trinidad. Certainly there is a company over there is my understanding so it may be useful to at least just pursue that.

Mr Albuery: Yes, I agree. Sir, when I leave the room I will ask Registrations to provide a copy of that letter to each of you.

Ms Jones: The contact address we have for the Registrant is Trinidad and Tobago and the letter of 19 August was sent to Gravesend. Was that the previous address?

Mr Albuery: I asked Mr Henley about that, Madam, this morning because I didn't know what that address was. We both believe because it was provided by the Fitness to Practise team that it was a previous address at which he might have worked and because the Rules suggest that all these methods are made, I think the Council thought well, let's just send it to every address we have but, as you have seen, it was returned to sender from that address.

Ms Jones: So has this individual always been registered principally living and working somewhere else, out of the country?

Mr Albuery: Not always, no. The fitness to practise proceedings also must relate to proceedings here and his practice here. I can't tell you when he moved to Trinidad and Tobago. That, again, is something that the Registrations team may be able to assist you with because there must have come a time when he actually notified the Council of that Trinidad and Tobago address so perhaps, Madam, I could ask that for you as well, when they received that notification.

Ms Jones: That would be helpful. There is at least then some engagement or there was at some point.

Mr Albuery: At some stage it seems so, yes, because the Council would otherwise not have known that is where he was. I will ask those two things.

Ms Jones: Thank you. Any final questions Professor Taylor?

Professor Taylor: When was he made aware of the proceedings for the substantive hearing?

Mr Albuery: I am not instructed in the substantive proceedings so I can't tell you without reference to other papers but I will do so.

Professor Taylor: I am assuming it was before the January process started. That is really what I am asking.

Mr Albuery: Certainly the proceedings must have started well before then.

Professor Taylor: So he would have been aware in January?

Mr Albuery: I assume so, but I will find out because of course he would have been invited to make representations to the Investigation Committee, then it would have been referred. There would have been a preliminary hearing and I think we can infer from the fact there is a hearing in December that he would have known, but much better to have the facts rather than draw inferences, so I will find that out.

Mr Henley: I can assist. I wrote to him initially to warn him of a procedural hearing on 9 May 2011 and again there was no response.

Mr Albuery: Of course, there will have been letters before that; immediately the Council receives the complaint and then once the matter is ready to be considered by the Investigation Committee.

Professor Taylor: That leads to another question then. Did the individual correspond at that point? In other words, have we never heard anything from him since that point in time?

Mr Albuery: All these are legitimate questions to which I have no answers. They are proper questions. I will find the answers for you.

Ms Jones: Before we then adjourn briefly, any final questions, Dr Azubike? [No] Could I suggest then we take a 15 minute break and we will come back and hear the responses.

Mr Albuery: Can I clarify the questions that I am to ask of others. Firstly, may we have a copy of that letter referred to in the activity log? Secondly, when were the Registration department told that he had this address in Trinidad and Tobago and, generally, what engagement has there been, if any, with the Fitness to Practise substantive proceedings.

Ms Jones: And is the address that was written to a previous employer or domestic?

Mr Albuery: I will go and find out the answers. Thank you very much. Madam, would it be appropriate, bearing in mind we are just adjourning, to make a point for the record – I had a situation recently – if you indicate you are not going to consider or determine the matter until you have that information or have even begun to consider it.

Ms Jones: We will not consider the matter until we have that information.

Mr Albuery: Thank you very much.

[Hearing adjourned at 09.40]

[Hearing reconvened at 10.02]

Mr Albuery: Madam, can I firstly thank you and your colleagues for the time you have given me. I apologise that I did not have answers to the questions when you asked them. The address in Gravesend is a previous contact address given to the Council and was used by them between 9 March 2008 and 14 April 2010. On 15 April 2010, Mr Robinson informed the Council of the new address in Trinidad and Tobago and that has been used since April of last year.

The letter from Ferreira is thought by the Registrations team to be a letter from the practice in Trinidad and Tobago but, sadly, the contents of it are not now known to the Council nor can I provide you with a copy for the reason that, as I understand it, it is not scanned in on receipt. The paper copy would be kept but those records and others around that time are currently out of the building with the Council's external contractors that scan information for them. If you think it important, Laura Hytti, the Registration Manager – I think that is her title – will ring that company to see if it can be traced and a copy be sent to you, but without that further call being made I cannot give you any more information about it I am afraid.

In relation to what I think was the last issue, which relates to engagement in the substantive proceedings, I am told by the Fitness to Practise team here that Mr Robinson was first informed about the referral to the Investigation Committee in October 2010. That was to the Trinidad and Tobago address and by email. No response appears to have been received to that referral or since, I am told by the Fitness to Practise team. My colleague, who has conduct of the substantive matter, is in another hearing today – Mr Hepworth – which is why I am afraid you have me and not him. I cannot contact him but I have spoken to his PA and she has looked on our system and can find no correspondence from Mr Robinson at all but she has found an email from Mr Hepworth to him referring to his lack of engagement. I have asked her to check the physical file as well, which she will do, but I thought that I ought to

tell you what the current state of play was, particularly to ask if you want the Registrations team to try to obtain a copy of this letter. I cannot guarantee they will obtain it but we can try.

Professor Taylor: Can I say that I really feel it would be sensible because if that is the only contact we have had since the point where the Registrant was notified that there would be a case against him, and we have had no acknowledgement of that at all – the fact that there is a letter from the practice and if it says we have never heard of this person, it would make a significant difference to what happens, or if they say “Yes, he is here” that again means that he has totally ignored everything that has been sent.

Mr Albuery: Well, then I will ask for that enquiry to be made. I am going to need to ask you to indulge us a bit because I have no idea how big a task tracing this letter by that company may be, but I think what I should do is ask that the call be made and for me to be informed of the likelihood of receiving it and how long that is going to be and then you can review how you want perhaps to manage that part of the case.

Professor Taylor: That would be very helpful.

Ms Jones: Can I just check at this point that there is no other information that we require. Dr Azubike, anything else?

Dr Azubike: I remember putting a question to Mr Albuery regarding conditions. Is this an appropriate stage to suggest a condition or not?

Mr Albuery: Of course.

Dr Azubike: If you look at Annex A, Section 6 of our guidance in the Fitness to Practise Panel Members Handbook.

Mr Albuery: I am being passed it now, thank you. Sorry, sir, which divider does that appear at?

Dr Azubike: Behind 5.

Mr Albuery: My 5 is the Role and Duties of the Legal Adviser.

Dr Azubike: Behind that, which is number 6. At the very back, Annex A, you see conditional registration order.

Mr Albuery: The bank of conditions, yes.

Dr Azubike: I was going to suggest that if we had a modified form of A1.4 would that be helpful to the Council? For instance, he must notify and obtain relevant permission from the Registrar before you accept any provisional

appointment in the UK and this includes teaching appointments, things like that.

Mr Albuery: Isn't the problem that he remains able to practise? If you impose that condition today he can still practise and the Council wants to prevent that.

Professor Taylor: Suggesting that if he notifies he will still be able to go ahead and practise.

Mr Albuery: And, indeed, until he notifies. The Council would then have to come back in breach if he didn't comply with it. First of all, he could still practise until, looking at the wording of that condition, he complied with it, and if he didn't comply with it there is going to be more time until the Council can bring new proceedings for a breach of the condition of the order.

Dr Azubike: Fine. Thank you.

Professor Taylor: Can I ask if the Legal Adviser has any comment to make on the absence of that letter?

Mr Hoskins: I think my view about it, on the basis of what I have heard this morning, is it is plainly going to be sensible to make every effort to try and obtain the letter. I would entirely endorse the observation that has already been made. I would not propose to give any advice to the Committee until we know what the situation is with regard to the letter.

Ms Jones: Thank you. As there are no matters, if you could pursue that, Mr Albuery, and if you would through Mr Henley come back to us and let us know possibly how long this may take, I would really appreciate it. Thank you.

Mr Albuery: Of course. Thank you for the time.

[Hearing adjourned at 10.09]

[Hearing reconvened at 10.12]

Mr Albuery: Madam, some news; I have spoken to Laura Hytti. She is as we speak making a call to the external contractor that deals with scanning. She tells me that ordinarily it might be received tomorrow, that she will ask for expedition which ordinarily means only that it might be received by the end of the day. That's all I have at the moment. If that changes as a result of the phone call I will tell you but I wanted you to know because only you know how important this letter is – well, you don't know how important it is – but you appear to believe that it could be important and I wanted to tell you what the current position was. Madam, what I would say is this; that whatever the letter said – and I am sorry that we don't know it – the fact is that Mr Robinson is not registered for whatever reason, for whatever route it came by, he is not registered properly other than for jurisdictional reasons and I repeat the

Council's concerns are that you have on your Register somebody who can practise in the UK, who has provided no evidence of insurance, CPD or that he is a fit and proper person and almost, whatever the letter says – I am sorry to make the point – that is the reality of today and the concern the Council has in terms of public protection.

Ms Jones: I think that whilst that is true, the Registrant is not present and if we can receive and count or discount that letter I think the Committee would feel happier to make a more informed decision.

Mr Albuery: And those are always the best decisions so shall we wait and see what comes of the phone call? I just wanted you to be aware that that may mean you being here all day because that is what I am told might be the case; waiting for the possibility of receiving a letter.

Ms Jones: Okay.

Professor Taylor: Just one question. Is it possible for the organisation to scan that letter in so that it becomes accessible immediately or is that not the way the system operates?

Mr Albuery: I don't know how the system operates. I don't think it is so much the receiving of it once it is retrieved because obviously that could be faxed or scanned, I am sure. It is the retrieval of it from what I assume are thousands of other records. I just don't know the process enough and I am not sure those here understand what happens off site enough to be confident of that, but if there is any more information I will let you know.

Ms Jones: Thank you very much.

[Hearing adjourned at 10.16]

[Hearing reconvened at 11.22]

Mr Albuery: Madam, thank you and your colleagues again for the time you have given the Council. The position I am afraid is not good in that the external company has still not been able to find that letter. They have found other letters written by Ferreira that relate to the payment of invoices for optometrists who they employ in Trinidad but that is not the letter you are looking for and the letter that has been found does not relate to Mr Robinson. It appears, Laura Hytti believes, that the letter may have been misfiled, which causes obviously the discovery of it to be troublesome. The external company continues to look for it but I don't know how realistic it is to expect them to find it. In terms of the records kept here, there are, I am told, about 2,000 and a search could be made of each of them to see if it has been misfiled but you can begin to imagine how long that might take and you might consider that not to be a proportionate response to the request to see a letter

which otherwise might have been a legitimate request. So I am afraid I can't put a copy of it in front of you, and there is nothing more I can say other than to apologise on behalf of the Council.

Ms Jones: Thank you very much for that, Mr Albuery. I think it is fair to say the Committee is disappointed that the document listed is not with the papers, but we thank you for your endeavours. Can I suggest we take our Legal Adviser's advice at this point, hear from yourself and then see if the Committee can move forward with this?

Mr Hoskins: Thank you, Madam. As has been indicated to you, your power to make an interim order to arise from Section 13L of the 1989 Act and Section 13L(1) reads so far as is material:

“Where the Fitness to Practise Committee are satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interest of the Registrant for
(a) his registration to be suspended or to be made subject to conditions.”

(b) doesn't arise here, the Committee may make an order.

So in this case the matter is put before you on behalf of the Council on two of those three limbs, namely, that an order is necessary for the protection of members of the public and also that it is otherwise in the public interest. The essence of the first limb, as I have understood it from Mr Albuery's submissions, is that the Registrant has not engaged with the retention process which would have enabled the Council to discover whether he had insurance and so, for all the Council knows, is in fact practising without insurance and perhaps treating patients without the benefit of that protection.

The second way in which I understand it that Mr Albuery puts his case is that the failure of the Registrant to engage with the process at all is of itself a matter to cause the Council concern and that an effective regulator must be seen to be taking steps in circumstances such as this so that it is otherwise in the public interest for an order to be made. There has been some discussion about an unfortunate and admitted error in letters which were sent to the Registrant to sign to which he has not responded. The fact of an error in the letter has been accepted by Mr Albuery. His point, which is for the Committee to consider, is that notwithstanding the error in the letter a responsible member of the profession would have engaged with the letter in some way and this has not happened.

When deciding whether to impose an interim order the Committee must take into account the effect which any order might have on the Registrant. The Committee's task is to balance the need for an order against the consequences which an order would have for the Registrant and satisfy itself that the consequences are not disproportionate to the risk from which they are

seeking to protect the public. The Committee also bears in mind that the primary purpose of an interim order is to protect members of the public. It would be relatively rare for an interim order to be made only on the ground that it is in the public interest. Here, of course, both grounds are being advanced before the Committee.

There has also been some discussion during submissions for the possibility of conditions and whether those might be imposed in this case. As you have been told by Mr Albuery, the Committee has a duty to consider whether the conditions meet the circumstances of the case before proceeding on, and if that is not the case, to consider whether suspension is appropriate. Of course one of the usual matters which bear heavily on whether conditions are appropriate is whether a registrant has in fact engaged with the process at all because if he hasn't, the Committee may well feel that the appropriate inference is that any conditions which it imposes are not likely to be of any effect.

Madam, that is the advice I give to the Committee. You bear in mind, of course, the Registrant is not here and has not addressed you on any of these matters, so in that sense you adopt even more care than is usual in deciding whether it is appropriate to make an interim order in this case.

Ms Jones: Thank you very much. Mr Albuery, do you have any final comments?

Mr Albuery: No, thank you, Madam.

Ms Jones: In that case, Mr Henley, could you clear the room.

[Hearing adjourned at 11.28]

[Hearing reconvened at 12.54]

Ms Jones: The Fitness to Practise Committee considered the Council's application for an Interim Order on 5 September 2011.

Notification of hearing

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

Decision

The Committee has to decide whether to impose an interim order under Section 13L of the Opticians Act 1989. The Registrant has not attended today's hearing or submitted any material to the Committee. On behalf of the

Council Mr Albuery submitted that an order was necessary to protect the public and was otherwise in the public interest. The Committee accepted the advice of the Legal Adviser.

The Registrant is facing fitness to practise proceedings which are due to be heard in December 2011. However, the basis for the present application is not to be found in those proceedings and the Committee makes it clear that it has had no regard to the allegations which will be heard in December.

The present application is based upon the Registrant's failure to apply for retention and consequent failure to satisfy the Council that he has insurance cover or completed the necessary CET or demonstrated that he is a suitable person to remain on the Register.

The Registrant, having failed to apply for retention, has been invited on two occasions to undertake that he will not carry out relevant activities until his insurance position is clarified. It is a matter of considerable concern to the Committee that the form of the undertaking which was sent to the Registrant on each occasion contained an important error in that the Registrant was asked to sign an undertaking appropriate to a dispensing optician rather than an optometrist. However, the Committee accepted Mr Albuery's submission that even if the Registrant was perfectly entitled not to sign the undertaking he had been sent, he nonetheless had a responsibility to make contact with the Council so as to clarify his position. The Registrant had been on the Register for a number of years, was notified in the usual way of the need to renew his registration, and failed to do so.

The present position is that the insurance status, CET and whether the Registrant is a fit and proper person to remain on the Register, is unknown. Any member of the public consulting an optometrist is entitled to expect the optometrist will have insurance cover, appropriate CET and be a fit and proper person. In these circumstances the Committee has concluded that it is necessary for the protection of the public to impose an interim order. The Committee has had in mind the effect which an interim order may have upon the Registrant's means of earning a living but the Committee has no information about this due to the Registrant's failure to engage with the process. In any event, the need to protect the public in this case requires an order to be made.

Mr Albuery also submitted that the failure of the Registrant to engage with the process meant that an order was necessary in the public interest. He submitted that it was important that the regulator be seen to be enforcing the relevant legal and professional requirements. The Committee accepted that submission.

Having reached the conclusion that an interim order was appropriate the Committee considered whether any conditions could be framed to meet the requirements of this case. The Committee concluded that no suitable

conditions could be framed. The Committee also had in mind that if conditions were to be effective the Registrant would need to engage with the process; there had been no such engagement.

The Committee thus ordered that the Registrant's registration be suspended for a period of 12 months from today. In coming to this decision the Committee has had in mind the possibility that the substantive hearing scheduled for December 2011 may for some reason be adjourned and that this period of suspension will take the Registrant beyond the next retention dateline. If, on the other hand, the hearing in December is effective, this interim order will be revoked. In any event, the Registrant can apply for a review after three months from today and the order, if still in force, will be reviewed within six months from today.

Thank you.

[Hearing concluded at 12.59]