BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

GENERAL OPTICAL COUNCIL

F(19)14

AND

VIKASH KUMAR (01-32579)

DETERMINATION OF A SUBSTANTIVE HEARING
16-20 DECEMBER 2019 & 3-6 MARCH 2020

Committee Members:	Dr P Ormerod (Chair/Lay) Ms S Fenoughty (Lay) Ms J Wortley (Lay) Dr E MacMilan (Optometrist) Ms C Roberts (Optometrist)
Legal adviser:	Mr M Bell
GOC Presenting Officer:	Mr M Corrie
Registrant present/represented:	Yes and represented
Registrant representative:	Mr C Knox (Counsel) Mr C Weidner (Solicitor)
Hearings Officer:	Ms A Riaz (16-20 Dec 19, 24 Feb 20, 5&6 Mar 20) Mr T Yates (3-4 Mar 20)
Facts found proved:	1, 2, 3, 4, 5, 6, 7 and 8
Facts not found proved:	None
Misconduct:	Found
Impairment:	Impaired
Sanction:	Erasure
Immediate order:	Granted- Immediate suspension order

Application to amend the allegation

Prior to the allegation being read Mr Corrie, on behalf of the Council, made an application to amend particular 8. He submitted that the words 'set out at 2 and/or 3' was an administrative error arising from matters being joined. Mr Corrie applied to amend the particular to read 'set out at 6 and/or 7.'

Mr Knox on the Registrant's behalf advised the Committee he did not object to the proposed amendment.

The Committee accepted the advice of the Legal Adviser who referred it to Rule 46 (20) of the Council's Fitness to Practise to Rules 2013 (the Rules).

Rule 46 (20) states;

"(20) Where it appears to the Fitness to Practise Committee at any time during the hearing, either upon the application of a party or of its own volition, that—

(a) the particulars of the allegation or the grounds upon which it is based, and which have been notified under Rule 28, should be amended; and

(b) the amendment can be made without injustice, it may, after hearing the parties and consulting with the legal adviser, amend those particulars or those grounds in appropriate terms."

The Committee determined that words 'set out at 2 and/or 3' as currently in particular 8 arose from an administrative error arising from matters being joined, that the particular should be amended and that to do so would cause no injustice to either party. It therefore determined to amend the particular 8 as applied for by Mr Corrie.

ALLEGATION

1. On a date unknown between 3 April and 2 May 2012 you submitted to the Swindon County Court in respect of proceedings 2SN00110:
    a. A Statement of Terms of Employment ("the statement") dated 1 February 2012 and/or
    b. A letter ("the letter") dated 23 March.

2. You inaccurately represented that the following had been signed by Mr A when they had not:
    a. The statement; and/or
    b. The letter.

3. You signed, or caused to be signed, the following documents in the name of Mr A:
    a. The statement; and/or
    b. The letter.

4. Your actions as set out at 1 and/or 2,and/or 3 and above were:

   a. Misleading; and/or

   b. Dishonest in that you sought to submit documents purporting to be signed by Mr A which you knew had not been signed by Mr A in order to assist your defence in the proceedings 2SN00110.

5. Mr A was, at the material time, a witness in fitness to practise proceedings against you due to be heard by the General Optical Council's Fitness to Practise Committee between 21 – 25 May 2018.

6. Between around 4 and 7 April 2018 you caused an intermediary to make contact with Mr A and to offer Mr A money.

7. On or around 10 April 2018 you contacted Mr A via WhatsApp as set out in Schedule A.

8. Your conduct set out at 6 and/or 7 was:

   a. Inappropriate in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A; and/or

   b. Lacking in integrity in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A ; and/or

   c. Dishonest in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A.

As a result of your conduct set out above your fitness to practise is impaired by reason of your misconduct.

Schedule A - redacted

DETERMINATION

Admissions in relation to the particulars of the allegation

The Registrant admitted particulars 1, 5 and 7 of the allegations and these were found proved.

Application under Rule 25 of the Rules

Mr Corrie made an application for any matters relating to Mr A's health to be heard in private in terms of Rule 25 of the GOC Fitness to Practise Rules 2013.

The Committee heard and accepted the advice of the Legal Adviser.

The Committee reminded itself of the terms of Rule 25 which states;

"25. (1) Substantive hearings before the Fitness to Practise Committee must be held in public.

This is subject to the following provisions of this rule.

(2) The Fitness to Practise Committee may determine that the proceedings, or any part of the proceedings, are to be a private hearing, where the Committee consider it appropriate, having regard to—

(a) the interests of the maker of an allegation (where one has been made);

(b) the interests of any patient or witness concerned;

(c) the interests of the registrant; and

(d) all the circumstances, including the public interest.

(3) A hearing, or any part of a hearing, of the Fitness to Practise Committee must be a private hearing where the Fitness to Practise Committee is considering the physical or mental health of the registrant.

The Committee was satisfied that the need to protect Mr A's privacy outweighed the public interest in transparency of proceedings in this case. It therefore granted the application in respect of matters relating to Mr A's health only. It determined to go into private when matters relating to Mr A's health were raised.

Application to admit evidence under Rule 40 of the Rules

Mr Knox made an application to have the following various documents which had so far been either fully or partially redacted, or not yet admitted, to be admitted in full as evidence:

1. Statement of Witness 1 dated 14/3/19.
2. Statement of Witness 2 dated 27/11/19.
3. Record of Grievance Procedure Meeting with Mr A dated 10/4/12.
4. Peninsula Grievance Procedure.
5. Statement of Witness 3 dated 30/11/19.
6. Undated Report by Mr B.

7. Statement by Mr C unsigned and dated 15/11/19.

He submitted that all the documents were relevant, and it was fair that they should be admitted in their entirety.

Mr Knox further submitted that documents 1, 2 and 5 contained information that he wished to put to Mr A in cross examination. He advised the Committee that the documents reflected that when Mr A left the Registrant's employment he was on 'decent terms' and that the relationship between Mr A and the Registrant changed around June 2012. He further explained to the Committee that documents 3 and 4 would also reflect that the Registrant's company operated a 'proper' grievance process and that any grievance involving him was dealt with through a 'properly conducted hearing'.

Mr Knox submitted that documents 1, 2 and 5 reflected Mr A's health issues and character.

He further submitted that document 6 was a report by an 'expert witness' and should be admitted on this basis.

Lastly, Mr Knox explained that document 7 was a statement of Mr C, an inquiry agent who had taken witness statements and that his own statement provided background information as to where other documents had come from.

Mr Corrie indicated that he was opposing the admission of some of the documents. He submitted that for any documents to be admitted they must be both relevant and fair. Mr Corrie submitted that any reference in the documents to 'Facebook' comments was irrelevant to the issues before the Committee and should not be admitted as the only individual who had apparently seen such comments was Witness 3. Further, any such comments should not form part of the assessment of Mr A's credibility. He further submitted that Witness 1 could not speak to the state of mind of other individuals and that his comments regarding Mr A's behaviour were irrelevant. He advised the Committee that he considered that this was an attempt to 'throw mud' at Mr A's character.

Mr Corrie submitted that the documents 3 and 4 were irrelevant. He told the Committee that Mr B report was not signed and did not set out his qualifications or other requirements of an expert witness report.

When directed by the Legal Adviser to the 'threshold test' for an expert witness as set out in *Kennedy v Cordia (Services) LLLP 2016 SC (UKSC) 59* Mr Corrie submitted that Mr B did not meet this test whilst Mr Knox submitted that he did.

The Committee accepted the advice of the Legal Adviser who referred it to Rule 40 and the cases of *Council for the Regulation of Health Care Professionals v General Medical Council and Ruscillo [2005] 1 WLR 717, Suddock v NMC [2015] EWHC 3612 (Admin) [2005] and 1 WLR 717 Kennedy v Cordia (Services) LLLP 2016 SC (UKSC) 59.*

The Committee noted the terms of Rule 40 which states;

'Admissibility of evidence

40.—

(1) The Fitness to Practise Committee may admit any evidence it considers fair and relevant to the case before it, whether or not such evidence would be admissible in a court of law. This is subject to paragraphs (2) and (3).

(2) Where evidence would not be admissible in civil proceedings in England and Wales, the Committee shall not admit such evidence unless, on the advice of the legal adviser, it is satisfied that its duty of making due inquiry into the case before it makes its admission desirable.

(3) [not relevant to the application]'

The Committee also reminded itself of its obligations as set out in Ruscillo that:

'The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.'

The Committee accepted the submissions of Mr Knox that he required the documents or redacted sections of documents 1 – 6, to fully and properly present the Registrant's case. It also noted that Mr Corrie had not sought to suggest that to admit the contested documents or sections of documents would result in unfairness to the Council.

However, the Committee did not consider that Mr B met the threshold test for an expert witness as set down in Kennedy. It also determined that Mr C's statement did not contain any matters that were relevant or pertinent to the issues it had to decide at this stage.

The Committee therefore determined to allow the application in relation to documents 1 – 6 but allowing Mr B's report on the limited basis of his not being an expert witness. The Committee refused the application in respect of Mr C.

Application to have a witness statement read in under Rule 40 of the Rules

Mr Knox made an application for the witness statement of Witness 4 to be read in as his evidence. He explained to the Committee that it had been agreed between the parties that Witness 4 was not required to attend as he simply spoke to uncontested matters. He further submitted that the Council did not oppose the admission of this statement.

Mr Corrie confirmed that the Council did not oppose the admission of this statement.

The Committee accepted the advice of the Legal Adviser. He referred it to Rule 40 (1) and the case of *Thorneycroft v NMC [2014] EWHC 1565 (Admin)*, in particular paragraph 45 of the judgement.

The Committee concluded that the witness statement was relevant. It noted that the contents of the statement were not contested by the Council and took into account the contents of the statement. It decided that to attend would cause unnecessary inconvenience to the witness. The Committee concluded that it was fair to admit this statement as evidence and granted Mr. Knox's application.

Background to the allegation

The allegation arises from a dispute between a recruitment consultant, witness 5 and the Registrant in his capacity as owner of Company A. Company A ran three opticians practices; Opticians 1, Opticians 2 and Opticians 3 in [redacted].

It is alleged that in January 2012 Witness 5 introduced Mr A as a candidate for employment by the Registrant and that he was subsequently employed by Company A and thus a fee was due to Witness 5.

The fee was not paid and Witness 5 issued civil court proceedings to recover these fees.

The Registrant submitted, or instructed to be submitted, a defence and counter claim to this action together with a Statement of Terms of Employment ("the statement") of Mr A with a company called Opticians 3 dated 1 February 2012 and a letter ("the letter") dated 23 March both purporting to be signed by Mr A. The letter stated he had never worked for Company A. These documents were submitted to support the Registrant's defence to Witness 5's claim. The Registrant's defence was that Mr A had not joined Company A, but rather had been employed by a 'competitor's' company.

The originals of these documents ('the original statement' and 'original letter') were mislaid by the Court and judgment in default was entered. This was then set aside and the Registrant submitted replacement documents ('the replacement statement' and 'replacement letter') which the Registrant indicated were exact replicas of the documents originally lodged, albeit the signature of Mr A on each replacement document was a facsimile written by the Registrant, but he said with his knowledge and permission.

When Witness 5 became aware of the nature of the defence she contacted Mr A who stated that he had never worked for Opticians 3 and had not written the letter. He said that he had been employed by Company A.

The civil claim was eventually settled in full by the Registrant, but in the meantime Witness 5 had reported the documents she believed were false to the police, and criminal proceedings were commenced against the Registrant. These were dismissed in March 2014, but in parallel a complaint had been raised with the Council.

As a result of these matters, which were alleged to be misleading and dishonest a substantive hearing of the Council's Fitness to Practise Committee was set down for 21 – 25 May 2018.

It is alleged that on 4 April 2018 Mr A was approached by an individual 'Sarah' who stated she was interested as hiring Mr A as singer for a party. A meeting was arranged between Mr A and 'Sarah' for 7 April 2018. It is alleged that at this meeting 'Sarah' revealed she was actually acting as a mediator on the Registrant's behalf. It is further alleged that 'Sarah' told Mr A that she was there to convey an apology from the Registrant and offered a cash settlement to 'make the case go away.' Mr A refused the offer.

On 10 April 2018 Mr A received a number of 'Whats App' messages from the Registrant. It is alleged that this again was an attempt to persuade Mr A either not to give evidence at the Fitness to Practise hearing or to influence the evidence that he would give.

It is further alleged that these actions were inappropriate, lacking in integrity and dishonest.

Findings in relation to facts

Witness Assessment

The Committee first considered the overall credibility and reliability of all the witnesses it heard from.

Mr A – The Committee considered that Mr A was consistent and clear in respect of the issues central to the allegations. It accepted that he had some difficulty recollecting certain events from 2012, but the Committee considered that this was explained by significant health issues (at the time) and the passage of time.

Witness 5 – Although Witness 5 clearly had a grievance against the Registrant as she held the firm belief that an attempt had been made to avoid due payment, she was nevertheless straightforward and consistent in her evidence. The Committee did not form the view that her evidence was adversely affected by any animosity. It found that where her recollection lacked detail this was adequately explained by the passage of time.

The Registrant – The Committee considered that the Registrant appeared very confident and assured but was aware that a witness' demeanour is only one factor to take into account. There were internal inconsistencies with the evidence the Registrant gave, for example, regarding the Registrant's position and responsibilities in the business and his involvement in the issues giving rise to the allegation. The Committee found that the Registrant was evasive in answering some of the Committee questions regarding these matters. The Registrant sought to attribute a large number of inconsistencies to administrative error. The Committee found this extent of administrative error to be implausible and inconsistent with the evidence the Registrant gave about his attention to procedural detail, for example, in relation to the Registrant's HR procedures. The Committee also considered that he unjustifiably sought to undermine and discredit Mr A both as an employee and an individual.

Witness 3-The Committee considered that she tried to assist it, but that her subjective view of Mr A had been adversely affected by the conclusions she had drawn from his absences from work. She appeared to have a lack of understanding about the nature and validity of Mr A's health condition, believing that he was deliberately making himself unwell while undertaking additional work elsewhere.

Witness 1– The Committee considered Witness 1 had tried to assist it. However, the Committee concluded his actions in 2011 and 2012 and the variation of his explanations for this was likely to be influenced by his employer/employee relationship with the Registrant at the time of the material events. It also concluded there were inconsistencies in his evidence which were likely to have been attributable to the passage of time since the events to which he spoke.

Witness 6 – The Committee found Witness 6 nervous and evasive. She was the person who posed as 'Sarah' for the purpose of mediating between the Registrant and Mr A. Her evidence was initially consistent with her prior statements, but when pressed and shown video evidence she accepted that she had made various significant comments that she had previously denied making and provided no plausible

explanation for this conflict in her evidence. She was a previous employee who has since ceased to work for the Registrant.

Witness 7 -The Committee considered that Witness 7 was initially confident and authoritative, but this lessened as her evidence went on. When pressed on internal and external inconsistencies and contradictions in her evidence she was evasive, often seeking to attribute these inconsistencies and contradictions to administrative errors or the actions of others. The Committee considered that at times her answers were disingenuous and explanations implausible, for example in characterising Opticians 3 as a competitor company.

Witness 4– The Committee applied appropriate weight to Witness 4's statement. The matters contained in the statement were not contested.

Witness 8 – The Committee considered that Witness 8's evidence did not assist at this stage.

Findings in relation to the facts

In reaching its decisions on the facts, the Committee considered all the evidence adduced in this case together with the submissions made by Mr Corrie on behalf of the Council and Mr Knox on the Registrant's behalf.

Mr Corrie submitted that there was no disagreement between the parties regarding the background to the allegation and that they arose from a dispute between Witness 5 and the Registrant in respect of an introduction fee for Mr A. He told the Committee that it was the Council's position that an interview took place on 17 January 2012. He submitted that the Committee should accept the evidence of Mr A that he did not sign either the original statement or original letter. Mr Corrie submitted that the Registrant either signed them or had someone sign them and had them sent to Court fully aware that they were false. He submitted that the Registrant did this to support his defence against the claim of Witness 5 and that the Registrant's action was both misleading and dishonest.

Mr Corrie further submitted that the Registrant instructed or caused to instruct Witness 6 to meet with Mr A and that the Registrant had then sent a series of messages to Mr A, both approaches intended to influence his evidence at the upcoming disciplinary proceedings against the Registrant. He submitted that in the context of the upcoming Fitness to Practise Proceedings the Registrant's actions were inappropriate, lacking in integrity and dishonest. Mr Corrie referred the Committee to *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* and *Wingate & Evans v SRA [2018] EWCA Civ 366*.

Mr Knox submitted that the Committee should find Mr A seriously unreliable. He said the Registrant's note and that of Witness 7 of the meetings of 10 and 11 April 2012 were crucial and were central to the issues. He said it was not possible to reconcile Mr A's evidence with that of the Registrant and Witness 7 and the Committee should prefer the evidence of the Registrant and Witness 7. He drew the Committee's attention to the assertions that Mr A was seeking compensation and that Mr A's account was false. Mr Knox further submitted that Witness 5 could give little direct evidence and was prejudiced against the Registrant.

In relation to allegations 5 – 8, Mr Knox submitted that Witness 7 and Witness 6 were clear that Witness 6 had no actual cash with her when she met Mr A. He accepted that whilst the 'Whats App' exchange may be 'inappropriate' when looked at in the round,

it was neither dishonest nor lacking in integrity. He further submitted that the Registrant should not be found to be 'responsible' for the independent actions of the Registrant's employees, even when acting in the capacity of an employee of the business.

The Committee heard and accepted the advice of the Legal Adviser. He advised the Committee that the burden of proof was on the Council and that the standard of proof was that of the balance of probabilities. He referred the Committee to various cases including *In re B [2008] UKHL 35, Suddock v NMC [2015] EWHC 3612 (Admin)* and *Ivey*. He also reminded them of the relevance of good character.

Particular 2

2. *You inaccurately represented that the following had been signed by Mr A when they had not:*
   - *i. The statement; and/or*
   - *ii. The letter.*

This particular is found proved

The Committee considered that, evidentially, particular 2 (i) and (ii) were inextricably linked. It therefore looked at all the evidence in relation to these issues in totality. In reaching its decision with regard to both particular (i) and (ii), the Committee took into account the evidence of Mr A, and Witness 5. It also took into account the Registrant's evidence, together with the evidence given in relation to this Charge by Witness 3, Witness 1, Witness 7 and the witness statement of Witness 4.

The Committee noted that it was an uncontested and agreed matter between the parties that this allegation arose from a dispute between Witness 5 and the Registrant over a fee that was claimed for the provision of Mr A as a candidate for employment with the Registrant's business and this had given rise to litigation between the parties. It was further agreed between the Registrant and the Council that on or around 3 April 2012, a defence was submitted on behalf of Company A signed by the Registrant and was sent to the Court, along with the original statement and the original letter, but that these documents were mislaid by the Court. This was also spoken to by the Registrant, Witness 7and Witness 4. Witness 5 stated that she did not believe that the original documents had ever been sent, but the Committee considered these comments to be conjecture. It also appears to be an uncontested issue between the parties that the documents before the Committee are copies of the 'replacement letter' and 'replacement statement'.

Witness 5 told the Committee that she had been engaged by the Registrant as managing director of Company A to provide the Registrant's company with an optical dispenser. She explained her terms of engagement to the Committee. Witness 5 said she recommended Mr A to the Registrant along with two other candidates and all three attended for an initial interview. She said that after the initial interview she tried to contact the Registrant for feedback, but the Registrant did not get back to her. She told the Committee that she only discovered that Mr A had been employed by Company A when she rang Company A on the 24 January 2012 and Mr A picked the phone up. She said the phone was passed to Witness 3 and Witness 5 asked Witness 7 to call her. She explained that Witness 7 had then called her and stated that Mr A

had been employed on a trial basis, which Witness 5 disputed. She told the Committee that she had obtained judgment in default in her favour, but that was set aside on the basis that the original defence documents had been lost. On having sight of the replacement documents, she contacted Mr A because she suspected they were fake. Further, she contacted the police regarding what she believed were fraudulent documents.

Mr A told the Committee that he attended for an interview at Opticians 1 in mid-January 2012 and that his only contract of employment was with Company A. This was a contract with Company A signed on 13 March 2012 but related to employment commencing 23 January 2012. He said the interview was with Witness 7. Witness 7 had said she would get back to him regarding the outcome of the interview, but that he was not to contact Witness 5. Mr A said that around an hour and a half after the interview he received a phone call from Witness 7 offering him a position as an optical dispenser.

Mr A said that he began his employment with Company A around 20 January 2012. The Committee noted that in the documents before it there was a letter dated 17 January 2012 from Witness 7 to Mr A which stated 'I am delighted to offer the Registrant a position with Company A as a dispenser. The Registrant's contract will commence on a full-time basis from 23rd January 2012.' Mr A also told the Committee that he did not have one place of work and rotated amongst 3 branches of Company A; the Opticians 3 in [redacted] and Opticians 2 and the Opticians 3 branch in [redacted].

Mr A explained that on 24 January 2012 he was working at the Opticians 3 branch and answered a telephone call which it transpired was from Witness 5. He said she seemed surprised he was there as she said she had been told he was not working for the Registrant. She asked to speak to the Registrant, but when he tried to transfer her he refused to take the call. Mr A said that soon after that all staff received an email telling them that if anyone asked, 'they should deny that he [Mr A] worked there.'

Mr A told the Committee that on 26 January 2012 he was directed to email Witness 5 by the Registrant and possibly Witness 7 telling Witness 5 not to contact him. He stated he did this through fear of losing his job and 'basically did as I was told.' Mr A told the Committee that he had no recollection of sending a further email to Witness 5 dated 8 February 2012. In relation to this email he further stated that 'it does not even sound like how I would write; it is not my kind of language.'

When referred to an email apparently sent to him from Witness 7 dated 21 March 2012, Mr A denied receiving it explaining that he was off sick at the time.

Mr A told the Committee that on 13 June 2012 Witness 5 called him and then sent him emails containing a contract of employment and a letter purportedly signed by him and lodged by the Registrant in the County Court. These documents indicated that he had been employed by Opticians 3. He told the Committee that he had not signed either document. He stressed that the signature on the document did not look like his and that he always looked very carefully at any document he signed, describing himself as being 'paranoid' about signing contracts. Mr A told the Committee that he had never had a conversation with the Registrant about the submission of replacement documents and had not given permission for any documents to be signed in his name. Mr A also told the Committee that he had never been employed by Witness 1, denied

agreeing to assist in any Court action and denied that he had sought compensation from the Registrant.

When challenged during cross examination Mr A denied that Witness 7 had effectively 'run the business'. He denied Opticians 3 had been owned by Witness 1 when he worked there. He insisted that it was his understanding that the business had been purchased by the Registrant before he was employed there. When challenged over whether he attended a meeting with the Registrant and Witness 7 on 10 April 2012 he said that 'to the best of his recollection' he only attended one meeting and that was on 11 April 2012 when he was handed a termination letter.

Witness 1 told the Committee that he had been the owner of Opticians 3, but that the Registrant had bought the business from him in 'late 2011', since when he had worked for the Registrant as an optical technician. He went on to explain that despite Company A buying the assets of Opticians 3, it required to continue to trade as Opticians 3 until the NHS contract was transferred. He further asserted that he remained the 'owner' of Opticians 3 despite the assets being purchased by Company A and that he had signed a contract of employment for Mr A at Opticians 3 at the Registrant's request to assist the Registrant with his disagreement with YMD. He also told the Committee that after the Registrant had spoken to him, he then provided further evidence to the police of 6 February 2013 because he was concerned, he had been confused when he had given his initial statement to the police. During cross examination Witness 1 confirmed that when he signed the original Opticians 3 contract at the beginning of March 2012 it had not been signed by Mr A.

The Registrant told the Committee that Opticians 3 had been taken over by Company A in late 2011, but when the Registrant realised that the NHS contract had not been transferred, it continued to trade as Opticians 3. The Registrant said that he had initially received an email from Witness 7 stating that she had three candidates the Registrant might be interested in employing. The Registrant stressed that other than negotiating a fee, he had nothing to do with the employment of Mr A and had asked Witness 7 to deal with it.

The Registrant further told the Committee that Mr A was initially interviewed by Witness 7 and Witness 3 on 17 January 2012 and he then met with him on 23 January 2012 to discuss him working at the practice for a trial period. The Registrant stated that Witness 7 advised him at a later date that Mr A was not competent for the job and that concerns had been raised about him and his behaviour. The Registrant stated that a grievance meeting had taken place on the 10 April 2012 regarding an interaction between Mr A and another member of staff and that there was a further meeting on 11 April 2012 when Mr A was advised that he had failed to meet expectations during the probationary period and that he would not be kept on. The Registrant said that he parted on amicable terms. The Registrant pointed to internal documents recorded by him and Witness 7 to support his account.

With regard to the County Court proceedings, the Registrant told the Committee that Witness 7 had been responsible for submitting on his behalf the original defence documents to the Court including the original statement and original letter. It was only when the Registrant became aware that a judgment had been passed against Company A that it became apparent that the original documents sent to the Court had been mislaid. The Registrant therefore tried to contact Mr. A to get him to sign a replacement contract. Mr A told the Registrant he was unwell and couldn't sign any replacement contract but stated to him that he could *"sign it [the replacement contract]*

and put my [Mr A's] name on it." The Registrant told the Committee that he had no intent to deceive the Court.

During cross examination the Registrant accepted that he had overall charge of financial matters of Company A and that, certainly with regard to any document sent to the Court, the Registrant accepted responsibility for their accuracy. When taken to the letter from Witness 7 to Mr A dated 17 January 2012, the Registrant accepted that it stated that the offer of employment was with Company A on a full-time basis commencing 23 January 2012. The Registrant also accepted that no mention was made of any trial period. However, the Registrant insisted such a period was company policy. The Registrant also said that Mr A had been 're-recruited to Opticians 3' when the issue of the NHS contract arose. The Registrant also accepted that the P45 produced by the Council was issued by Company A but said that this was a mistake and the Registrant explained that HMRC had been contacted after Mr A's employment was terminated, to provide a corrected P45. No corrected P45 was before the Committee.

When it was put to the Registrant [redacted], with regard to employing Mr A;

> *"What was cunning on my part and the company's part is that we waited to sign all the documents by 3rd April. A week later all the documents were sent on 3rd April. A week later we terminated his contract …"*

The Registrant did not seek to disagree with this other than to state the word 'cunning' should be replaced with 'astute'.

Witness 7 provided the Committee with a similar background to the takeover of Opticians 3 by Company A as the Registrant had. She also stated that Mr A had initially been interviewed by Witness 7 and Witness 3 on 17 January 2012. She told the Committee that she had tried to fax, but subsequently posted the documents to the County Court and that she had included a contract 'between me and Mr A and Witness 1 of Opticians 3 confirming that he worked for Opticians 3. Witness 7 stated that the commencement date for employment on this contract was 2 February 2012. She also said that when it was discovered that judgment had passed by default 'copies' of the 'contract between Mr A and Opticians 3 and … a statement outlining the fact that he never worked for Opticians 1 were sent to the Court'. She said that she had been in the room when the Registrant called Mr A and he had given permission for copies of the documents to be sent with his signature applied by the Registrant on his behalf. She stated that no copies of the 'original statement' and 'original letter' were available because she had not had time to make copies before posting the originals, although in other respects she presented herself as meticulous.

Witness 7 insisted to the Committee that she had responded to a call from Witness 3 on 22 March 2012 to come to Opticians 1 as a matter of urgency regarding the acute illness of Mr A. Witness 7 said had taken the statement and contract for Mr A to sign in accordance with an arrangement made the day before. When Witness 7 arrived at Opticians 1 she considered that Mr A was well enough to sign both documents in the presence of Witness 3, which she said he did. However, Witness 7 then determined that Mr A was sufficiently unwell that an ambulance needed to be called, although in her undated written statement she said she sent him to hospital in a taxi. He was absent thereafter until early April 2012. When questioned about the date on 'the letter' i.e. 23 March Witness 7 stated that this was an administrative error. The Committee noted that all parties agreed that Mr A was off sick on 23 March 2012.

The Committee considered the evidence given by Witness 7. The Committee noted that the account from Witness 3 did not corroborate the account of Witness 7 in two critical areas. Firstly, Witness 3 did not state that she witnessed Mr A sign a contract. Secondly, Witness 3 makes no reference to Witness 7 attending at Opticians 1. Witness 3 said she had telephoned Witness 7 who advised her to call an ambulance for Mr A.

At the outset the Committee accepted that the statement and letter before it was copies of replacements for the documents previously in Court in terms of particular 1.

The Committee considered the explanation provided by the Registrant and Witness 7 to be inherently improbable and riddled with inconsistencies, both internally and in relation to documentation. The Committee observed that there was no documentary evidence provided to corroborate the assertions by both the Registrant and Witness 7 that Mr A had been employed on 'a trial basis'. Witness 7 did not provide a satisfactory explanation for the existence of the contract with Company A which Mr A had signed on 13 March 2012. The dates on the 'replacement statement' and 'replacement letter' produced and agreed by the parties did not correspond with the dates of Mr A's employment, the start date and the hours of work differ between the two contracts. The Committee found the Registrant's evidence orally and in the Registrant's defence statement that Opticians 3 was a 'competitor' company to be entirely misleading. Opticians 3 had been purchased by Company A in 2011 and the Committee determined that its day to day running was controlled by the Registrant. Further, there was no independent evidence led on the Registrant's behalf to corroborate this assertion.

The Committee considered the evidence of Witness 1, but considered that this was unreliable, inconsistent and in places contradictory. It considered his assertions that he remained the 'owner of Opticians 3' was misleading and contradicted his acknowledgement that Company A had purchased Opticians 3 in late 2011 and he continued to work for the Registrant as his employee. Witness 1 said he had been asked to sign the document because of a problem with the recruitment agent. He did not seem entirely clear why he had been asked to sign it. He did not say he was employing Mr A in his business. If Witness 1 was in fact in control of the business, it is implausible he would have been signing the document at the Registrant's behest. The Committee found it more likely that he was complying with the Registrant's request as by then the Registrant had taken over the running of his practice and he was no longer making any decisions in relation to the running of that business. The Committee noted that according to Witness 7 all the other employees at Opticians 3 had already been 'TUPEd' over to the employment of Company A some months before Mr A was employed.

The Committee had regard to the internal records of the meetings said by the Registrant to have been held on 10 and 11 April 2012. The Committee noted that the typewritten records purport to show that two distinct meetings had taken place, a grievance meeting on the 10 April 2012 and a probationary review on 11 April 2012. The Committee accepted that there may have been two meetings, but there was insufficient evidence to allow it to conclude that this actually was the case. The Committee noted that Mr A had said that no formal meeting took place on 10 April 2012. It considered that Mr A's recollection of the dates of these meetings, which took place nearly eight years ago may have been affected by the passage of time and significant health issues. Further, the Committee considered that Mr A had been

consistent regarding the core issues relating to particular 2 over a period of time and any inaccuracy in recalling the exact dates of these meetings did not undermine his credibility.

The Committee also took into account the nature of the dispute between the Registrant and Witness 5. The Registrant had been quite open in his determination from the outset to avoid paying her fee, something the Registrant advised the in [redacted] (acknowledging that the Registrant's actions were 'perhaps morally not right', but in his opinion legal) and maintained in his oral evidence. It concluded, for the reasons set out above, that it was more likely than not that the Registrant submitted the documents bearing the signature of Mr A to the Court to assist the Registrant's efforts to avoid making payment to Witness 5, by creating a fiction that Mr A had not been employed by the Registrant. The fiction was sustained by the replacement documents which it was intended that the Court should accept were copies of the originals, albeit with an explanation regarding the signature of Mr A which the Registrant stated he reproduced. The Committee did not accept the Registrant's explanation that permission had been sought and obtained from Mr A to sign the replacements on his behalf, preferring the evidence of Mr A in this respect. Further, it accepted Mr A's denial that he had signed the original documents.

Having examined all the evidence the Committee concluded that it was more likely than not that the Registrant knew Mr A had not signed the original documents but nevertheless presented them to the Court as bona fide documents. It therefore concluded on the balance of probabilities that the Registrant signed or caused to be signed the original statement and original letter thereby inaccurately representing that the Statement of Terms of Employment dated 1 February 2012 and the letter dated 23 March had been signed by Mr A when they had not.

The Committee therefore found particulars 2 (i) and (ii) proved.

Particular 3

3. *You signed, or caused to be signed, the following documents in the name of Mr A:*
    a. *The statement; and/or*
    b. *The letter.*

This particular is found proved

The Committee noted the Registrant's acceptance in evidence, as set out above, that he had signed the replacement Statement of Terms of Employment dated 1 February 2012 and the replacement letter dated 23 March. It further noted that Witness 7 had also stated that the documents were signed by the Registrant.

The Committee had found that the 'original statement' and the 'original letter' had been created by the Registrant without Mr A's knowledge or permission and that in submitting them he was representing that Mr A had signed them. The Registrant said they bore his signature and the replacement documents were replicas of the originals, save that the Registrant had signed the replacement documents in Mr A's name. As the Committee had rejected the Registrant's explanation that he had his permission it

was therefore satisfied that it was more likely than not that the Registrant also had signed or caused to be signed the original statement and letter in Mr A's name.

Particular 3 is therefore found proved.

Particular 4

Your actions as set out at 1 and/or 2,and/or 3 and above were:

a. Misleading; and/or

b. Dishonest in that you sought to submit documents purporting to be signed by Mr A which you knew had not been signed by Mr A in order to assist your defence in the proceedings 2SN00110.

This particular is found proved in its entirety.

The Committee initially considered whether the Registrant's actions as either admitted or found proved in particulars 1, 2 and 3 were misleading. In doing do it applied the definition of misleading as seeking to 'give the wrong idea or impression'.

The Committee noted that the Registrant admitted particular 1. Further it had found that the Registrant inaccurately represented that the Statement of Terms of Employment dated 1 February 2012 and the letter dated 23 March had been signed by Mr A when they had not and that the Registrant had signed or caused to be signed these documents in the name of Mr A without his knowledge or permission. The Committee also took into account the nature of the dispute between the Registrant and Witness 5.

Looking at all the evidence in the round, the Committee determined that the Registrant's actions as set out in particulars 1, 2 and 3 were undertaken to persuade the Court that Mr A had not been employed by the Registrant, which was not a true representation of the facts. The Committee concluded that in doing so it was the Registrants intention to give the wrong idea or impression and thereby mislead.

The Committee therefore found particular 4 (a) proved.

The Committee then went onto consider particular 4 (b).

In considering whether the Registrants actions were dishonest for the reasons set out in particular 4(b) the Committee applied the test as set out in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* which states:

"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that

the defendant must appreciate that what he has done is, by those standards, dishonest."

The Committee initially addressed the issue of the Registrants actual state of knowledge or belief as to the facts.

Looking at the evidence in totality the Committee determined that the Registrant was fully aware that the original documents submitted to the Court had not been signed by Mr A, that the Registrant had signed or caused them to be signed in his name without his consent and that the documents were submitted in an attempt to defeat or delay Witness 5's claim.

Having reached this conclusion as to the Registrant actual state of mind at the date of these acts occurring, the Committee went on to determine whether the Registrants actions would be considered dishonest by applying the (objective) standards of ordinary decent people. The Committee determined that by such standards the Registrants actions by attempting to influence a Court process by providing misleading/false documents would be considered dishonest.

The Committee therefore found particular 4 (b) proved.

Particular 6

6.Between around 4 and 7 April 2018 you caused an intermediary to make contact with Mr A and to offer Mr A money.

This particular is found proved.

In reaching this decision, the Committee took into account the evidence of Mr A, together with the contemporaneous 'video' evidence produced by him. It also took the Registrants evidence into account, together with the evidence given in relation to this particular by Witness 7 and Witness 6.

Mr A told the Committee that he had been contacted on 4 April 2018 by someone calling herself 'Sarah', who indicated that she was interested in hiring him as a singer for her mother's 60th birthday. A meeting was arranged at a local pub on 7 April 2018 to discuss this. Mr A explained that at the outset of this meeting 'Sarah' revealed she was there to convey an apology from the Registrant and make an offer of a cash settlement. Mr A explained to the Committee that 'Sarah' had an envelope with her which she said contained cash and documents for him to sign to settle the case. Mr A said that he was not told about the amount of money that she had brought but that 'Sarah' told him that if the cash sum was not enough then he could suggest an amount that would 'make me happy' and he would receive it .

Mr A told the Committee that he had refused to take any cash from 'Sarah' and told her that if the Registrant wanted an 'out of court settlement' then the courts and legal teams must be involved. He also explained that during the conversation 'Sarah' disclosed that her name was actually [redacted].

The Registrant told the Committee that, whilst the Registrant accepted that Mr A was contacted by Witness 6, this was done without his knowledge or consent. The Registrant further explained that when he was told what had occurred by Witness 7, he was angry with her because of her actions.

Witness 6, who in April 2018 was the Registrant's employee, told the Committee that she had not been instructed to approach Mr A by the Registrant, but by Witness 7. She insisted that there was no cash in the envelope and that it simply contained documentation for Mr A to consider. She told the Committee that she was there solely to explore and facilitate the possibility of Mr A accepting compensation. Witness 6 having given evidence that there was no cash in the envelope, the Committee requested that the video be replayed in her presence. This was done and the Committee raised the issue that she had clearly referred to having cash with her in the video. When challenged on this issue, Witness 6 told the Committee that she was simply exploring whether Mr A was seeking some form of cash compensation.

Witness 7 also told the Committee that the Registrant had no knowledge nor had the Registrant authorised any approach to or a meeting with Mr A. She explained that she was concerned about the effect that the complaint involving Mr A was having upon the Registrant personally and on the Registrant's [redacted]. She therefore decided, of her own volition, that an approach should be made to Mr A. She told the Committee that she chose Witness 6, as she felt that her character was suited to making such an approach. Witness 7 also told the Committee that all that was contained in the envelope was a draft 'Non-Disclosure Agreement' which she expected Mr A to take legal advice on. She was equivocal as to how responsibilities for various decisions were shared between the Registrant and her, sometimes asserting complete autonomy and at other times deferring to the Registrants overall control.

When pressed on the timing of the approach, Witness 7 stated that she saw 'no merit in the case continuing' and confirmed the case she was referring to was the Council's investigation into the Registrant. However, she denied being aware that there was a hearing of the Council's Fitness to Practise Committee to consider the issues contained in particulars 1 – 4 set down for 21 – 25 May 2018, some six weeks later even though she would have been expected to be a witness. In her evidence the timing was merely coincidental.

The Committee did not accept the explanations provided by the Registrant, Witness 6 or Witness 7. It noted the Registrant's earlier evidence that he was highly involved in the running of the business. Whilst certain matters may have been delegated on a day to day basis and certain employees would also have some autonomy in relation to day to day matters, the Committee considered that it was inherently improbable that anything as unusual or important as arranging a meeting with Mr A with regard to 'settling the case', in the context of an investigation by the Registrant's regulator into the Registrant's professional conduct would have occurred without his involvement and approval.

The Committee further considered that by the Registrant evidence that by the Registrant knew nothing about the approach to Mr A or the meeting was inconsistent with his prior evidence that he took an overall controlling role over the workings of the business. The Committee concluded that both the Registrant's evidence and that of Witness 7 clearly indicated that she deferred to by the Registrant in relation to significant matters relating to the running of the business. The Committee considered that by the Registrant's statement that he was angry on learning of Witness 6's

meeting with Mr A was contradicted by the Registrant's subsequent decision to engage personally with Mr A through What's App messages.

There was no clear and dependable evidence before the Committee to show that Witness 7 had the capacity to bind the business in relation to settlement of claims or Non-Disclosure Agreements. Whilst legal advice was referred to, no evidence of its existence was produced.

The Committee also considered the evidence of Witness 6 to be highly unreliable. She could be heard on the recording saying "you don't even know how much money I've got here" after Mr A had rejected the suggestion of settlement without going through lawyers. Given the clear references by her to "cash" in the video, the Committee concluded that her explanation that this meeting was simply to explore potential settlement terms to be inherently implausible. Having concluded that the envelope did contain cash, this was inconsistent with Witness 7's evidence that it only contained a Non-Disclosure Agreement and further undermined the reliability of her evidence.

The Committee also considered that Witness 7's evidence that she was not aware that a Fitness to Practise Committee had been set down to commence on 21 May 2018 was inherently implausible as she and other colleagues were potential witnesses in the case and it would have had an operational impact on the business. The Committee noted that Witness 7 accepted that she was aware of the Council's investigation and that the reason for the meeting was to facilitate settlement of 'the case'. Given the working inter-relationship with by the Registrant, the Committee does not accept that she did not know that the hearing was imminent.

For all the foregoing reasons, together with those set out in its evaluation of witnesses, the Committee rejected the evidence of by the Registrant, Witness 6 and Witness 7.

Again, for the reasons set out in its evaluation of the witnesses, the Committee preferred the evidence of Mr A supported by the video.

In all the circumstances the Committee determined that between around 4 and 7 April 2018 by the Registrant caused an intermediary to make contact with Mr A and to offer Mr A money.

Particular 6 is therefore found proved.

<u>Particular 8</u>

8. Your conduct set out at 6 and/or 7 was:

a. Inappropriate in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A; and/or

b. Lacking in integrity in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A ; and/or

c. Dishonest in that you were attempting to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A.

Found proved in its entirety.

The Committee first considered particular 8 in respect of the Registrant's conduct found proved in particular 6.

As regards to particular 6 (a), the Committee has already found that by the Registrant caused the contact set out in particular 6 to be initiated and made. The Committee also observed that the Registrant did not seek to suggest that between around 4 and 7 April 2018 that he was not aware that Fitness to Practise proceedings against him were due to be heard between 21 – 25 May 2018. The Committee considered that it would be inherently implausible in any event that by the Registrant was not aware of these proceedings.

The Committee concluded that, on the balance of probabilities, by the Registrants actions in particular 6 were an attempt to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A in proceedings brought against by the Registrant by the Registrant's professional regulator. As Mr A was a witness to the key facts in the case any attempt to prevent him from giving evidence or to influence his evidence amounted to an attempt to frustrate the purpose of the regulatory process.

The Committee therefore considered whether by the Registrants actions as set out and found proved in particular 6 were not suitable or proper in the circumstances. The Committee considered that by the Registrant's actions, amounting to an attempt to prevent Mr A from giving evidence or to influence his evidence, amounted to an attempt to frustrate the purpose of the regulatory process and in the particular circumstances, were not proper and were inappropriate.

Particular 8 (a), insofar as it relates to particular 6, is therefore found proved.

As regards particular 8 (b) the Committee noted the judgment in *Wingate & Evans v SRA [2018] EWCA Civ 366*, where it was stated:

> *"97. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in Williams at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.*
>
> *98. I agree with Davis LJ in Chan that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: "Well you can always recognise it, but you can never describe it."*
>
> *99. The broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer. The observations of the*

Financial Services and Markets Tribunal in Hoodless have met with general approbation.

100. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse."

The Committee already determined that by the Registrants actions in particular 6 were an inappropriate attempt to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A thereby frustrating the purpose of the regulatory process. The Committee considered that the Registrant's actions in particular 6 lacked integrity as defined in Wingate & Evans.

Particular 8(b), insofar as it relates to particular 6, is found proved.

As regards particular 8(c) the Committee again applied the test as set out in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* and fully narrated above.

As regards the issue of by the Registrants actual state of knowledge or belief as to the facts, the Committee has already determined that by the Registrants actions in particular 6 were an attempt to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A.

Having reached this conclusion as to by the Registrant's actual state of mind at the date of these acts occurring, the Committee then went onto to consider whether the Registrant's actions would be considered dishonest by applying the (objective) standards of ordinary decent people. It had found that by seeking to persuade Mr A not to give evidence or to influence his evidence by the Registrant was attempting to frustrate the investigation into a complaint that the Registrant had fabricated documents. The Committee determined that by the Registrant's actions as found proved in particular 6 would be considered dishonest by the standards of ordinary decent people.

The Committee then went onto consider particular 8 in respect of by the Registrant's conduct as admitted in particular 7.

As set out above the Committee determined that the Registrant did not seek to suggest that between around 4 and 7 April 2018 that he was not aware that Fitness to Practise proceedings against him were due to be heard between 21 – 25 May 2018. The Committee considered that it would be inherently implausible that by the Registrant was not aware of these proceedings.

The Committee noted the Registrant's explanation for contacting Mr A was:

'I've been involved in [redacted], the rules of engagement encouraged open dialogue. The employment tribunal its métier was to reach the truth. [redacted]. I deeply regret that I thought the same rules applied, it was an honest belief.'

Against the background of the pending Fitness to Practise proceedings against the Registrant in which it was alleged that by the Registrant's conduct had been dishonest the Committee found this explanation inherently implausible. In any event the Committee was of the opinion that by the Registrant would have known that it was entirely inappropriate to approach Mr A in any way. The Committee rejected the Registrant's explanation.

Having rejected this explanation, the Committee concluded that, on the balance of probabilities, the Registrant's actions in particular 7 were an attempt to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A, a key witness in the forthcoming hearing.

The Committee therefore considered whether the Registrant's actions as set out and found proved in particular 7 were not suitable or proper in the circumstances. The Committee considered that the Registrant's actions, in the particular circumstances, were not proper and were entirely inappropriate, seeking as they did to distort the regulatory process.

Particular 8(a), insofar as it relates to particular 7, is therefore found proved.

As regards to particular 8(b), in relation to particular 7, the Committee again noted the judgment in Wingate & Evans.

For the reasons set out in respect of the Registrants actions being inappropriate The Committee considered that the Registrants actions in particular 7 lacked integrity as defined in Wingate & Evans.

Particular 8 (b), insofar as it relates to particular 7, is therefore found proved.

As regards particular 8 (c) the Committee again applied the test as set out in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* and fully narrated above.

As regards the issue of the Registrant's actual state of knowledge or belief as to the facts, the Committee has already determined that the Registrants actions in particular 7 were an attempt to persuade Mr A not to give evidence and/or to influence the evidence given by Mr A.

Having reached this conclusion as the Registrant's actual state of mind at the date of these acts occurring, the Committee went on to determine whether the Registrants actions would be considered dishonest by applying the (objective) standards of ordinary decent people. The Committee determined that by such standards the Registrants as admitted in particular 7 would be considered dishonest.

Particular 8, insofar as it relates to particular 7, is therefore found proved.

Findings regarding misconduct

The Committee took into account all relevant evidence, including evidence adduced at facts stage, further oral evidence from the Registrant, testimonials submitted on the Registrants behalf and its prior determination. It heard submissions from Mr Corrie on behalf of the Council and Mr Knox on the Registrant's behalf.

The Registrant outlined the nature and extent of his practice to the Committee. He stated that he accepted its findings of fact and explained that he had now tightened up his business systems, with particular reference to how the business now recruits people and had strengthened its Human Resources processes. The Registrant explained that he has engaged a business mentor Mr D and had developed strong 'core values'.

The Registrant told the Committee that his action in 2012 was a huge error of judgement and that he had reflected deeply, attended leadership courses and the Registrants moral compass had improved.

During cross examination by Mr Corrie, the Registrant stated that he accepted 'overarching responsibility' for what occurred, as the Registrant was Managing Director of the company at the time. When Mr Corrie put it to the Registrant that his actions in 2012 were a 'sham' he did not accept this and stated that he was dealing with an employee with a bad sickness record. The Registrant denied that his actions were a premeditated course of conduct. The Registrant accepted that his actions were not that to be expected of a member of the profession.

When asked for his views of the effect of his actions on Mr A, the Registrant said he was deeply remorseful and very sorry how matters had turned out. The Registrant told the Committee that he would not 'shed a tear' for Witness 5 but had no 'animosity' towards Witness 5.

When Mr Corrie suggested that the incidents in 2012 and 2018 were distinct matters the Registrant did not accept this and stated that they were inextricably linked. He stated that the Registrant had been badly advised by others including lawyers, resulting in him acting as he did. The Registrant stressed that he had strong 'core values', which included civic responsibility, dignity in the workplace and respect for colleagues. The Registrant stated that he had learned from what had occurred. When asked about Witness 6 contacting Mr A, the Registrant stated that he 'categorically' did not send an intermediary to meet with Mr A.

During questions from the Committee the Registrant stated he had learned to respect people, treat them with dignity and be generous and giving. He explained that he had had a 'mercurial', volatile personality in 2012, but was now a more rounded and reflective person and continued to learn.

As regards misconduct, Mr Corrie submitted that there was a spectrum of dishonesty and the Committee had to determine where the gravity of the dishonesty found proved lay on it. He submitted that, in relation to particulars 1 - 4 that the Registrant's actions were a pre-meditated course of conduct, which had required careful planning and execution. He stated that the Registrant's actions were inherently linked to the way he ran his business and were for financial gain – to avoid paying Witness 5. He submitted

that the Registrant's dishonest actions in 2012 were intended to deceive the County Court, to manipulate Mr A and to support the Registrant's legal claim.

Mr Corrie further submitted that in relation to particulars 5 – 8 the Registrant's actions were again pre-meditated and amounted to a repetition of dishonest conduct designed to avoid the consequences of previous acts of dishonesty. He stated that whilst they were linked to particulars 1 – 4, they were separate and distinct acts and sought to frustrate the regulatory process of the Council. He submitted that the particulars found proved constituted very serious misconduct.

Mr Corrie submitted that the particulars found proved amounted to breaches of a number of paragraphs of the Council's Code of Conduct 2010 (The Code) applicable at the time of particulars 1 - 4 and the Standards for Optometrists and Dispensing Opticians 2016 at the time of particulars 5 – 8 (The Standards); that the misconduct was professional misconduct; and were serious breaches of the Code. He referred the panel to the case of *Roylance v GMC (No. 2) [2000] 1 AC 311, Calhaem v GMC [2007] EWHC 2606, Nandi v GMC [2004] EWHC (Admin) 2317* and *Remedy UK v GMC [2010] EWHC 1245*.

Mr Knox told the Committee that the Registrant accepted the Committee's findings and regretted the background to these events. He stated that the Registrant accepted the findings of dishonesty and it was likely that the Committee would find that the Registrant's actions did amount to misconduct.

Mr Knox submitted that the Registrant's dishonest misconduct was not at the serious end of the spectrum of dishonesty. He submitted it did not involve important areas of his practice – it didn't involve patient care or clinical behaviour and was not a case where an individual set out to commit fraud in the course of his practice e.g. on NHS or fraudulently change a patient's notes. Mr Knox submitted that it arose from a private matter and, but for the regulatory proceedings, would not in reality have become public.

Mr Knox further submitted that the County Court proceedings were Small Claim proceedings and it was not a case of deceit for huge gain. He stated that the Registrant acted on the 'spur of the moment' in respect of a dispute over an unsatisfactory employee. He submitted neither Witness 5 or Mr A suffered any financial loss and the Registrant's actions were an ill-judged attempt to brings matters to an end.

The Committee accepted the advice of the Legal Adviser. He referred the Committee to cases including Roylance and Calhaem and the 2010 Code and 2016 Code.

The Committee was aware that, in considering the question of misconduct, there was no burden of proof, nor standard of proof.

In reaching its decision on misconduct, the panel bore in mind its duty to protect the public, to maintain public confidence in the profession and the regulatory process, and to declare and uphold proper standards of behaviour and conduct. The Committee appreciated that breaches of the Code or Standards do not automatically result in a finding of misconduct.

The Committee considered that acting in the manner found proved in particulars 1 - 4 comprised a deliberate premeditated and dishonest course of conduct, over a period of time, by which the Registrant sought to mislead the County Court. Further his acts were an attempt to avoid making payment to the detriment of Witness 5.

The Committee further considered that the acts found proved in particulars 5 – 8 also comprised a deliberate premeditated course of conduct, over a period of time, and involved inappropriate contact with Mr A, in an attempt to persuade him not to give evidence or to influence the evidence which he gave, and which sought to defeat the regulatory process of the Council. In such circumstances, the Registrant's acts lacked integrity and were dishonest.

The Committee also considered that the Registrant had shown disregard for the legal process of the County Court and the Council as his regulator.

The Committee concluded that in relation to particulars 1 – 4 the registrant was in breach of the following paragraphs of the Code:

> *"10. Be honest and trustworthy.*
> *19. Ensure your conduct, whether or not connected with your professional practice, does not damage confidence in you or your profession."*

The Committee concluded that in relation to particulars 5 – 8 the registrant was in breach of the following paragraphs of the Standards:

"16. Be honest and trustworthy

> *16.1 Act with honesty and integrity to maintain public trust and confidence in your profession."*

"17. Do not damage the reputation of your profession through your conduct

> *17.1 Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession."*

The Committee was satisfied that, both individually and cumulatively, the Registrant's acts and omissions fell seriously below the standard to be expected of an optometrist, would be regarded by fellow members of the profession as deplorable and amounted to misconduct.

Decision on impairment

The Committee went on to consider if as a result of his misconduct the Registrant's fitness to practise is currently impaired.

The Committee took into account all relevant evidence including evidence adduced at facts stage, further oral evidence from the Registrant, testimonials submitted on his behalf and its prior determination. It heard submissions from Mr Corrie on behalf of the Council and Mr Knox on the Registrant's behalf in relation to impairment.

Mr Corrie submitted that, whilst it was not the case that dishonesty could not be remediated, that there was no evidence that the Registrant had adequately remediated his misconduct. He told the Committee that there was no evidence of adequate reflection and asked the Committee to note that during the Registrant's evidence, when asked if he accepted its findings, he said he 'did, but regretfully.' He submitted that the testimonials provided on the Registrant's behalf were of little or no value as they were written before the Committee's findings on facts and were based on the way the Registrant had characterised what had occurred. He further submitted that the testimonial from Mr D, the Registrant's mentor, showed no evidence of reflection or remediation by the Registrant. Mr Corrie pointed out that when asked for his view on Witness 5, the Registrant stated that he "would not shed a tear for Witness 5 and had no personal animosity." He submitted that the Registrant continued to describe his actions as a "momentary lapse", had a tendency to blame others and had described his contact with Mr A by Whats App as being a 'huge error', arising from wrong advice.

Mr Corrie further submitted that the Registrant's acceptance of responsibility for his conduct was limited to having 'overarching responsibility' as the managing director of Company A and that, in this capacity, he had been given wrong advice by lawyers. He also submitted that the Registrant had denied that his actions were premeditated and specifically continued to deny that he had sent Witness 6 as an intermediary. He said the Registrant had failed to accept the gravity of his misconduct and had failed to demonstrate remediation. He submitted that public confidence in the profession would be undermined if a finding of impairment were not made in these circumstances.

Mr Corrie referred the Committee to the cases *Zygmunt v GMC [2008] EWHC 2643* and *Cheatle v GMC [2009] EWHC 645* referred the Committee to the case of Council for *Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).*

On the Registrant's behalf, Mr Knox submitted that the Registrant accepted the Committee's findings, attempting to make it clear, in the context of events, that he regretted his misconduct. Mr Knox submitted that the Registrant had demonstrated real introspection, reflection and distress. He referred the Committee to the report from Mr B. Mr Knox submitted that the Registrant's misconduct in 2012 and 2018 were not two separate episodes but were inextricably linked.

As regards remediation, Mr Knox submitted that the Registrant had reflected and had paid a price. He told the Committee that the Registrant had learned his lesson and made it clear that he had done what he could to remediate. Mr Knox referred to the Registrant's evidence that he now takes advice, has tried to change his organisation and to be a good clinician. He has discussed matters with his mentor Mr D and separated his clinical practice from the business side of the operation. Mr Knox stated that the Registrant's misconduct was not at the severe end of the spectrum of dishonesty, arose from a massive misjudgement and was remediable. He stated that it was clear from the testimonials that the misconduct had been remediated and would not re-occur.

The Committee accepted the advice of the Legal Adviser. He referred it to cases including Grant and *Cohen v GMC, PSA v Uppal [2015] EWHC 1304 (Admin)* and *PSA v NMC [2017] CSIH 29.*

In paragraph 76 of Grant Mrs Justice Cox stated:

"I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor's fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

> *(a)has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
>
> *(c) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
>
> *(c))has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
>
> *(d) has in the past acted dishonestly and/or is liable to act dishonestly in the future."*

The Committee considered the Registrant's misconduct, in the past, met the criteria set out above in paragraphs b, c and d.

The Committee considered that the Registrant's misconduct in particulars 1- 4 of the allegation sought to mislead the County Court and was an attempt to gain financially. Further, the Registrant's actions in these particulars were inappropriate, misleading and dishonest. By acting in this manner, the Registrant has brought the profession into disrepute and breached fundamental tenets of the profession. The Committee rejected Mr Knox's submission that to attempt to deceive the Court was not at the serious end of the spectrum of dishonesty.

The Committee considered that the Registrant's misconduct in particulars 5 – 8 amounted to an attempt to defeat the legitimate regulatory process of the Council in its capacity as his regulator, were inappropriate, lacked integrity and were dishonest and thus brought the profession into disrepute and breached fundamental tenets of the profession. The Committee rejected Mr Knox's submission that to attempt to frustrate the Council's regulatory process was not at the serious end of the spectrum of dishonesty.

Regarding insight, the Committee noted that, whilst the Registrant admitted particulars 1, 5 and 7 at the outset of this hearing, he had continued to deny the other particulars, seeking to assert that Mr A had been employed by 'a competitor' and had given his permission for the Registrant to sign the replacement statement and letter. He also continued to assert that he had no knowledge of or involvement in Witness 6 meeting Mr A and that his actions in contacting Mr A by Whats App were not an attempt to influence and defeat the Fitness to Practise Hearing. Whilst the Registrant had stated during the evidence he gave at this stage of process that he 'accepted' the Committee's findings, the Committee noted that he did so 'regretfully', continued to attribute his misconduct to receiving bad advice and attributed blame to others. The Committee particularly noted that he stated that he 'categorically' denied sending Witness 6 to meet Mr A as an intermediary. The Committee considered that the foregoing was contradictory to a full and unfettered acceptance of its Findings of Facts.

The Committee considered that the Registrant has continued to fail to demonstrate any real understanding or acceptance of the full nature and extent of his misconduct or its potential consequential effect on members of the public, colleagues or confidence in the profession. The Committee considered that during his further oral testimony the Registrant had continued to seek to apportion blame for his misconduct to receiving 'bad advice'. In apportioning blame to others, he attempted to distance himself from and deny responsibility for his actions. The Committee did not consider that the Registrant's frequent reference to vague and generic 'core values' – particularly as they arose in the context of his business model and his emphasis on leadership qualities - demonstrated any real insight into his personal misconduct and its actual and potential consequences.

The Committee determined that, whilst linked, the Registrant's misconduct in 2012 and 2018 were distinct and disparate, occurring some 6 years apart. The Committee considered that, despite having time to reflect on his 2012 misconduct during the period 2012 to 2018 and to demonstrate insight and remediation, the Registrant had not only failed to do so, but had acted in a similarly dishonest manner in 2018. The Committee further considered that, neither the evidence given by the Registrant at this stage of the hearing nor any of the testimonials, showed that he had developed any real insight or understanding of the full nature and extent of his misconduct in 2012 and 2018 or of the potential consequences of his misconduct on members of the public, colleagues or public confidence in the profession or the Council as its Regulator. In these circumstances, the Committee considered that there was no evidence before it of real insight or remorse on the Registrant's part.

The Committee considered that, whilst the Registrant's dishonesty and lack of integrity did not take place within his clinical practice, it occurred whilst he was acting in the course of his optical business. It had the potential to permeate all aspects of his professional practice, including his interaction with patients. The Committee determined that this gave rise to a potential risk to members of the public.

The Committee considered that Mr Knox's submissions, whilst not directly referring to relevant case law, amounted to a submission that the Registrant should not be found impaired on the basis set out in Uppal. The Committee noted the terms of the judgment in Uppal, particularly in paragraphs 30 and 34 and that the position of the Registrant in Uppal ' was an exceptional case, on the facts.' The Committee also considered the

judgment in *PSA v NMC*. The Committee considered that the Registrant's misconduct was *'so egregious that … any reasonable person would conclude that the registrant should not be allowed to practise on an unrestricted basis, or at all.'*

Given the Registrant's lack of remorse and failure to demonstrate any insight, the Committee concluded that there exists a real risk of repetition of analogous behaviour as that found proved.

The Committee therefore considered that a finding of current impairment on public protection grounds is necessary, given the prior history of misconduct; the absence of any remediation, insight or remorse; and given that the Committee has found there is a risk of repetition.

The Committee then considered whether a finding of impairment was also necessary to maintain public confidence in the profession. The Committee was in no doubt that the Registrant's past actions did bring the profession into disrepute and given the seriousness of the misconduct identified, including two acts of dishonesty occurring over a significant period of time, that public confidence in the profession would be seriously damaged if a finding of current impairment were not made.

The Committee is therefore satisfied that the Registrant's fitness to practise is currently impaired both on public protection grounds and in the wider public interest to maintain public confidence in the profession and the regulatory process and to declare and uphold proper standards of behaviour and conduct.

Application to adjourn

Prior to the Committee proceeding to commence consideration of the issue of what Sanction, if any, to impose, Mr Knox on behalf of the Registrant made an application for the proceedings to be adjourned in terms of Rules 35 and 36.

Mr Knox submitted that, having noted the Committee's comments in its decision on impairment that;

> "*…neither the evidence given by the Registrant at this stage of the hearing nor any of the testimonials, showed that he had developed any real insight or understanding of the full nature and extent of his misconduct in 2012 and 2018 or of the potential consequences of his misconduct on members of the public, colleagues or public confidence in the profession or the Council as its Regulator."*

This indicated to him that the value of the testimonials to the Committee had been diminished as the authors had not been made aware of the Committee's finding of fact prior to providing testimonials. He referred to this issue being put to the Registrant in cross examination by Mr Corrie to bolster his position. Mr Knox told the Committee that, in light of this, he wished to revert to the authors of the nine testimonials, let them have sight of the Committee's prior determinations, *'including all the papers'* and ask them to provide updated testimonials. He said it was particularly important to hear from Mr D, Mr E and Mr F, because they knew the Registrant and his business well. Mr

Knox confirmed that he had not approached any of the character referees since the findings of fact two days previously to ascertain either their availability or amenability to this course of action. He explained that in light of the Committee's prior determinations the Registrant was aware of the potential sanctions that may be sought by the Counsel and in these circumstances, it was considered necessary to provide the Committee with up to date testimonials. He explained he thought this process might take up to two weeks and this was why he sought an adjournment of the hearing today. Mr Knox submitted that Article 6 of the ECHR was engaged.

Mr Corrie, on behalf of the Council, opposed the application. He submitted that the Committee required to consider not only any potential prejudice to the Registrant, but also potential prejudice to the Council and the issue of public interest. He said that the Committee had to ask what steps had been taken since the determination on facts had been handed down to obtain updated testimonials. He submitted that a proper consideration of the Committee's determination on impairment showed that it had found that there was no evidence of the Registrant demonstrating any real insight at all and that it was not open to the Committee or Mr Knox to seek to revisit this finding.

Mr Corrie submitted that there would be no prejudice to the Registrant if the application were to be refused, and suggested that if, in fact, there was any prejudice it was very limited and of the Registrant's own making. He submitted that the public interest in ensuring that this hearing was dealt with expeditiously required to be considered.

The Committee heard and accepted the advice of the Legal Adviser who referred it to Rules 35 and 36.

Rule 35 and 36 states:

> *"35. (1) At any stage, a party may apply to the Fitness to Practise Committee for the adjournment of a hearing and must notify the other parties of the application.*
>
> *(2) Such an application must be considered either—*
>
> > *(a)at the hearing at which the application is made; or*
> >
> > *(b)if the application is made otherwise than at a hearing, on the next date upon which the Fitness to Practise Committee sit in such a case all parties must be notified of that date by the Hearings Manager.*
>
> *36. (1) Upon the hearing of an application under rule 35, or of its own motion, the Fitness to Practise Committee may adjourn a hearing.*
>
> *(2) Where the Fitness to Practise Committee decides to adjourn a hearing, it may fix a new date for the hearing."*

The Committee considered that Mr Knox's application was based on an assumption that it had reached a fixed conclusion as to the of value the testimonials. The Committee determined that this was not the case.

Up to this stage the Committee has considered the testimonials and their contents for the sole purpose of reaching a conclusion on whether or not the Registrant is currently impaired. This issue is wholly distinct from any consideration the Committee will give to the issue of sanction and any value the testimonials may then have for the Committee and for the Registrant. The Committee has not, and could not, reach any view on what weight to attribute to any evidence or what assistance any evidence may be to the matter of sanction. The Committee has yet to hear any further evidence or submissions in relation to the issue of sanction. It is only after it has heard such evidence and submissions that it will consider what weight to give to the testimonials and what assistance they may be to it as regards the distinct matter of sanction.

As Mr Knox's application was predicated on the assumption that the Committee had already taken a view on the value of the testimonials in respect of its consideration of sanction, the Committee determined that the potential prejudice identified by Mr Knox did not exist.

As such the Committee determined that there was no material risk of unfairness to the Registrant in proceeding. It therefore refused Mr Knox's application to adjourn this hearing.

SANCTION

Having determined that the Registrant's fitness to practise is impaired, the Committee considered what sanction, if any, it should impose. In reaching its decision, the Committee has considered all the evidence provided, together with Mr Corrie's submissions on behalf of the Council and Mr Knox's submissions on the Registrant's behalf.

Mr Corrie referred to the Registrant's evidence about the nature of his practice and that, if he were to be suspended or erased, that the business would no longer continue with its NHS contract and that this would adversely affect patients in the deprived areas where some of his business operated. He also referred to the Registrant's evidence that if he were suspended or erased the bank would recall the business loans and the business could no longer continue to operate. He submitted that there was no evidence to support these assertions and that it was for the Committee to decide what weight it should attribute to them. Mr Corrie further submitted that the business accounts for 2017 – 2018 provided by the Registrant were not of assistance to the Committee in respect of its decision on sanction. Mr Corrie referred the Committee to the case of *The Law Society v Salsbury 2008 EWCA Civ 1285* with regard to the relative weight to be afforded to personal mitigation in regulatory cases.

Mr Corrie submitted that, in relation to particulars 1 - 4 the aggravating factors were that the Registrant's actions were a pre-meditated course of conduct, which had required careful planning and execution. He stated that the Registrant's actions were inherently linked to the way he ran his business and were for financial gain – to avoid paying Witness 5. He submitted that the Registrant's dishonest actions in 2012 were intended to deceive the County Court, to manipulate Mr A and to support the Registrant's legal claim.

Mr Corrie further submitted that in relation to particulars 5 – 8 the aggravating factors were that the Registrant's actions were again pre-meditated and amounted to a repetition of dishonest conduct designed to avoid the consequences of previous acts of dishonesty. He stated that whilst they were linked to particulars 1 – 4, they were separate and distinct acts and sought to frustrate the regulatory process of the Council.

In relation to mitigation Mr Corrie stated that the Registrant had no prior disciplinary findings and that there was no evidence of any concerns regarding his clinical practice. He stressed that, it was the Council's position, that there was no suggestion of any risk of harm to patients and that the Council submissions regarding sanction were based solely on the grounds of wider public interest. He referred to the positive evidence regarding the Registrant's business, the existence of a business mentoring arrangement and that he had stated that he had 'tightened up procedures. He also referred to the Registrant's evidence regarding 'personal issues.

Mr Corrie submitted that the Registrant had failed to demonstrate any insight into his misconduct and referred the Committee to the terms of its determination on impairment with reference to its findings on insight, remediation and risk of repetition. Having taken the Committee through the sanctions available to it, Mr Corrie submitted that the only appropriate sanction in the particular circumstances of this case was erasure.

Mr Knox stressed to the Committee that the 'reality' of this case was that the Registrant's misconduct did not relate to clinical involvement with 'anyone at all'. He submitted that the misconduct did not involve fraud in a clinical setting – for example by way of a false NHS claim – and that the only member of the public involved was Witness 5. He submitted that it was clear that the Registrant had taken steps to remove himself from the administrative side of the business to avoid conflict and that he now concentrated on his clinical practice.

Mr Knox referred to the specialist nature of the Registrant's practice and to the various testimonials provided by the Registrant as evidence of the Registrant being a excellent clinical practitioner. He submitted that the Registrant's misconduct amounted to two episodes of reacting badly to situations and that he had accepted this. Mr Knox referred to various aspects of the Registrant's practice and submitted that he was an excellent clinical practitioner, and this was not challenged by the Council. He referred to the 2017 – 2018 business accounts and that it was clear that this was a successful small to medium sized business that the Registrant had built up himself. He commended the Registrant's social values.

Mr Knox referred to the case of *PSA v Uppal 2015 EWHC 1304 (Admin)* and, by reference to the approach formulated by Dame Janet Smith in the Fifth Shipman report in relation to impairment, submitted that since the formulation of this approach the primary and main concern of regulators was patient harm and that no such harm had occurred in this case.

Mr Knox concluded by submitting that the Registrant 'was trying to avoid erasure', that the business could not carry on without him and that an appropriate sanction would be a financial penalty or short suspension.

The Committee heard and accepted the advice of the Legal Adviser. He referred it to the case *Bolton v Law Society [1993] EWCA Civ 32*, the Indicative Sanctions Guidance (ISG) and advised the Committee that, with regard to the findings of dishonesty, it should have regard to all relevant issues when deciding how serious the dishonesty was.

The Committee has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. It recognised that the decision on sanction is a matter for the Committee, exercising its own independent judgement.

Before making its decision on the appropriate sanction, the Committee established the aggravating and mitigating features in this case.

The Committee considered that the aggravating factors in this case were:

- The repeated misconduct in 2012 and 2018 was pre-meditated, requiring careful planning and execution over a period of time.
- The misconduct was inherently linked to the Registrant's business.
- The misconduct was for financial gain.
- The misconduct in 2012 was intended to deceive the County Court and manipulate Mr A in support of the Registrant's legal claim.
- The misconduct in 2018 was designed to avoid the consequences of previous dishonest acts and was a deliberate attempt to frustrate the regulatory process.
- The 2012 and 2018 misconduct were separate and distinct dishonest acts.

The Committee considered that the mitigating factors in this case were:

- No previous regulatory or disciplinary concerns
- No concerns regarding the Registrant's clinical practice.
- Strong testimonials in relation to the Registrant's character and his clinical practice.
- No patient harm.

The Committee accepted that no patient harm had occurred. It approached the issue of sanction on the grounds of the wider public interest.

The Committee considered Mr Knox's submissions that, since the formulation of the approach to impairment by Dame Janet Smith, the primary and main concern of regulators was patient harm. It also took into account the comments made by Mrs Justice Cox in the case of Grant at paragraph 71 that:

> *"However it is essential, when deciding whether fitness to practise is impaired, not to lose sight of the fundamental considerations emphasised at the outset of this section of his judgment at paragraph 62, namely the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession."*

And at paragraph 74 that:

> *"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances."*

The Committee also took into account the terms of paragraph 8 of the ISG that states

"*8. Our objective*

8.1 …[The Council's] objective encompasses the following aims:

(a) To protect, promote and maintain the health, safety and wellbeing of the public;

(b) To promote and maintain public confidence in the professions regulated under the Opticians Act;

(c) To promote and maintain proper professional standards and conduct for members of those professions; and

(d) To promote and maintain proper standards and conduct for business registrants."

Having considered the foregoing, the Committee did not accept Mr Knox's submission that, since the formulation of the approach to impairment by Dame Janet Smith, the primary and main concern of regulators was patient harm. The Committee determined that the issue of the wider public interest also required to be addressed.

The Committee also took into account the comments in *Bolton v Law Society [1993] EWCA Civ 32* where it was stated at paragraph 16:

> *"Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more*

important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

The Committee adopted this approach when considering the mitigation in this case. Whilst it acknowledged the issues that may arise with the Registrant's business, it did so in light of the guidance in Bolton. The Committee also had regard to the positive testimonials provided by the Registrant but considered that their use was of limited value in relation to the regulatory concerns underpinning the particulars found proved.

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

The Committee first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The Committee decided that it would be neither proportionate nor in the public interest to take no further action.

The Committee then considered whether to impose a financial penalty. However, it determined that these matters are too serious for a financial penalty to be considered appropriate or sufficient to reflect adequately the public interest.

The Committee next considered the imposition of a Conditional Registration Order.

The Committee noted the terms of paragraph 33.9 of the ISG which states:

"33.9 This sanction may be appropriate when most or all of the following factors are apparent (this list is not exhaustive):

a. *No evidence of harmful deep seated personality or attitudinal problems;*

b. *Identifiable areas of registrant's practice in need of assessment or retraining;*

c. *Evidence that registrant has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision;*

d. *Potential and willingness to respond positively to retraining;*

e. *Patients will not be put in danger either directly or indirectly as a result of conditional registration itself;*

f. *The conditions will protect patients during the period they are in force; or*

g. *It is possible to formulate appropriate and practical conditions to impose on registration and make provision as to how conditions will be monitored."*

The Committee considered that the Registrant had not demonstrated any evidence of real insight or remediation. The Committee could not exclude the possibility of the existence of harmful deep-seated personality or attitudinal problems. This is not a case

where retraining would address the regulatory concerns. Further, the Committee determined it is difficult to formulate conditions in cases where repeated dishonesty has been found.

In light of this, the Committee determined that there were no practical or workable conditions that could be formulated at this time which would adequately address the concerns in this case and protect the public and the wider public interest. In any event, the nature of the repeated dishonesty is too serious for this to be an appropriate disposal.

The Committee then went on to consider whether a suspension order would be an appropriate sanction. It noted the terms of paragraph 34.1 of the ISG which states:

"34.1 This sanction may be appropriate when some or all of the following factors are apparent (this list is not exhaustive):

a. A serious instance of misconduct but where a lesser sanction is not sufficient;

b. No evidence of harmful deep-seated personality or attitudinal problems;

c. No evidence of repetition of behaviour since incident;

d. The Committee is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour;

e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant was allowed to continue to practise even under conditions;"

As set out above the Committee considered it could not exclude the possibility of the existence of harmful deep-seated personality or attitudinal problems. It had found no evidence of real insight or remediation. Further, the Committee was satisfied that this was not one serious instance of misconduct, but rather two acts of distinct pre-meditated dishonest misconduct over a period of time, with the misconduct in 2018 being designed to avoid the consequences of previous dishonest acts.

The Committee determined that a suspension order is insufficient to satisfy the public interest in maintaining public confidence in the profession and the GOC as the regulator.

The Committee then went on to consider erasure.

It noted the terms of paragraph 36.5 which states:

"36.5 This sanction is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional and involves any of the following (this list is not exhaustive):

a. *Serious departure from the relevant professional standards as set out in the Standards of Practice for registrants and the Code of Conduct for business registrants;*

b. *Doing serious harm to individuals (patients or otherwise), either deliberately or through incompetence, and particularly where there is a continuing risk to patients;*

c. *Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients;*

d. *Offences of a sexual nature, including involvement in child pornography;*

e. *Offences involving violence;*

f. *Dishonesty (especially where persistent and covered up); or*

g. *Persistent lack of insight into seriousness of actions or consequences."*

The Committee was satisfied that the Registrant's actions amount to a serious departure from the relevant professional standards. The 2012 and 2018 misconduct were separate and distinct dishonest acts. The misconduct in both 2012 and 2018 was pre-meditated, requiring careful planning and execution and was inherently linked to the Registrant's business and was for financial gain. The misconduct in 2012 was intended to deceive the County Court and manipulate Mr A in support of the Registrant's legal claim. The misconduct in 2018 was designed to avoid the consequences of previous dishonest acts and to frustrate proceedings brought by his regulator. Despite the passage of time since the initial 2012 dishonest misconduct the Registrant has continued to show a persistent lack of insight into the serious nature and consequences of his actions.

The Committee was wholly satisfied that the Registrant's conduct was fundamentally incompatible with continued registration.

The Committee considered the significant adverse impact this sanction may have on the Registrant and his business, but his dishonest misconduct is such that the public interest outweighed the Registrant's own interests.

Having considered all of these factors and after taking into account all the evidence before it during this case, the Committee determined that the appropriate and proportionate sanction is that of erasure. Having regard to the matters it identified, in particular the effect of the Registrant's actions in bringing the profession into disrepute, the Committee has concluded that nothing short of erasure would be sufficient in this case.

The Committee considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of an optometrist.

Immediate order

The Committee then went onto to consider if an immediate order was required on the grounds that it was necessary for the protection of the public and is otherwise in the public interest.

The Committee has heard submissions from Mr Corrie on behalf of the Council and Mr Knox on the Registrant's behalf.

Mr Corrie advised the Committee that the Council sought an immediate order only on the grounds of public interest. He referred the Committee to the cases of *Shek v GDC [2007] EWHC 2972 (Admin) and Davey v GDC 2015 WL 6757832.* Mr Corrie reminded the Committee that the bar is set 'high' where an immediate order is made on the grounds that it is in the public interest alone and that it is relatively rare for an immediate order to be made in these circumstances. Mr Corrie submitted that the Committee should consider the nature of the conduct found proved and whether the Registrant was suitable to remain on the register at all. He submitted that the nature of the conduct found proved went to the formality of the `county Court process and to the heart of respect for the regulatory process. He referred the Committee to its findings in respect of the Registrant's lack if insight.

Mr Corrie submitted that an immediate order was required to protect the reputation of the profession, to declare and uphold public confidence in the profession and the reputation of the regulatory process.

Mr Weidner referred the Committee to section 13I of the Opticians Act 1989 (the Act). He submitted that the particulars found proved had been in existence with for 6 years or more and that the Registrant had continued to practice during this period. He stated that whilst it was accepted that the dishonest misconduct in 2012 and 2018 was linked that it was isolated to Witness 5 and that there was suggestion of any further wrongdoing. He submitted that there was no allegation involving patient care or the Registrant's clinical practice. Mr Weidner explained that the Registrant had [redacted] and [redacted] clinical employees and around [redacted] employees in total. He submitted that the Registrant should be allowed a 'reasonable period of adjustment' to restructure his business in light of the Committee's determination on sanction. He also submitted that the 'bar is set high' where an immediate order is made on the grounds that it is in the public interest alone and that it is relatively rare for an immediate order to be made in these circumstances.

The Committee has accepted the advice of the Legal Adviser. He referred it to the ISG.

Section 13I (1) of the Act states:

> *"13I. (1) On giving:-*
> *(a) a direction for erasure or a direction for suspension under section 13F(2) above; or*

(b) a direction for removal from the appropriate register of an entry relating to a specialty or proficiency under section 13F(4)(a) or (b) above, the Fitness to Practise Committee, if satisfied that to do so is:-

(i) necessary for the protection of members of the public;
(ii) otherwise in the public interest; or
(iii) in the best interests of the individual or body corporate,

may order that the registration of the registrant shall be suspended forthwith or, in the case of an entry relating to a specialty or proficiency, that the removal from the register of the entry relating to the specialty or proficiency"

The Committee considered that as of today there is no evidence before it to show that an immediate order is 'necessary' for the protection of members of the public. It also considered that such an order was not required in the best interests of the Registrant.

The Committee therefore considered whether an immediate order was otherwise in the public interest. The Committee was aware that the 'bar is set high' and that it is relatively rare for an immediate order to be made on the grounds of public interest alone. The Committee took into account the effect that the imposition of an immediate order would have upon the Registrant. It considered Mr Weidner's submissions regarding the registrant being given a period of time to restructure his business, but noted that no specific independent evidence had been provided as to the effect any immediate order would have upon the business or its employees. The Committee also considered the nature of the regulatory concerns arising from the allegation. The Registrant acted dishonestly on two occasion in 2012 and 2018, firstly for financial gain and secondly to his benefit by seeking to frustrate the legitimate regulatory process of the Council. His misconduct in 2018 was designed to avoid the consequences of his previous dishonest acts. He has shown disrespect for the County Court and the Council as his regulator. The Committee has found that the Registrant's misconduct was at the serious end of the spectrum of dishonesty and that his misconduct in 2018 also lacked integrity. The Committee also found that, whilst the Registrant had stated during the evidence, he gave at this stage of process that he 'accepted' the Committee's findings, the Committee noted that he did so 'regretfully', continued to attribute his misconduct to receiving bad advice and attributed blame to others. Further, the Registrant has failed to demonstrate any insight or remediation of his misconduct either prior to or during this hearing. The Committee at Sanction stage concluded that the Registrant's conduct was fundamentally incompatible with continued registration.

The Committee took into account that the Registrant has continued to practise without restriction until today. It further took into account that, if an immediate order is imposed, that it will continue to exist until any appeal, should it be made, is determined. It also considered Mr Weidner's submission that to impose an interim order would cause reputational damage more swiftly than would arise through the current determination.

As regards the issue of reputational damage, the Committee has been told that the current determination will be made public within 48 hours. It therefore does not accept that the imposition of an immediate order would cause such further reputational damage as to make its imposition disproportionate.

The Committee also considered that the nature of the Registrants dishonest misconduct and subsequent lack of integrity, particularly in the context of seeking to mislead the County Court and frustrate the Council's legitimate regulatory process was such that any informed member of the public or fellow member of the profession would consider that it would be wrong for the Registrant to continue to practise without an immediate order being put in place, even with the potential consequences should an appeal proceed. The Committee concluded that in the very particular circumstances of this case that it fell into the 'relatively rare' category where an immediate order was otherwise in the public interest and that the potential consequential effect on the Registrant did not make the imposition of such an order disproportionate.

If no appeal is made, then the immediate order will be replaced by the substantive order of erasure 28 days after the Registrant is sent the decision of this hearing in writing.

Chair of the Committee: Dr Pamela Ormerod

Signature ……. **Date: 06 March 2020**

Registrant: Mr Vikash Kumar

Signature ……. **Date: 06 March 2020**

NOTICE TO REGISTRANT:

- In accordance with Section 13C(3) of the Opticians Act 1989, the GOC may disclose to any person any information relating to your fitness to practise in the public interest.
- In accordance with Section 13B(1) of the Opticians Act 1989, the GOC may require any person, including your learning/workplace supervisor or professional colleague, to supply any information or document relevant to its statutory functions.

FURTHER INFORMATION

Transcript

A full transcript of the hearing will be made available for purchase in due course.

Appeal

Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).

Professional Standards Authority

This decision will be reported to the Professional Standards Authority (PSA) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. PSA may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been insufficient to protect the public and/or should not have been made, and if they consider that referral is desirable for the protection of the public. PSA is required to make its decision within 40 days of the hearing (or 40 days from the last day on which a registrant can appeal against the decision, if applicable) and will send written confirmation of a decision to refer to registrants on the first working day following a hearing. PSA will notify you promptly of a decision to refer. A letter will be sent by recorded delivery to your registered address (unless PSA has been notified by the GOC of a change of address).

Further information about the PSA can be obtained from its website at www.professionalstandards.org.uk or by telephone on 020 7389 8030.

Effect of orders for suspension or erasure

To practise or carry on business as an optometrist or dispensing optician, to take or use a description which implies registration or entitlement to undertake any activity which the law restricts to a registered person, may amount to a criminal offence once an entry in the register has been suspended or erased.

European Alert

The General Optical Council is required by Regulation 67 of the European Union (Recognition of Professional Qualifications) Regulations 2015 to inform all European competent authorities of any restrictions or prohibitions on a dispensing optician or an optometrist's practice. 'Competent authority' effectively means the relevant regulator for each EU member state.

The GOC is the competent authority for all opticians registered in the United Kingdom (UK).

If you have been made subject to either a suspension or conditions of practice order (whether interim or substantive), or to an erasure order, we hereby notify you of the following:

- Within 3 days of the Fitness to Practise Committee decision taking effect you will be the subject of an alert sent under article 56a(1) of the Directive;
- You have the right to appeal the decision to issue the alert or to apply for rectification of the decision; and
- You have the right to access remedies in respect of any damage caused by false alerts sent to other competent authorities.

The alert is sent securely via the Internal Market Information (IMI) system. The alert will include the following details:

- Your identity (full name and date of birth);
- Your profession;
- Your GOC registration number;
- The fact that the GOC is the national authority which adopted the decision on the restriction or prohibition of your professional activities;
- The scope of the restriction or prohibition;
- The period during which the restriction or the prohibition applies.

If you wish to appeal the decision to issue this alert then please see the information sheet below. Please note that this relates to your right of appeal against the issuing of the alert – see above regarding your right of appeal against a substantive decision.

A copy of the alert may be obtained via the contact details at the end of this document.

Please see the attached information sheet for further information.

Contact

If you require any further information, please contact the Council's Hearings Manager at 10 Old Bailey, London, EC4M 7NG or, by telephone, on 020 7580 3898.

European Alert – Information Sheet

Please see the below Frequently Asked Questions (FAQs) which have been developed to assist you with this process and explain your options.

1. Why has the General Optical Council (GOC) sent this alert?

With effect from 18 January 2016 the GOC is legally required to issue alerts concerning all registrants whose practice has been prohibited or restricted – this includes all determinations of suspension, conditions or erasure issued by a Fitness to Practice Committee (FTPC), whether interim or substantive, and any extensions ordered by the High Court.

This legal requirement is placed on us by article 56a of Directive 2005/36/EC on the recognition of professional qualifications ('the Directive'). This article was adopted into UK legislation via Regulation 67 of the European Union (Recognition of Professional Qualifications) Regulations 2015. All other Member States must also comply with the provisions of the Directive and participate in the alert mechanism.

2. What is the purpose of these alerts?

The purpose of these alerts is to ensure public protection across all Member States. The intention is that each member state will be notified of any restrictions or prohibitions placed on UK registrants so that they are able to check this against their own registers and applicants. We will also be notified of any restrictions or prohibitions handed down to European optical professionals. This will assist us with safeguarding the public and maintaining the integrity of our registers.

3. Why was I not consulted before the alert was sent?

The terms of the Regulations are very strict; the alert must be issued within three days of the panel's decision coming into effect. The notification must be issued at the same time the alert itself is sent.

4. Who will see the alert?

The alert is sent securely via the Internal Market Information (IMI) system to the competent authority in each Member State.

In the UK, statutorily regulated health and social care professionals have to be registered with, and show that they meet the standards of, the relevant regulatory body, in order to practise their profession. The regulators control access to regulated professions, professional and vocational titles and professional activities which require specific qualifications, and are subject to national law. The European Commission term these organisations the 'competent authorities' although the exact duties of the competent authorities vary across member states, they are effectively the regulator (in the same way the GOC is) for each member state.

A competent authority has been defined by the European Commission as: *any authority or body empowered by a Member State specifically to issue or receive training diplomas and other documents or information and to receive the application and take the decision, referred to in Directive 2005/36/EC.*

5. If there is a mistake in the alert can I apply for it to be corrected?

If you notice a mistake in the alert (such as a typing error or incorrect information) then please contact the GOC and we will consider your request to amend the alert. Please note the GOC is not able to remove an alert at your request, see next question for further information.

6. What if I disagree with the alert being sent?

If you disagree with the sending of an alert then you have the right of appeal to the County Court. If you merely consider there to be a mistake within the alert then please refer to the above question.

Please note that the GOC is required to send the alert under European Law. With this in mind, and if you still wish to appeal to the County Court, then you may find the following government website useful: https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/county-court/

If you attended the hearing and were given the FTPC decision document by hand then the period for submitting an appeal with the County Court is 28 days from the date you were handed the document. If the FTPC decision document has been sent to you by post, the appeal period is 30 days from the date the decision document was posted to you (there is an additional 2 days allowed to cover postage time).

7. Can the GOC assist me with my appeal against the issuing of an alert?

The GOC is unable to help you with your appeal – we strongly advise that you seek independent legal advice.

8. If I appeal an alert being sent, what effect will that have on the substantive decision made in relation to my registration?

There will be no effect on the decision made by the GOC affecting your registration. This would be an appeal against the issuing of the alert and not the substantive decision – they are two separate things and each have different appeal routes. If you require details on how to appeal the substantive decision (i.e. the erasure, conditions or suspension) then please refer to the separate guidance sheet enclosed with the decision letter regarding your substantive GOC case.

9. If I successfully appeal the issuing of an alert, what will happen to the alert itself?

While your appeal is ongoing the alert will remain on the IMI system but with a qualification to say that an appeal has been lodged.

On appeal the County Court may:

- Dismiss your appeal;
- Allow your appeal and direct the alert be withdrawn or amended accordingly.

If the County Court decide to allow the appeal then the GOC has a duty to delete the alert (or amend as appropriate) within three days of this decision.

10. What happens if the order made by the FTPC is revoked?

When an order is revoked by the FTPC (or the High Court) and that order was the subject of a European alert, we will close the alert within 3 days of the decision to revoke the order. When an alert is closed, all personal data is removed from the alert system.