Case No: CO/4576/04

Neutral Citation Number: [2005] EWHC 93 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 4 February 2005

Before :

THE HONOURABLE MR JUSTICE RICHARDS

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Between :

Council for the Regulation of Health Care Professionals	**Appellant**
- and -	
(1) Health Professions Council **(2) Peter R Jellett**	**Respondents**

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(Transcript of the Handed Down Judgment of
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Jason Coppel (instructed by **Bevan Brittan**) for the **Appellant**
Jenni Richards (instructed by **Bircham Dyson Bell**) for the **(1) Respondent**
Alan Maclean (instructed by **Chattertons**) for the **(2) Respondent**

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Judgment
As Approved by the Court

Mr Justice Richards :

1. The Council for Health Care Regulatory Professionals (known as the Council for Healthcare Regulatory Excellence, and referred to in this judgment as "the Council") appeals under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act") against a decision of the Conduct and Competence Committee ("the CCC") of the Health Professions Council ("the HPC") in the case of Mr Peter Jellett, who is a physiotherapist. The decision was to the effect that Mr Jellett should be restored unconditionally to the register of professionals maintained by the HPC pursuant to article 5 of the Health Professions Order 2001.

2. The Council's case is that the decision was wrong and should be quashed, and that the case should be remitted to the CCC to reconsider and dispose of Mr Jellett's application for restoration to the register (either by dismissing it or by imposing a conditions of practice order) in accordance with the directions of the court. The HPC and Mr Jellett resist the Council's case.

The appeal: statutory framework

3. The background to the 2002 Act and the functions of the Council are described in the judgment of the Court of Appeal in *Ruscillo v. (1) Council for the Regulation of Health Care Professionals and (2) General Medical Council* and *Council for the Regulation of Health Care Professionals v. (1) Nursing and Midwifery Council and (2) Truscott* [2004] EWCA Civ 1356 (*"Ruscillo/Truscott"*), at paragraphs 5-9.

4. Section 29 empowers the Council to refer certain disciplinary cases to the court. By subsection (1) the section applies to decisions to take disciplinary measures. By subsection (2) it also applies to certain decisions not to take disciplinary measures or to restore a person to the register: it is common ground that the decision under challenge in this case falls within subsection (2). Subsection (4) reads:

> "29.(4) If the Council considers that -
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> (a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or
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> (b) a relevant decision falling within subsection (2) should not have been made,
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> and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court."

5. In the present case the Council considered, under section 29(4)(b), that the decision should not have been made and that it would be desirable for the protection of members of the public to take action under the section. It therefore referred the case to the court. Section 29(7) provides that if the Council does so refer a case, the case is to be treated by the court as an appeal by the Council against the relevant decision (even though the Council was not a party to the proceedings resulting in the relevant decision).

6. By section 29(8), the court's powers on such an appeal are (a) to dismiss the appeal, (b) to allow the appeal and quash the relevant decision, (c) to substitute for the relevant decision any other decision which could have been made by the committee concerned, or (d) to remit the case to the committee concerned to dispose of the case in accordance with the directions of the court.

7. In *Ruscillo/Truscott* the Court of Appeal held that appeals to the High Court under section 29 are subject to the relevant procedural provisions of CPR Part 52. In particular, by CPR 52.11:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless:
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> (a) a practice direction makes different provision for a particular category of appeal; or
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> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing.
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> (2) Unless it orders otherwise, the appeal court will not receive:
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> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was:
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

8. The Court of Appeal held that the powers of the High Court on appeal, as set out in section 29(7) of the 2002 Act, are in no way incompatible with CPR 52.11. The two have to be read together.

9. At paragraph 68 of the judgment in *Ruscillo/Truscott* the Court of Appeal stated that, although section 29(4)(b) says nothing about undue leniency, "it seems to us implicit that the Council will not refer a case to the High Court unless it considers that the failure of the disciplinary tribunal to impose any penalty is unduly lenient to the practitioner". In my judgment, and contrary to a submission made by Mr Coppel for the Council, the same implicit point about undue leniency also applies in relation to a decision to restore a practitioner to the register. I see no sensible reason why the underlying policy should be different in relation to this one category of decision. Nor do I see any difficulty in principle in examining such a decision by reference to the concept of undue leniency, either on the basis that it is unduly lenient to restore the practitioner to the register at all or on the basis that the terms on which the restoration is ordered are unduly lenient.

10. The court in *Ruscillo/Truscott* went on to deal with the general approach of the High Court to a reference (paragraphs 69-78). Although the passage relates in terms to decisions on the imposition of a penalty, in my view the general tenor of the guidance can and should be applied, with the necessary modifications, to a decision to restore a practitioner to the register:

> "69. We have concluded that the concerns of the Council which can entitle it to refer a case to the High Court are (i) that the decision in relation to the imposition of a penalty is unduly lenient and (ii) that it is desirable in the interests of the public to take action under the section. Where a reference is made, what is the task of the Court when considering the reference? The Act does not deal with this, save for the important provision that the reference is to be treated as an appeal by the Council *against the relevant decision.* Thus the Court is concerned with the decision as to the penalty.
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> 70. If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate ....
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> 71. If the Court decides that the decision as to penalty was 'wrong', it must allow the appeal and quash the relevant decision, in accordance with CPR 52.11(3)(a) and section 29(8)(b) of the Act. It can then substitute its own decision under section 29(8)(c) or remit the case under section 29(8)(d).
>
> 72. It may be that the Court will find that there has been a serious procedural or other irregularity in the proceedings before the disciplinary tribunal. In those circumstances it may be unable to decide whether the decision as to penalty was appropriate or not. In such circumstances the Court can allow the appeal and remit the case to the disciplinary tribunal with directions as to how to proceed, pursuant to CPR 52.11(3)(b) and section 29(8)(d) of the Act.

73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed the task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.

...

76. ... We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.

77. ... In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public.

78. The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will have to be reassessed."

The Health Professions Council: statutory scheme

11. The HPC and its committees are governed by Part II of the Health Professions Order 2001, made under the Health Act 1999. Article 3 of the 2001 Order establishes the HPC and provides in paragraph (4) that its main objective in exercising its functions shall be "to safeguard the health and well-being of persons using or needing the services of registrants". Extensive provision is made for the establishment and maintenance of a register of members of the relevant professions.

12. Article 27 lays down the functions of the Conduct and Competence Committee (the CCC, as defined above). They include consideration of any application for restoration referred to the CCC by the Registrar. By article 33, a person who has been struck off the register and who wishes to be restored to the register must apply to the Registrar, who must refer the application to the relevant committee (in this case the CCC) for determination. The central provision governing the committee's consideration of the application is contained in article 33(5):

> "(5) The Committee shall not grant an application for restoration unless it is satisfied, on such evidence as it may require, that the applicant not only satisfies the requirements of article 9(2)(a) and (b) [i.e. that he holds an approved qualification award and is capable of safe and effective practice] but, having regard in particular to the circumstances which led to the making of the order under 29, 30 or 38 [striking off etc.], is also a fit and proper person to practise the relevant profession."

13. The committee may make the granting of the application subject to additional requirements and, by article 33(7)(b), may in particular make a "conditions of practice order" with respect to the applicant. By article 33(8), the relevant provisions of articles 29 and 30 have effect in relation to such a conditions of practice order. Article 29(5) defines a conditions of practice order as "an order imposing conditions with which the person concerned must comply for a specified period which shall not exceed three years". Article 30(1) provides that, before the expiry of such an order, the committee must review the order and may *inter alia* extend, or further extend, the period for which the order has effect. By article 30(5), an order may not be extended by more than three years at a time.

14. Although Mr Jellett had been removed from the register before the 2001 Order came into force, the provisions referred to above concerning restoration to the register were applicable by virtue of transitional provisions.

15. The reason why Mr Jellett applied for restoration to the register, and why the application was so important to him, was that, again by virtue of the 2001 Order, from 9 July 2005 he would not be able to style himself as a physiotherapist or physical therapist of any kind unless he were restored.

The proceedings before the CCC

16. Mr Jellett's application for restoration to the register came before the CCC on 26 August 2004. The case was opened by the HPC's solicitor, who dealt with the regulatory framework and then outlined the circumstances that had led to Mr Jellett's removal from the register in 1996. After that, the committee received evidence from Mr Jellett in the form of a statutory declaration and accompanying documents, setting out the history since his removal from the register. Various matters were amplified orally by Mr Jellett in evidence in chief and in answer to questions from the committee. The HPC's solicitor did not cross-examine him, stating that it was for Mr Jellett to satisfy the committee that he was a fit and proper person. For the same reason, the HPC's solicitor did not make any substantial closing submissions, though he did deal later with certain matters arising from closing submissions on behalf of Mr Jellett. After hearing closing submissions from Mr Jellett's solicitor and submissions and legal advice on the procedural matters, the committee retired, before returning to announce its decision.

17. The evidence before the CCC was to the following effect, starting with the circumstances that led to his original removal from the register.

18. In June 1996 Mr Jellett was convicted of three offences of indecent assault upon female patients in the course of his practice as a physiotherapist. The circumstances were that a patient complained that when she had been treated by Mr Jellett in respect of low back pain at a private hospital in May 1995, he had removed her bra and had given her a full massage from her pubic features up to her neck, including her breasts, and had at one stage for a short period put his hands inside her pants. Following the complaint, Mr Jellett was interviewed by the police and denied any question of indecency. But the matter got into the press and as a result of that coverage another lady, Miss B, came forward and said that a similar thing had happened to her when she visited Mr Jellett at his private practice in April 1995. Mr Jellett was again interviewed by the police. He said that he could not remember anything that had happened with Miss B. He then sent a questionnaire to a number of his patients asking them to confirm that he had not indecently assaulted them. One of the recipients of the questionnaire, Miss C, contacted the police and said that she had been indecently assaulted by Mr Jellett in March 1992, when she had been to see him for a neck injury and he had massaged her breasts. Mr Jellett was interviewed once more by the police but said that he could not remember anything about that patient. He was charged with the three offences of indecent assault, contested the case but was convicted and sentenced to 9 months' imprisonment.

19. In November 1996 the predecessor body to the HPC, namely the Council for Professions Supplementary to Medicine, decided in disciplinary proceedings that Mr Jellett's name should be removed from the register. At the time this meant that he became ineligible for NHS or local authority employment but was entitled to continue in private practice as a physiotherapist.

20. At about the same time the Chartered Society of Physiotherapy ("the CSP") removed him from membership, which meant that he could no longer style himself as a "chartered physiotherapist" but only as a "physiotherapist".

21. Mr Jellett gave evidence that on his release from prison in November 1996 he initially found work as a builder's labourer. Unexpectedly, however, he found that a number of former patients requested his services as a physiotherapist. He was advised that he could still provide physiotherapy services provided that he made it clear that he had no professional status. He also found that local doctors were prepared to send patients to him. As a result of these matters, he was able to resurrect his practice. All of this happened in knowledge of his conviction and his non-professional status. He lived in Louth, a small market town, and his conviction had received extensive local publicity.

22. In 1999 the CSP's Professional Conduct Committee heard and granted an application by Mr Jellett for restoration of his CSP membership. The decision was recorded in a letter dated 6 May 1999 in these terms:

> "We are minded to restore your name to the membership register of the Chartered Society of Physiotherapy, subject to the undertakings you have given, the form of which we outline as follows.
>
> We consider membership of the Chartered Society of Physiotherapy is a privilege, which carries with it the responsibilities of awareness of, and adherence to, the Rules of Professional Conduct and standards of good practice.
>
> Inherent in our standards is respect in the trust put in us by our patients and this trust is not to be abused.
>
> The decision to restore your name to the CSP Register is based on the particular facts of your case and the undertakings you have given as follows:
>
> 1. That you undertake only to see and/or treat female patients in the presence of a chaperone.
>
> 2. That your practice will be regularly monitored for a period of 3 years by an independent member of the Society, nominated by the Chair of the Professional Conduct Committee.
>
> You will be informed of the name of the independent member of the Society who will monitor your practice.
>
> In fulfilling your undertaking to the PCC, I require the following from you:
>
> (A) A clear statement of the **permanent** arrangements you will have in your practice to ensure that you only see

and/or treat female patients in the presence of a chaperone.

This must include the identity of the person or persons providing the chaperone service and whether or not the person is working for you. The chaperone must be female (unless it is the choice of the patient to have a husband or partner present). It will not be enough for you to rely on casual arrangements.

You must keep the Society informed of any change in the identity of the persons providing the permanent chaperone arrangements. There must not be any examples of where you see and/or treat female patients without a chaperone present ...." (original emphasis)

23. Mr Jellett was required by the CSP to sign a declaration giving a binding commitment to the undertakings listed in the letter and acknowledging that failure to adhere to them would be deemed a serious breach of the CSP's professional disciplinary rules.

24. On 12 July 2002 the CSP informed Mr Jellett that he had been reinstated as a member in good standing:

"On 19th June 2002, the CSP Council meeting considered my recommendation that you should be re-instated to the Register as a Member in good standing following your compliance with the conditions set down by the Professional Conduct Committee of 28 April 1998.

The Council approved my recommendation and you are now a Member in Good Standing with the Society. May I remind you of your responsibility as a Member to abide by the Rules of Professional Conduct .... You are also reminded that Members of the Society should at all times behave in a way not to bring the profession into disrepute.

I would also remind you that you gave a permanent binding undertaking to the CSP Professional Conduct Committee three years ago that you would have a permanent chaperoning arrangement in your practice for any female patients. **I expect to receive a letter of confirmation from you** that these arrangements are currently in place and will remain place for good in the future. The Society may choose, at unspecified dates in the future, to inspect that the undertaking on chaperoning you gave to the PCC remains in place for the protection of the public. Your continued registration with the Chartered Society of Physiotherapy may be at risk if you fail to adhere to your undertakings." (original emphasis)

25. Mr Jellett's evidence to the CCC was that, from the time he started seeing patients again, he ensured that a chaperone was present for female patients, though these arrangements became more formal later, in compliance with his undertaking to the CSP. He said that most of his female patients provided their own chaperone, but where that was not possible he ensured that his wife (who is a state registered nurse) or his mother were present. He explained that he had a typed notice in the hallway and in each treatment room regarding the need for a chaperone.

26. In support of his application to be restored to the HPC's register, Mr Jellett submitted a report dated 15 August 2003 from Mrs Jenny Archer MCSP SRP, an independent chartered and state registered physiotherapist, concerning a survey of Mr Jellett's patients which she had carried out at the request of his solicitor. Mrs Archer had acted as an expert witness for the defence at Mr Jellett's trial. She had also carried out a survey at the time of his application for restoration to membership of the CSP. On the present occasion the survey involved sending a letter and questionnaire to a random sample of 20 patients, equally split between men and women, chosen by her from Mr Jellett's list of patients. She had received 17 replies. In her opinion the replies demonstrated that Mr Jellett's patients had considerable confidence in his treatment and the arrangements he made for the treatment of patients. She drew particular attention to the chaperoning arrangements (in that the replies supported the view that Mr Jellett had been complying with the requirements imposed by the CSP).

27. In addition to Mrs Archer's report, Mr Jellett provided the CCC with the letters of support he had used for the purposes of his application for restoration to membership of the CSP, together with a number of more recent references.

28. Mr Jellett was also asked questions by the CCC about his continuing professional training.

29. In closing submissions, Mr Jellett's solicitor placed weight on the decisions taken in respect of Mr Jellett by the CSP and the fact that Mr Jellett had been conducting a practice as a chartered physiotherapist for some time. It was submitted that the chaperoning system had been shown to work. Mr Jellett was described as "rehabilitated". It was made clear that Mr Jellett was willing to give a permanent undertaking in the same terms as he had given to the CSP, and also to have a conditions of practice imposed. There was some discussion as to the status of any such undertaking, for which no provision is made in the 2001 Order. There was also considerable discussion as to how a conditions of practice order could be implemented: the HPC's solicitor expressed concern about how compliance could be verified.

30. After a short retirement, the CCC's decision was announced by the chairman in these terms:

"The Committee has given great consideration to the application of Mr Jellett to have his name restored to the register.

The convictions of Mr Jellett in 1996 were of a very serious nature, which have been taken into account by the Committee today.

During the past six years Mr Jellett has continued to work in his profession and, according to his references, has enjoyed support from former colleagues and other health professionals who are aware of his convictions.

Mr Jellett had also been removed from membership of the Chartered Society of Physiotherapists. However, in July 1999 he was restored as a member of the CSP with a condition that he agreed not to treat female patients without the presence of a chaperone. Having fulfilled these conditions, Mr Jellett was restored to a member of good standing in 2002.

The Chartered Society of Physiotherapists at that time wished that Mr Jellett continue with the chaperone process and also stated that they may choose unspecified dates to inspect his practice to ensure that the undertakings and chaperoning were in place.

The Committee also reviewed the continued professional development undertaken by Mr Jellett during the past five years and consider this to be satisfactory.

Having satisfied ourselves as to the professional competence of Mr Jellett, the Committee then considered the question as to whether Mr Jellett is a fit and proper person to practise as a physiotherapist.

The Committee took the view that it is possible for individuals to rehabilitate themselves and noted the measures already in place to ensure the safety of the public. We took into account the findings and decisions of the Chartered Society of Physiotherapists and therefore the Committee were reassured that this was adequate protection for the public provided that the recommendations of the Chartered Society of Physiotherapists remain in place as outlined in the letter of 12th July 2002 from the CSP.

We therefore direct the Registrar to register the applicant in the relevant part of the register, subject to the satisfactory completion of the appropriate forms and payment of the prescribed fee."

Fresh evidence before the court

31. Mr Jellett seeks to adduce before this court certain evidence that was not before the CCC. A witness statement from him deals with his chaperoning arrangements, his undertakings to the CSP (including the monitoring of those undertakings by the CSP) and his continued willingness to submit to a conditions of practice order on certain terms. A witness statement from his solicitor, Mr Cordingley, provides further information concerning Mrs Archer's report. Much of the further evidence is submitted in response to criticisms made by the Council about the evidence on which the CCC relied in reaching its decision.

32. Mr Coppel, for the Council, objects to the admission of parts of the evidence, on the ground that Mr Jellett could and should have placed that evidence before the CCC. He submits that the principles laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 apply in this situation and that the criteria for the admission of fresh evidence on appeal have not been met.

33. In paragraphs 79-83 of *Ruscillo/Truscott* the Court of Appeal considered issues of procedural shortcomings and fresh evidence. In paragraph 81 it referred to the situation where the Council is led to believe that a case has been "under prosecuted" or the relevant evidence has not been put before the tribunal, with the consequence that the tribunal's decision is flawed. The court indicated that careful consideration was needed before material that was not before the tribunal was placed in the public domain, since arrangements may have been made for the protection of complainants. But it went on:

> "82. At the same time there will be cases where it is in the public interest that additional evidence should be placed before the court on a reference under section 29. This may be necessary to ensure that a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk.
>
> 83. Where an application is made to the Court to adduce additional evidence pursuant to CPR 52.11(2) the Court should not apply the principle in *Ladd v. Marshall* [1954] 1 WLR 1489. The principles in that case have no application to a reference under section 29. The fact that the evidence could have been, but was not, placed before the disciplinary tribunal can have no bearing on whether it should be admitted by the Court. The Court will, however, be concerned, just as the Council should be, to be sure that the introduction of such evidence is truly in the public interest."

34. Mr Coppel submits that what was said in paragraph 83 of *Ruscillo/Truscott* was intended to apply only to the admission of fresh evidence in support of an appeal by the Council. The test in that context has to be one of public interest, rather than the

Ladd v. Marshall principles, because the legislative policy is the protection of the public and the Council is therefore empowered to refer a decision to the court where, for example, there has been under prosecution or a failure to deploy relevant evidence. The position is wholly different where a practitioner seeks to put in fresh evidence on an appeal. The *Ladd v. Marshall* principles should apply in that situation, because it is important to uphold the role of the disciplinary tribunal as the primary decision-maker; evidence put before the disciplinary tribunal can be investigated and challenged, whereas evidence adduced for the first time before the court cannot be tested in the same way; and, to the extent that it can be tested, it is wholly inappropriate that the task of testing it should fall to the Council.

35. I reject the submission that the test for the admission of fresh evidence on appeal differs according to whether it is the Council or the practitioner who seeks to adduce that evidence. What the Court of Appeal said in *Ruscillo/Truscott* was expressed in entirely general terms - that the principles in *Ladd v. Marshall* "have no application to a reference under section 29" - and I decline to read into it the heavy qualification that Mr Coppel's submission would place upon it. It seems to me that the correct approach should depend on the nature of the case rather than the identity of the party. An approach that has particular regard to the public interest is as workable in relation to applications by a practitioner to adduce fresh evidence as it is in relation to applications by the Council. Where a practitioner is simply seeking to bolster the case advanced before the disciplinary tribunal, the public interest is likely to tell against allowing the application. But there will be cases where it can properly be regarded as being in the public interest to admit further evidence on the appeal.

36. In the present case there are particular circumstances that make it in the public interest that the further evidence be admitted. I read it *de bene esse* at the outset of the case and considered, in the course of the appeal hearing, how it impacted on the submissions made. It seems to me that, if it were left out of account, there is a real risk that an injustice would be done to Mr Jellett. The CCC is criticised in part for acting without evidence or without adequate investigation of the evidence; but Mr Jellett provided all the information that was asked of him and the fresh evidence indicates that the factual picture presented by him was indeed correct.

37. Since I propose to take account of the fresh evidence when considering the issues, it will be convenient for me to summarise that evidence here.

38. In his witness statement Mr Jellett gives further details of the arrangements in place to ensure that no female patient is treated without the presence of a chaperone. He also exhibits the patient consent forms in use at the material time and as amended following receipt of the notice of appeal. He explains that the arrangements in place are exactly in accordance with the undertaking given to the CSP. He refers to the CSP's appointment of Mr Ian Rutherford MCSP, Head of Physiotherapy Education at the University of Nottingham, as his mentor in August 2000. He describes three meetings held with Mr Rutherford at Mr Jellett's surgery in August 2000, January 2001 and July 2001, as well as a number of telephone conversations with Mr Rutherford. He also refers to the CSP's appointment of Ms Rosemary Woodley

MCSP (the Chair of the CSP committee which ordered his restoration) and Mrs Penny Robinson MCSP (the CSP's director of professional affairs) as his monitors, again in August 2000. He describes two visits made by them to his surgery in January and November 2001, which they chose to make by prior appointment. At these meetings Mr Jellett's chaperoning arrangements were discussed and his patient records were examined. As a result of the discussions, Mr Jellett also carried out a patient audit and a survey of patients in the course of 2001, to the satisfaction of the CSP. Mr Jellett states that there has been no suggestion by his CSP mentor or monitors that his patient chaperoning arrangements were other than satisfactory, and no suggestion that they were in breach of his undertaking.

39. A further matter covered in Mr Jellett's witness statement is his continued willingness to submit to a conditions of practice order and to offer a permanent undertaking. He comments on the appropriateness or otherwise of various conditions that have been suggested by the Council.

40. The witness statement of the solicitor, Mr Cordingley, exhibits his letter of instruction to Mrs Archer and a letter from Mrs Archer describing how the patients to be surveyed were selected at random by her from Mr Jellett's appointments diary, albeit that the letters were sent to the patients by Mr Jellett himself in order to preserve patient confidentiality. Mr Cordingley also exhibits some additional character references which had been before the CCC but had apparently not been included in the bundle of documents subsequently given to the Council.

The case for the Council

41. Early in his submissions Mr Coppel made certain criticisms about an alleged lack of co-operation on the part of the HPC, including the fact that the decision was not sent to the Council and that there was a delay in providing the Council with the documentation that was before the CCC - a delay that meant that the notice of appeal had to be settled without the benefit of that documentation. Miss Richards, for the HPC, submitted that this appeal was not the appropriate forum for such criticisms but that they were in any event unfounded and that agreed procedures had quickly been put in place between the HPC and the Council. I need say very little about this issue since, in the event, the court has before it everything it needs for the resolution of the appeal. But it is worth stressing that the duty of bodies such as the HPC to co-operate with the Council is clearly stated in section 27(1) of the 2002 Act and is reflected in paragraph 81 of the Court of Appeal's judgment in *Ruscillo/Truscott*. Article 3(5)(b)(iii) of the 2001 Order also places a specific duty on the HPC to "co-operate wherever reasonably practicable with ... persons who are responsible for regulating or co-ordinating the regulation of other health ... care professions". It is important for the effectiveness of the statutory scheme that regulatory bodies such as the HPC comply with that duty.

42. Mr Coppel also made a number of adverse comments about the way in which the case on behalf of the HPC was conducted before the CCC. He submitted that the HPC's

failure to explore or challenge Mr Jellett's evidence, and the stance it took about the unworkability of a conditions of practice order (a matter on which, it is suggested, the HPC has subsequently adopted a different position), were unhelpful to the CCC. I agree that it would have been better, and might have avoided the problems that have arisen, if the HPC had given the CCC more positive assistance in this case. But that is very much an observation about the particular case. The appropriate stance for a regulatory body to take before its disciplinary tribunal is a matter of judgment and must depend on the particular circumstances of the case.

43. Turning to the CCC's decision itself, Mr Coppel submits that it was wrong in the light of the need for protection of the members of the public, the need for general deterrence, and the need for public trust in practitioners and to maintain public confidence in the system of regulation. Three particular aspects of the decision come in for particular criticism: (1) what the CCC said about rehabilitation, (2) the CCC's reliance on the CSP, and (3) the CCC's rejection of a conditions of practice order.

44. As to (1), Mr Coppel submits that the CCC relied heavily on its opinion that "it is possible for an individual to rehabilitate himself". It did not find in terms that he had rehabilitated himself; but if it made an implicit finding that he had done so, that finding could not be sustained on the evidence. Moreover the CCC failed to play a sufficiently proactive role in ensuring that the case before it was properly presented and that the relevant evidence was produced for its consideration. The following features of the evidence are said to be significant in relation to the question of rehabilitation: (i) Mr Jellett had been convicted only eight years previously of extremely serious offences going to the very essence of the relationship between practitioner and patient. (ii) He continued to deny his guilt and so displayed a total lack of insight into his wrongdoing. (iii) Various criticisms are made of Mr Jellett's chaperoning arrangements, which are described as "ad hoc, casual arrangements involving his wife and mother or anyone the patient wished to bring along"; and it is not accepted that his wife and mother are suitable chaperones, since neither are sufficiently independent of him to safeguard public confidence in the profession. Points made about lack of evidence of compliance with his undertakings to the CSP are considered below. It should, however, be noted that the concerns originally expressed about the chaperoning arrangements have had to be toned down in the light of the fresh evidence from Mr Jellett. (iv) It was originally suggested that the CCC had not been provided with up to date character evidence, but this point falls away in the light of the fresh evidence. (v) Criticisms are made of Mrs Archer's survey of patients. Here, too, the concerns have had to be toned down in the light of the fresh evidence. But it is still asserted that the CCC should have shown greater caution about the survey, since it was commissioned on behalf of Mr Jellett from a practitioner who was sympathetic to him: it should have been commissioned by the regulatory body itself. In any event it was based on a very small sample and is not sufficient evidence of rehabilitation.

45. As to (2), Mr Coppel submits that the CCC relied very heavily on the CSP, describing the CSP's findings and decisions as "adequate protection for the public". Again the CCC should have played a more proactive role and should not have relied as it did on the CSP. In particular: (i) Mr Coppel submits that the CSP's primary function is to

protect the interests of its members (it had assisted Mr Jellett's defence at his criminal trial) and it cannot be regarded as a suitably disinterested regulator of the profession to which the CCC could delegate its functions. (ii) Membership of the CSP only determines whether a physiotherapist can style himself "chartered", so any sanctions imposed by the CSP on Mr Jellett for breach of his undertaking could only affect that subsidiary aspect of his practice; whereas the consequences of breach of a conditions of practice order made by the CCC would be much more serious. (iii) The CCC heard no evidence in relation to the decision-making process of the CSP and the extent of investigations made by the CSP. (iv) It was originally suggested that there was no evidence that the CSP had taken steps to monitor compliance by Mr Jellett with his undertaking concerning chaperoning arrangements, and that the CSP had failed to take action against him for non-compliance. Again, this had to be toned down in the light of the fresh evidence. What is now said is that it took a long time before the CSP appointed a mentor and monitors; there were only three meetings with the mentor over a twelve-month period; and there were only two visits by the monitors, both pre-arranged. Yet this is what the CSP regarded as amounting to monitoring and mentoring of Mr Jellett's practice for a period of three years from April 1999. On one view this was not satisfactory evidence of an enthusiasm or capacity to enforce the undertakings. There is no explanation of why this evidence was not placed before the CCC; but had that been done, the evidence might not have reassured the CCC. (v) The CCC regarded it as important that "the recommendations of [the CSP] remain in place as outlined in the letter of 12th July 2002", yet did not establish any mechanism for ensuring that they remained in place and were policed and enforced. (vi) In short, the CCC attached excessive weight to Mr Jellett's undertakings to the CSP.

46. As to (3), Mr Coppel submits that there was ample evidence on which the CCC could have refused altogether to restore Mr Jellett to the register, but that at the very least the CCC was wrong to restore him without making a conditions of practice order. Mr Jellett himself accepted that a conditions of practice order was appropriate. Yet the HPC sought, erroneously, to convince the CCC that such an order should not be made because it could not easily be policed and enforced. It is submitted that this amounted to a procedural irregularity. Moreover the CCC could not rationally have accepted the HPC's argument whilst at the same time relying on the continued existence of analogous undertakings to the CSP which equally required to be policed and enforced.

47. As a further instance of procedural irregularity, Mr Coppel suggests that the CCC may also have been misled by the advice of the legal assessor that a conditions of practice order could only be made for a maximum of three years; advice which is said to have been misleading because it did not allow for the possibility of a further order being made before the expiry of the three year period.

48. Mr Coppel submits that there was a range of conditions that the CCC should have considered imposing in order to protect the public and safeguard public confidence in the profession. Any conditions would have to be appropriate, workable and measurable. Such conditions could have included conditions that Mr Jellett undergo psychosexual counselling, that he be supervised in his practice, that he work in a group practice and/or acquire a mentor, and that he treat female patients only in the presence of a chaperone. I do not understand Mr Coppel seriously to pursue a

suggested condition that Mr Jellett should not treat female patients at all. As to chaperoning, it is submitted that there should be a formal and permanent chaperoning arrangement, involving a registered health practitioner (for example, a nurse): it is not appropriate for Mr Jellett's wife or mother to act as chaperone.

49. In the light of the considerations summarised above, the Council's case is that the CCC's decision was wrong and should be quashed. Mr Jellett's application for restoration to the register should be remitted to the CCC for reconsideration and disposal in accordance with the directions of the court, whether by dismissal of the application or by imposition of a conditions of practice order.

The case for the HPC

50. Miss Richards took me through the evidence before the CCC with a view to showing that the CCC had ample evidence on which to base the decision it reached. She submits that the CSP is a chartered society of considerable reputation and standing, which has had its own "fitness to practise" system for many years; and that the CCC was entitled to place weight on the decisions taken by the CSP and the basis of those decisions. In relation to Mrs Archer's survey, she points to the fact that there were 17 out of 20 responses (including 10 out of 10 of the women surveyed) and that they were all favourable to Mr Jellett. There were also character references from a wide range of people, both from 1998 (which he had used in support of his application to the CSP) and more recently. From the transcript of the hearing, it is clear that the CCC was fully aware of the offences of which Mr Jellett was convicted. Further information about chaperoning and other relevant matters was given by Mr Jellett in his evidence. The fact that Mr Jellett was willing to give a permanent undertaking and to have a conditions of practice order imposed was something that the CCC was entitled to take into account in his favour. There was, it is submitted, no inaccuracy in the legal advice.

51. In relation to the Council's criticisms of the CCC's approach to the question of rehabilitation, Miss Richards submits: (i) It is true that Mr Jellett had been convicted of serious offences, but the CCC also had evidence of the resumption of his practice as a physiotherapist, at the request of former patients who knew of his conviction, and without any further complaints. (ii) A denial of guilt does not preclude rehabilitation or restoration to the register. There are other ways of minimising risk, such as avoidance of the situation in which further offending can take place. That was achieved by the permanent chaperoning arrangements instituted by Mr Jellett. The CCC had the benefit of hearing from him and evaluating his commitment to the arrangements. (iii) The CSP's letters in 1999 and 2002 made clear that it was satisfied that Mr Jellett was complying with the chaperoning arrangements, and that is confirmed by the fresh evidence. (iv) It is clear that the CCC had up to date character references, from professionals and patients, in support of Mr Jellett. (v) All the criticisms of Mrs Archer's survey are bad. The fact that Mrs Archer had given expert evidence for the defence at Mr Jellett's trial did not affect her independence. The CCC was entitled to rely upon her report. The survey confirmed that the chaperoning arrangements were working well.

52. In relation to the criticisms of the CCC's approach towards the CSP, Miss Richards submits that the CSP is a highly reputable body and that it was plainly reasonable to place reliance on its view that Mr Jellett had complied with his undertaking, and on the fact that the undertaking was permanent and that there was a continuing liability to inspections.

53. As to a conditions of practice order, Miss Richards submits that at no stage did the HPC suggest that such an order *could not* be made. It continues to acknowledge that such an order *could* be made, though the workability of the order would depend upon the particular conditions imposed. But the CCC's decision to restore Mr Jellett to the register without imposing a conditions of practice order was reasonably open to it. The decision was not manifestly inappropriate or wrong, nor was it vitiated by any serious procedural irregularity.

The case for Mr Jellett

54. Mr Maclean put in detailed written submissions on behalf of Mr Jellett but sensibly limited himself in his oral submissions to adopting Miss Richards's submissions and adding just a few points of his own. Amongst other matters, he pointed to further details in the evidence concerning the chaperoning arrangements, in support of a submission that those arrangements cannot be dismissed as ad hoc or casual. As a further reason why the CCC was entitled to place weight on the chaperoning arrangements, Mr Maclean observed that those arrangements were in place to protect Mr Jellett himself as well as his patients.

55. Mr Maclean relies on the passage in Mr Jellett's witness statement which comments on the conditions which the Council now suggests should have been considered by the CCC (some of which it would be impossible to comply with). He makes clear that Mr Jellett was and is entirely content to abide by conditions of registration, applicable in the first instance for three years, that (a) he does not see or treat female patients without the presence of a chaperone, (b) unless the chaperone is the husband or partner of the patient, the chaperone shall be female, (c) all female patients shall provide written consent to the presence of a named chaperone prior to being seen or treated by Mr Jellett, and (d) the chaperone will also sign confirmation of having been present throughout Mr Jellett's treatment of a female patient. It is submitted that those are reasonable conditions and that, if the court concludes that the CCC was wrong not to impose a conditions of practice order, the court itself should substitute an order imposing those conditions. Alternatively, it should remit the matter to the CCC, but on a basis that makes clear that Mr Jellett is to be restored to the register and that the only issue for the CCC is whether and on what terms to impose a conditions of practice order.

56. A further respect in which Mr Maclean elaborated on Miss Richards's submissions was in relation to the question of deterrence. He submitted that deterrence has no significant role at the stage of a decision whether to restore to the register. The time for deterrence is at the penalty stage, i.e. when the decision is taken whether to strike

off the register. At the stage of an application to restore, the question for the CCC is whether it is satisfied that the conditions specified in article 33(5) of the 2001 Order are met, in particular that the applicant is a fit and proper person to practise the relevant profession. The real question is whether the CCC's conclusion that Mr Jellett is a fit and proper person has been shown to be wrong.

Concerns expressed by the CSP

57. After the hearing and before I had written my judgment in the case, solicitors for the CSP wrote to the court to raise points of concern about various matters in Mr Coppel's skeleton argument for the Council, which had only recently been drawn to the CSP's attention. The CSP had learnt of the proceedings too late to apply to join them as an interested party. The concerns expressed in the letter related in part to adverse comments by the Council on the role of the CSP as an independent regulator of the profession, and in part to factual matters which have largely now been dealt with by the fresh evidence before the court.

58. Mr Coppel objected to my taking the CSP's letter into consideration, both on the basis that it seeks to adduce new evidence and on the basis that CSP is not a party to the proceedings. Mr Maclean submitted that the letter should be taken into consideration. I have concluded that I ought not to take it into consideration, for the reasons given by Mr Coppel. But because I am concerned in this case with matters of public interest, I reached that conclusion only after reading the letter and satisfying myself that its contents would not materially affect the outcome of the case. Had I taken a different view I would have considered whether to re-open the case and invite the CSP to apply to be joined as an interested party and to regularise the basis upon which its concerns could be placed before the court.

Conclusions

59. In my judgment the concerns expressed by the Council in relation to the CCC's decision are substantially overstated. It is true that the evidence before the CCC was somewhat thin, in part because of a failure on the part of the HPC to explore that evidence and bring out some of the detail underlying it. The fresh evidence before this court indicates, however, that such exploration of the evidence would have led to confirmation and amplification rather than to a materially different general picture from that already before the CCC.

60. The CCC's statement that "it is possible for individuals to rehabilitate themselves" must be read together with the rest of the sentence, namely that the CCC "noted the measures in place to ensure the safety of the public". This was not, and did not need to be, an informed psychological assessment. It was a practical assessment that to allow Mr Jellett to practise would not place patients at risk. The CCC took express account of the very serious nature of the offences for which he had been convicted in 1996. It was aware that he continued to deny the offences and that this was therefore not a case of a man who accepted past wrongdoing and displayed an insight into it.

Nonetheless it had a substantial body of evidence to support the view that there would be no repetition of the previous offending. Mr Jellett had resumed practice as a physiotherapist and had been practising for several years without any problem. Nor was this just a matter of absence of complaint. He was supported by very favourable references from a wide range of people. At the heart of the matter, however, lay the chaperoning arrangements, since the presence of an appropriate chaperone was the key to securing continued protection of the public. The question that requires closest attention, in my view, is whether the CCC dealt adequately with that issue.

61. The CCC clearly attached considerable weight to the undertaking given to the CSP with regard to chaperoning arrangements, and to the CSP's finding that he had complied with that undertaking. I see no objection in principle to the CCC placing weight on an assessment of that kind made by a professional body, and indeed on the fact that the practitioner concerned had shown his commitment by giving an undertaking to that body and co-operating with it over a substantial period. On the material before the court I have no reason to doubt the CSP's good standing as a regulator, even if it also provides assistance and advice to members. Moreover this is something that the CCC, as a specialist committee, was well placed to judge. It would have been better if, before deciding how much weight to place on the CSP's assessment, the CCC had had evidence of the operation in practice of the CSP's mentoring and monitoring measures. But the further evidence placed before this court shows that the CSP did have a substantial basis for making the decision it did to reinstate Mr Jellett as a member in good standing; and I reject the view put forward by Mr Coppel that it does not amount to satisfactory evidence of an enthusiasm or capacity to enforce the undertakings.

62. That Mr Jellett had been complying with his undertaking with regard to chaperoning arrangements was also supported by Mrs Archer's report. I reject Mr Coppel's criticisms of the survey carried out by Mrs Archer. There is no reason to doubt her credentials as an independent expert even though she had given expert evidence for the defence at Mr Jellett's trial. It is true that a relatively small number of patients were sampled, but the evidence supports the view that they were a random sample. The replies received tended to confirm the existence of an established chaperoning system and its proper operation in practice, as well as voicing more general support for Mr Jellett. I should add that in my view it was acceptable to rely on an independent report commissioned by Mr Jellett and was not necessary for the HPC or the CCC to commission an independent report of its own.

63. As to Mr Coppel's criticism of the fact that Mr Jellett's wife and, occasionally, his mother act as chaperones, I am not persuaded that there is any hard and fast rule that makes it wrong for a practitioner's relative to act as a chaperone. It may not be appropriate as the primary form of chaperoning; but as a fall-back, if a patient cannot find a chaperone of her own and the patient consents, it does not seem to me to be necessarily objectionable. The fact that in this case the practitioner's wife is herself a state registered nurse is a further relevant consideration. The CSP plainly saw no objection to Mr Jellett's arrangements. Nor did the CCC. There is no sufficient basis for interfering with that judgment on the material before the court.

64. I therefore take the view that the CCC was entitled to find that Mr Jellett's chaperoning arrangements provided adequate protection for the public. In the light of that and the evidence as a whole, it was also entitled to find that he was a fit and proper person to practise as a physiotherapist and to direct that he be restored to the register. That was a conclusion reasonably open to it on the evidence. There was no element of undue leniency in restoring Mr Jellett to the register in these circumstances and after a gap of almost eight years since the removal of his name following his conviction. In saying that I take into account all the purposes of the disciplinary regime, but I agree with Mr Maclean's submission that deterrence has little relevance at this stage of the process.

65. A further question for the CCC, however, was whether he should be restored to the register unconditionally or whether a conditions of practice order should be imposed. It is on this issue alone that in my judgment the CCC's decision is open to justified criticism. The continued protection of the public depended on the continued operation of adequate chaperoning arrangements. The CCC relied in this respect on Mr Jellett's undertaking to the CSP and the CSP's letter of 12 July 2002 (in which it sought written confirmation that the arrangements would remain in place for good and indicated that it might make inspections at unspecified dates in the future). In my view, however, the CCC was wrong to rely on those matters alone. Although there is no reason to doubt the CSP's good intentions, there is no *guarantee* that it will ensure compliance with the undertaking by effective monitoring and enforcement of it. Moreover, even if it were found that Mr Jellett had failed to comply with the undertaking and that led to the loss of his CSP membership, it would not prevent his continuing in practice but would only affect his right to call himself a "chartered" physiotherapist. In my judgment, therefore, the effective protection of the public required the CCC to do more, namely to impose a conditions of practice order which would enable the HPC itself to police the chaperoning arrangements and to take enforcement action in the event of a failure to comply with the conditions laid down.

66. I am not surprised that the CCC declined to accept the undertaking offered by Mr Jellett in the same terms as the undertaking given to the CSP. An undertaking of this kind does not fit easily within the regulatory scheme. But Mr Jellett also made clear that he was willing to accept a conditions of practice order, and I am surprised that the CCC did not go down that route. It may well be that it was deterred by the concerns expressed by the HPC about the implementation of such an order. I do not accept that the HPC's stance gave rise to a procedural irregularity. Nor do I accept that the legal advice given was wrong or misleading or gave rise to a procedural irregularity. I do consider, however, that the end result, in the form of the CCC's decision to direct Mr Jellett's unconditional restoration to the register, was wrong and that the decision should not have been made. It failed to impose upon him the conditions reasonably necessary to ensure the continued protection of the public. In that sense it was unduly lenient to him.

67. It follows that the CCC's decision must be quashed. I have considered whether I should substitute an order directing Mr Jellett's restoration to the register subject to a conditions of practice order on terms determined by me. The conclusion I have reached is that the precise terms of a conditions of practice order are best left for the

CCC, especially because it may be thought appropriate to include one or more conditions with regard to monitoring of the chaperoning arrangements (e.g. as to the carrying out of a periodic audit), and the detailed formulation of any such condition or conditions is best done by the CCC in the light of representations from the HPC and Mr Jellett. Accordingly, I have decided to remit the matter to the CCC for the imposition of a conditions of practice order on terms to be determined by it.

68. It should be clear from what I have said already that I reject the Council's case that a possible outcome of further consideration by the CCC is the *dismissal* of the application for restoration to the register. I have held that the CCC was entitled to conclude as it did that Mr Jellett was a fit and proper person to practise as a physiotherapist and to direct his restoration to the register. I remit the matter not for the purpose of enabling that aspect of the decision to be reopened but only for the purpose of the imposition of a conditions of practice order.

69. I should also make clear that in my view some of the conditions suggested by the Council for consideration by the CCC are unnecessary and inappropriate. This does not seem to me to be a case that calls for psychosexual counselling; and conditions that made it impossible or very difficult for Mr Jellett to carry on his practice would in my view be unreasonable. The CCC's findings as to "fit and proper person" were premised, as it seems to me, on the view that Mr Jellett's existing practice arrangements, in particular as to chaperoning, were satisfactory. That was, as I have said, a reasonable view. The conditions of practice order should be directed towards ensuring the maintenance of a similar level of protection. It does not follow that the CCC is tied to giving continued effect to the precise detail of the existing arrangements. An exercise of judgment is required as to the appropriate conditions, and that judgment will have to be exercised on the material before the CCC at the time. The CCC may, for example, be invited to give further consideration to whether and in what circumstances it is appropriate for Mr Jellett's wife and mother to act as chaperones. But I hope that I have done enough to make clear the relatively narrow parameters within which the CCC's further consideration of the case should fall.

70. For the reasons I have given, the appeal will be allowed, the CCC's decision that the application for restoration to the register be allowed unconditionally will be quashed, and the matter will be remitted to the CCC for it to allow the application subject to the imposition of a conditions of practice order on terms to be determined by it.

MR JUSTICE RICHARDS: I am handing down judgment in this case. For the reasons given in the judgment, the appeal succeeds on a limited basis. I think that there is somebody in court for the Chartered Society of Physiotherapy which made late representations to the court and is not a party to the appeal. The position of the Society is dealt with at paragraphs 57 and 58 of the judgment, a copy of which will be provided to whoever is here for the Society. Yes?

MR COPPEL: My Lord, I have an application for costs against the HPC. My Lord, the Council was successful in its appeal. It had a single head of claim, as it were, which is set out in section 29(4) of the statute, that the decision should not have been made. The court has accepted that that claim was well-founded, albeit that it did not accept that all of the grounds put forward by the Council were well-founded. We submit that the usual rule of costs following the event should apply. The court has already had submissions from the HPC in its original skeleton argument for the hearing before your Lordship (paragraphs 23 onwards) as to how the HPC had sought to resolve the appeal by consent. I have two points that I would like to make.

MR JUSTICE RICHARDS: I have had a further skeleton argument, if I can find it, from Miss Richards this morning, expanding on that. But you want me to look at the original one?

MR COPPEL: My Lord, yes, it is paragraph 23 onwards. It is right that there has been correspondence from an early stage between all parties as to how the appeal could be settled by consent, but I submit that that correspondence does not justify the Council being deprived of any portion of its costs. I have two points to make at this stage. Firstly, it was open to the HPC at any stage to support the Council's appeal, even on the limited basis that the CCC had been wrong not to make a conditions of practice order. But the HPC never did so. As one can see from paragraph 23 of the skeleton, the HPC maintained all along that there was nothing wrong with the decision. That appears from the correspondence, it appears from the skeleton and it was maintained at the hearing. My Lord, we had some difficulty with the HPC's position because of the institutional arrangements which apply in this case. The HPC was the prosecuting authority before the CCC. We had concerns about the way in which the HPC had conducted the case before the CCC, as my Lord was aware, and to some extent the court accepted that those concerns were well-founded.

We did have concern then about what would happen on a remitted hearing if the HPC was again the prosecuting authority and the HPC did not accept that there had been anything wrong with the decision first time round. So, my Lord, the fact that the HPC never at any stage supported the appeal and always maintained that there was nothing wrong with the decision is, in my submission, an important point.

The second point which I would wish to make at this stage is that it was open to the HPC at any stage to make a Part 36 offer to the Council. Such offers it is said in CPR 36.2 can be made in appeal proceedings. There is a presumption, at least in Part 36.1, that a Part 36 offer should be made if a party wishes to obtain the costs protection which would follow from such an offer being made. We say, my Lord, in this case there was no good reason for the HPC's failure to make a Part 36 offer. It is clear from the correspondence that the reason why the HPC did not make such an offer was because it did not want to have to pay any of the Council's costs, that being the usual consequence that would follow from a Part 36 offer being made and accepted. The reason why it did not want to do that was because that would be an indication that there had been some flaw in the original decision. But we say that was not a good reason for not making a Part 36 offer. Unless the HPC can provide one this morning, then in our submission the HPC should not be granted the costs protection which would follow from a Part 36 offer, if one had been made.

My Lord, I may have some further submissions to make on the correspondence once I have heard what Miss Richards says based on her skeleton argument of this morning, but for the moment, my Lord, I submit that the Council should have its costs against the HPC.

MR JUSTICE RICHARDS: Thank you very much. Yes, Miss Richards, I read your skeleton argument this morning, but I do not seem to have a copy with me. Do you have a spare copy?

MISS RICHARDS: I do, my Lord, and can I also hand up a very small bundle of correspondence. I think you have a bigger bundle already that Mr MacLean's solicitors provided and which I suspect he may take you through in some greater detail. My Lord, the effect of your Lordship's judgment, in summary, is that my Lord decided that the CCC should have made a conditions of practice order, but rejected the other arguments raised by Mr Coppel, in particular and primarily the assertion that one of the options which the CCC should have considered and should still be considered was the option of refusing Mr Jellett's application for restoration to the register outright. My Lord, very soon after being served with the proceedings, the HPC sought to settle these proceedings on a sensible basis. I think the first letter it wrote -- I am not going to take my Lord through all the correspondence -- was 5 October, which was only about a week or so after the proceedings were served. If my Lord would look at the small bundle of correspondence, your Lordship will see that on 14 October the HPC wrote to Mr Jellett's solicitors proposing that the matter be remitted to the CCC on the basis that the HPC would submit to the CCC that a conditions of practice order would be appropriate. So the CCC's broader discretion was retained, but essentially the matter was attempted to be resolved on a pragmatic basis, but a conditions of practice order would be an acceptable outcome. If your Lordship looks at the letter that the HPC solicitors then wrote on 18 October 2004, your Lordship will see that in the second paragraph of that letter it was explained that the HPC had made proposals, that they were waiting to hear from Mr Jellett's solicitors, and they suggested it would be appropriate to have the case stood out. That was an offer that was rejected and instead the HPC received the appellant's skeleton.

You will see Mr Jellett's solicitors wrote on 18 October indicating that what was proposed by the HPC was acceptable to Mr Jellett, provided also it was approved by the CRHP. My Lord, as long ago as October 2004 the HPC and Mr Jellett had proposed a sensible compromise of these proceedings, which is a compromise that effectively would have achieved the same result as the court's judgment. That compromise was not acceptable to the appellant. My Lord, I have not enclosed all the correspondence. No doubt Mr Coppel or Mr MacLean can take you to further correspondence if it is thought appropriate or necessary. But the appellant's stance remained throughout, as it did before my Lord, that the issue of the CCC rejecting Mr Jellett's application outright had to remain as a key factor in any reconsideration. So those proposals were rejected.

MR JUSTICE RICHARDS: So there was no acceptance at any time by you that the CCC had in fact erred?

MISS RICHARDS: No.

MR JUSTICE RICHARDS: But you say that what was proposed by way of the compromise was substantially what has emerged from the judgment.

MISS RICHARDS: Yes, in my submission precisely what has emerged from the judgment. What the appellant's sticking point was was precisely what my Lord rejected in the judgment. Having secured the agreement of Mr Jellett's solicitors to those proposals, the HPC's solicitors wrote on 19 October, and this is the next letter in the bundle, enclosing the correspondence with Mr Jellett's solicitors and inviting their agreement. That was the agreement that was not forthcoming.

My Lord, on 9 December the HPC's solicitors renewed their efforts to secure a compromise of these proceedings on the basis of a conditions of practice order being made, and you will see that from the last letter in the bundle which sets out again a set of proposals -- paragraph 3 -- which is that the CCC shall allow the application subject to the making of a conditions of practice order on such conditions the CCC may deem appropriate. My Lord, again, that was a proposal that was rejected because it remained the appellant's position that the CCC ought to consider refusing Mr Jellett's application outright. My Lord, it is in the light of those proposals, and I have set out the extract from Simon Brown J's (as he then was) judgment in the Liverpool case in paragraph 3 of my submissions on costs, that there was a sensible attempt to shortcut the proceedings and avoid their expense or inconvenience or uncertainty, which is an option that all parties in cases of this kind are encouraged to pursue. In light of those, in my submission it would be wholly inappropriate for the HPC to be ordered to pay the appellant's costs. The bulk of those costs -- and I shall come on to their size in a moment, my Lord, because their costs are, in my submission, truly disproportionate -- but the bulk of those costs should have been avoided if the appellant had accepted the proposal that was made in October 2004; a proposal which is entirely consistent with the outcome of the judgment.

There are, in my submission, two orders the court could make which would reflect overall the justice of the situation. Either the court could order that the HPC pay the appellant's costs up until 19 October and that the appellant pays the HPC's costs thereafter, or the court could make no order as to costs. The latter, whilst it might in financial terms slightly disadvantage the HPC who would have the greater advantage of avoiding further costs (inaudible) in detailed assessment. The suggestion has been made that no Part 36 offer was made. My Lord, it is entirely right that the HPC did not write a letter headed "Part 36", but they wrote countless letters, and this is just a sample of them, trying to resolve proceedings on a sensible basis. It is quite proper that the court should have regard to those efforts.

My Lord, there are a number of additional reasons why, in my submission, the appellant should not receive its costs from the HPC, leaving aside the arguments that I have already mentioned in terms of the attempts to settle. The appellant failed in a number of its arguments. Costs both in terms of the hearing and preparation costs were incurred as a result of the appellant's unreasonable stance in terms of Mr Jellett's evidence, and costs were incurred by the appellant pursuing its argument that the CCC should consider the option of rejecting Mr Jellett's application. Your Lordship correctly, in my submission, described the submissions made on behalf of the appellant in your judgment in parts as overstated, and there is no reason why the HPC should bear the costs of the appellant having put its case at that height in circumstances where a significant portion of the Council's arguments have been rejected.

My Lord, it had been the HPC's intention to ask your Lordship to do a summary assessment if you decided that, in principle, the appellant should receive any.

MR JUSTICE RICHARDS: Let us worry about the form of assessment once I have reached a decision on the principle.

MISS RICHARDS: My Lord, certainly, because there is quite a lot I would say on the size of the appellant's application for costs.

MR JUSTICE RICHARDS: I am not surprised.

MISS RICHARDS: Those are my submissions in relation to the appellant's application for costs. To the extent that Mr MacLean on behalf of Mr Jellett seeks any costs from the HPC, I can deal with that appropriately in reply to him.

MR JUSTICE RICHARDS: Thank you very much. I think I had better hear from you now. Everybody seems to be seeking costs from everybody else, so you will all get another chance as necessary.

MR MACLEAN: My Lord, one sees the sense of that. My Lord, first of all, in a nutshell, Mr Jellett seeks his costs.

MR JUSTICE RICHARDS: You say he should not have to meet his own costs. Somebody should be paying them.

MR MACLEAN: Somebody should be paying them. It is a matter of complete indifference to Mr Jellett personally as to whether it is paid by the appellant or by the respondent or by both in some combination. It should not be a matter of indifference to the court as to how those costs are split up. So my submission is that somebody -- one or other or both of the other parties -- should be paying Mr Jellett's costs of these proceedings and I am going to invite your Lordship, if your Lordship is prepared to, to make that order in principle and to summarily assess those costs today, because it would be wholly disproportionate to subject those to detailed assessment. My Lord, my principal target for the costs is the appellant for reasons I will explore in just a moment. But your Lordship appreciates the oddity of Mr Jellett's position in these proceedings -- in my experience a quite unique position. He went along to the respondent's committee asking essentially for half a loaf. He was given a whole loaf by the respondent's committee, which was obviously a welcome result from his point of view. The appellant then issued the appeal and began these proceedings, and the prospects in the proceedings was that Mr Jellett would find himself back before the respondent's committee where there was a prospect, a real prospect, and if the appellant had anything to do with it, a very real prospect, of ending up with no bread at all. My Lord, the only point on which the appellant has won in these proceedings was the point on whether there should have been a conditions of practice order made by the respondent. On that point Mr Jellett's position was always clear. It was clear before the committee and it was clear before your Lordship. My Lord records that in a number of places in the judgment, for example paragraph 46. As Miss Richards has rightly said, the appellant was never prepared to send the case back to the committee on the basis that your Lordship has now ordered. Your Lordship has rejected the suggestion that Mr Jellett's application could lawfully be completely refused at paragraph 68 of the judgment. Can I just show your Lordship briefly, and I do not need to take up any more time than is necessary for this, but this is important to Mr Jellett who is privately funding these proceedings -- he is caught up in the crossfire of two deep pocketed public bodies. He has been privately funding this application and he told me last time

before your Lordship when he was present at the hearing that he remortgaged his home in order to fund the representation. So this is clearly a matter of some considerable importance to him, though the sums he seeks by way of costs are relatively modest, certainly compared to the costs my learned friend, Mr Coppel, seeks on behalf of his clients.

Can I invite your Lordship to turn to this bundle of correspondence shortly. Can I start first of all at page 1, which is a letter from my solicitor, Chattertons, to Mr Coppel's solicitors, then called Bevan Ashford. It is dated 24 December 2004. Your Lordship will observe that a notice of appeal in this case is curiously stamped by the court on 21 September and signed by the appellant's solicitors on 22 September. If one assumes that the appellant's notice was issued on 21 September, to all intents and purposes immediately my instructing solicitor writes this letter. Your Lordship sees what is said at the bottom of the paragraph on page 1 and then over the page. Just to pick up one of Mr Coppel's points, the magic words, if they are magic words -- Part 36 -- do appear in this letter right at the very beginning. My Lord, that letter found its way into the hands of the respondent. I think my solicitor sent a copy direct but I think also Mr Coppel's solicitors sent that letter on to Miss Richard's solicitors, and your Lordship sees their response at page 5 of this bundle -- a firm called Bircham, Dyson and Bell, who instruct Miss Richards, to Mr Coppel's solicitors, and your Lordship sees the last paragraph on page 5 beginning, "in the circumstances". If your Lordship would be good enough to look at that --

MR JUSTICE RICHARDS: Yes.

MR MACLEAN: My Lord, at page 7 of the same bundle, on 14 October, this is a letter from Miss Richards' solicitors to my solicitors on 14 October setting out the position that they are willing to reach in principle, and I think this is either the same or very similar to the letter that Miss Richards has already shown me -- page 7 and the conditions set out over on page 8, and as Miss Richards says, and here is the proof at page 9, that was a suggestion that was acceptable to Mr Jellett. The short letter of 18 October to Miss Richards' instructing solicitor, Mr Langley, makes that clear.

The respondent then told the appellant of this agreement between Mr Jellett and the HPC, that is page 10, a letter from Miss Richards' solicitors to Mr Coppel's, saying essentially: are you on board or are you not? The answer was that they were not and they communicated that in a letter dated 29 October, page 11 of my bundle. Would your Lordship be good enough to look at page 12 and in particular the last three paragraphs, beginning, "our client therefore considers"?

MR JUSTICE RICHARDS: Yes.

MR MACLEAN: There are two problems from Mr Jellett's point of view. Of course, it is not just a question of who is paying the appellant's costs. Who actually pays the appellant's costs does not matter to Mr Jellett. What does matter is that the appellant wanted the question of dismissal of the application *in toto* still to be in the arena. Page 16, my Lord, is a letter from Miss Richards' solicitors to Bevan Brittan saying, amongst other things, that they are not paying the costs. So that was one of the bases on which there was no deal as between the appellant and the respondent. My Lord, that is not directly a matter for Mr Jellett of course. But then, my Lord, on 9 December 2004, at page 21 of the bundle, Miss Richards' solicitors made another attempt and this is very

shortly before the hearing, which I think is 13 December. This is shortly before the hearing. The letter at page 21 of the bundle, see in particular the first two paragraphs, especially the second:

> "We therefore wish to propose that all three parties agree that this appeal can be disposed of on the basis that Mr Jellett is restored to the register subject to a conditions of practice order."

That is what your Lordship has said ought to happen. My solicitors responded to that, see page 23 of the bundle. It is actually to the appellant's solicitors, but everybody has been copied in on all of this.

> "As Bircham Dyson Bell rightly say we [reached] an agreement in [principle] with them as to the appropriate conditions of practice (see their letter of 14 October 2004). Mr Jellett's Witness Statement, paragraph 16 points a-e, refines those conditions in a sensible, minor and uncontroversial way, which we are sure present no difficulty to HPC. We trust you will agree that paragraph 16, points a-e can form the basis of a conditions of practice order."

Over the page Mr Jellett's solicitor makes it entirely clear that he would be willing for the three-year period to be extended if that was thought appropriate. My Lord, the response from the appellant, and that is, as I understand it, the last response before the hearing, is a letter to my solicitors dated 10 December, page 25 of the bundle, and a letter to Miss Richards' solicitors, page 26 of the bundle, and an order. This was a proposed draft order coming from the appellant. At pages 27 and 28, see in particular page 28 -- your Lordship has to look at the foot of 27 to make sense of it:

> "When disposing of the second respondent's application, the CCC shall ...
>
> (2) Either (a) refuse the application or (b) allow the application subject to the making of a conditions of practice order, on such conditions as the CCC may deem appropriate."

So it is still wanting dismissal as an alternative. Moreover, so far as the conditions are concerned, on 10 December 2004 the appellant Council wrote to the chief executive of Miss Richards' clients -- this is page 29 of the bundle and following --

MR JUSTICE RICHARDS: Of course, those suggested conditions were before me and I made certain comments on them.

MR MACLEAN: Quite, so your Lordship sees what is being proposed here was that Mr Jellett should still have the risk hanging over him of ending up with no bread at all, which your Lordship has said would be quite wrong, and if there were any (inaudible) conditions that were being proposed were conditions which your Lordship has found, to use your Lordship's words, to be unnecessary and inappropriate. So, my Lord, one sees from all of that that at the very earliest possible stage my solicitors were attempting to compromise these proceedings on the basis which your Lordship has ordered, namely that the matter could go back to the CCC, conditions of practice order would be made, substantially, very substantially perhaps, along the lines of the conditions which he was

already subject to in any event. That is why, in my submission, the correct target for costs so far as Mr Jellett is concerned, at least in large part, is the appellant.

My Lord, there are other reasons too for coming to the same conclusion. Your Lordship will recall that there was an application to adduce further evidence, further evidence being evidence of Mr Jellett and also my solicitors in court. Your Lordship deals with that at paragraph 31 and following of the judgment. The appellant's position in respect of that further evidence was wholly unreasonable from the first, and for example a lot of that --

MR JUSTICE RICHARDS: In any event, that application occasioned your turning up in court rather than relying on written submissions and you succeeded.

MR MACLEAN: We succeeded and your Lordship has dealt with that. As a result, many of the points that had been taken, some of which were (inaudible) on the basis of the transcript, which was obviously before the appellant when they prepared their skeleton argument, were simply bad. My Lord, in no sense is Mr Jellett intervening in this case. He is a party and he has been made a party by this appellant and he has been caught in the crossfire between the appellant and the respondent. He is here mostly, in my submission, because of the unreasonable stance taken by the appellant, but, of course, partly because of mistake of law made by the respondent, which he was in no part the author or cause of. My Lord, there is a costs schedule. I hope your Lordship has this.

MR JUSTICE RICHARDS: I will look at the costs schedules when I have reached my decision in principle. But I have not got a costs schedule from you.

MR MACLEAN: I will hand one up, if it is appropriate, in a moment. But my submission is that your Lordship ought to order summary assessment of Mr Jellett's costs in the sum set out in the schedule against the appellant principally, and if there is any shortfall in Mr Jellett's recovery of costs, these should be made up by the respondent whose error of law was the original, although not the main cause of Mr Jellett attending before your Lordship.

MR JUSTICE RICHARDS: Hand it in so I have it in front of me.

MR MACLEAN: It is a two-page document and an explanation as to how the work done on documents breaks down.

MR JUSTICE RICHARDS: Thank you. Yes?

MR COPPEL: My Lord, dealing first with Miss Richards' submissions. Her main point is that she says her client made proposals to my client which in fact reflected the outcome of the judgment, and that they made those proposals first of all in October and then again on 9 December. My Lord, just starting on the question of timing. 9 December was a Thursday and the offer was made at 5.46, so effectively on the Friday and the hearing was on the Monday. So it was a late offer. I will come back to it in a minute. The October correspondence, my Lord, contrary to what Miss Richards has said, does not show that her client had offered what the judgment in the end provided for. One can take this either from the first letter in Miss Richards' bundle --

MR JUSTICE RICHARDS: Right, I have that in front of me.

MR COPPEL: The first difference between what this letter proposes and what my Lord has held is that this letter proposes that all options be open before the CCC, including reaching the same conclusion as it had reached before. There is no restriction as to what options should be open to the CCC and that is wholly --

MR JUSTICE RICHARDS: It would not be possible to restrict the CCC's discretion. The HPC can determine what case it will put to the CCC, but it cannot say: we are removing from your discretion, can it?

MR COPPEL: My Lord, yes. A consent order could ultimately be reached in the terms which my Lord has reached following his decision, that the case be remitted on certain terms, eg that the CCC should consider only a conditions of practice order or should consider either a conditions of practice order or a rejection of the application for restoration. But this proposal goes towards a consent order which leaves all options open, including reaching the same conclusion as before.

MR JUSTICE RICHARDS: That ought to have appealed to you rather than being something that you objected to.

MR COPPEL: My Lord, it fits with our concern that the HPC were not accepting that there was anything wrong with the original decision and so was quite happy for the CCC to be left open to reach the same decision as it had already reached. My Lord, the second reason why this proposal differs from what my Lord has held and was of concern to my clients was that there appeared to be an agreement in advance between the HPC and Mr Jellett as to what the conditions of practice ought to be. My Lord, we have consistently taken the position that it is for the CCC to consider a wide range of conditions, some of which my Lord has held were inappropriate in this case, but one of which, which is of great interest to our client, was in relation to whether Mr Jellett should be able to continue to use his wife or his mother as an appropriate chaperone and that is something which my Lord has held should be a matter to be considered by the CCC. This proposal which was made on 14 October, which would in effect have carved up the conditions before the CCC had ever got to look at it, would not have met my client's concern for that reason. My Lord, we felt that the CCC should retain its discretion in that regard and not be prejudiced by what the HPC, as the prosecuting authority, was going to submit as being agreed already with Mr Jellett. So, my Lord, for those reasons the offer which was made in October did not correspond with my Lord's judgment. I have made the point already about the question of costs, that the HPC was at no stage prepared to pay any costs, and maintain that there was nothing wrong with the decision. So there are two further reasons why my client was justified in not accepting the offer which was put forward at that stage.

Then one comes to the December correspondence which, as I have said, my Lord, took place in effect on 10 December, the working day immediately before the hearing. We say in relation to that that again it was legitimate for the Council not to accept the very late offer from the HPC. It was late. The HPC stance continued to be that there was nothing wrong with the decision and it was not paying any costs.

My Lord, there was also a concern that if the Council was to settle the case at that late stage, then the CCC on remission would not have the benefit of any guidance from the

courts, nor could the Council be able to rely upon the HPC to make appropriate submissions given its position that there was nothing wrong. We say that it was legitimate for the Council to take the view that it should be able to make representations to the CCC on the wider range of options; not just a conditions of practice but also on the wider option of possible refusal of the application. But, my Lord, at the very least we submit that we should be entitled to our costs up until 10 December when this offer was made. I say we were entitled to reject it, but if my Lord is not in agreement, then I would seek costs against the HPC up until the point of which that offer was made.

My Lord, in relation to Mr Jellett's application for costs against my client, the most significant contribution made by Mr Jellett to the proceedings and what appears to have taken up the lion's share of the costs incurred by him is the submission of further evidence and then of written submissions made by Mr MacLean on the basis of that further evidence. I say that the Council should not be liable for the costs relating to that evidence for two reasons. First of all, part of the evidence comprised of character references and CPD materials, which came in under a statement from Mr Cordingley, and had been material which was before the CCC. We had asked the HPC to supply us with documents which were before the CCC and they supplied us with an incomplete bundle. The Council should not, in my submission, have to pay the costs of Mr Jellett rectifying the HPC's error in that regard.

The rest of the evidence filed by Mr Jellett was evidence which, as my Lord knows, we say could have been and should have been before the CCC at the original hearing. It was relevant evidence which related to the decision-making process, in particular of the CSP -- the monitoring process, the inspections and the Archer survey -- and we have had no explanation at all as to why that evidence was not put before the CCC. It was all in the possession of Mr Jellett but he declined to put it to the CCC. Of course, the court has decided Mr Jellett is entitled to submit that evidence on appeal, but it is one thing to say that a practitioner is entitled to make fuller disclosure of the relevant facts once an appeal is brought; it is quite another thing to say that the Council ought to pay the costs of that when, if the evidence had been put into the CCC in the first place when it should have been, no costs in that regard would have been incurred. The evidence would have simply been in the bundle before the CCC and we would have got it in the normal way and there would have been no need for any of this. My Lord, in the absence of an explanation from Mr Jellett -- good reasons as to why that evidence was not before the CCC -- we say that it would be unjust to require the Council to pay his costs of putting in evidence at a late stage on appeal.

My Lord, on the point in relation to the evidence which was determined against the Council, Mr MacLean says that the Council's position was wholly unreasonable. I dispute that, my Lord, and it is not a finding which my Lord has made. It was open to the Council on the terms of the judgment in Ruscillo to make the argument and it is an argument which has wider implications beyond the instant case. So it was, in my submission, legitimate for the Council to make the point. But, of course, again the point would never have arisen had the effort been applied at the appropriate time. My Lord, I do accept ultimately that I did lose that application. If my Lord is minded to make some order for costs against my client in relation to Mr Jellett, it should be limited to the costs of arguing that application. The application would have had to be made in any event because that is what the rules say -- the court has to order the admission of new evidence on appeal -- but we should not have to pay the costs of the

preparation of the evidence for the reasons I have given, and nor should we have to pay the costs of Mr MacLean staying at the hearing in order to make his other submissions on the substantive issues. We do not accept that the only reason Mr MacLean was here was to argue the evidential point. He could have left the court when that issue had been determined, but, of course, as was expected, he chose not to do so because he had submissions to make on the rest of the case as well.

My Lord, that is the evidence -- the contribution of Mr Jellett in that regard. In relation to the conduct of the negotiations once the litigation had started, I say this also does not assist Mr Jellett. I have been to the October correspondence. There was subsequently in November an agreement between the Council and the HPC as to the terms on which the case should be remitted to the CCC, and there was a further agreement at a very late stage immediately before the hearing, but both agreements were scuppered by Mr Jellett. The final position of Mr Jellett in the negotiations, which appears from a letter from his solicitors of 7 December 2004 -- it may be in the bundle --

MR JUSTICE RICHARDS: This is another letter?

MR COPPEL: This is a letter which is not included in the Chattertons bundle. It is a letter from them and this represents a final position of Mr Jellett in the negotiations which is that the court ought to make a conditions of practice order. So one sees from the second paragraph and the third paragraph that the court has power to make a pay conditions of practice order. Of course, that was an issue between Mr MacLean and myself ultimately at the hearing. He said it was appropriate for my Lord to make the order and I said it was not. That issue was determined in my favour. So, in my submission, My Lord, the later negotiations do not assist Mr Jellett in seeking his costs.

In relation then to the remaining contribution of Mr Jellett at the hearing, I say that the contribution which was made was not so significant as to warrant any recovery of costs. This was a case where Mr Jellett was entitled to take part. Of course he was a respondent, but once it got to that stage he had no need to do so. The HPC was defending its own position to the hilt and it is difficult to see what really Mr Jellett added to that once his new evidence was admitted. So we say that it would not be right to order us to pay the costs of his appearance at the hearing.

Finally, my Lord, we say in relation to Mr Jellett that if anybody should have to pay his costs, it should be the HPC. As I said in my submissions at the hearing, we had some sympathy with Mr Jellett's position because if the HPC and then the CCC had accepted the half a loan which Mr Jellett was offering at the time, these proceedings would never have happened -- the fact that the CCC erroneously rejected the proposal of Mr Jellett which led to the predicament in which he found himself. Ultimately, my Lord, we say that the cause of these proceedings has been the CCC.

MR JUSTICE RICHARDS: Thank you, very much.

MISS RICHARDS: If I might deal with Mr MacLean's application --

MR COPPEL: My Lord, I am sorry, I am asked to make one additional point, which is that the HPC should not be entitled to say that the Council was unreasonable at the very last to insist that it remain an option for the CCC to dismiss the application altogether

because the HPC agreed to that cause. I have a letter of 10 December from the HPC agreeing to that cause. That is the additional point I wished to make.

MR JUSTICE RICHARDS: Thank you.

MISS RICHARDS: My Lord, on that last point, it was made clear that the HPC would agree to that if Mr Jellett would agree to it. Mr Jellett entirely understandably and justifiably, as the judgment demonstrates, would not agree to that.

My Lord, in response to Mr MacLean's application, I associate myself with what he says about why the appellant should pay Mr Jellett's costs. On the question of whether the HPC should pay Mr Jellett's costs, there are three reasons in particular why it should not. Firstly, Mr Jellett and the HPC, as your Lordship has seen from the correspondence, reached agreement on 18 October as to the sensible means of disposing of this appeal. Any costs incurred thereafter by Mr Jellett were incurred not as a result of any action by the HPC, but by the appellant's stance. Secondly, the evidence served on behalf of Mr Jellett and his submissions on that evidence was largely prompted by the erroneous assertions and allegations made in the appellant's skeleton argument, and that is not something for which the HPC should be held responsible. Thirdly, The attendance of counsel at the hearing for Mr Jellett was incurred solely as a result of -- and I see no reason why the court or any other party should doubt Mr MacLean's solicitor's words in relation to this -- solely because the appellant repeatedly refused to agree to Mr Jellett's evidence being considered by the court. My Lord, there is letter after letter in which the appellant's solicitors reiterated that they would not agree to the evidence being admitted. The HPC on the other hand made clear that it had no objection and that was the reason for Mr MacLean's attendance. So, my Lord, those are the reasons why Mr Jellett's costs should not be borne by the HPC.

My Lord, can I draw your Lordship's attention -- dealing with an earlier point of Mr Coppel's -- to CPR part 44.3(4).

MR JUSTICE RICHARDS: I have not got the White Book here, but read it out.

MISS RICHARDS: I will read it out:

> "In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including-
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)."

My Lord, (a) and (c) are factors I rely upon in the present case.

MR JUSTICE RICHARDS: Thank you, very much. I do not think I need to hear further from you, Mr MacLean.

The issue of costs is one of rather greater complexity than in the ordinary case. I have to exercise my discretion so as to do justice having regard to the overall circumstances. As between the Council and the HPC, there seem to me to be two main factors. The first is that the Council has won, but that it has won on a much more limited basis than it was putting forward. I have held, in my judgment, that its case was overstated. I have rejected a contention to which the Council attached importance, that a course properly open to the CCC was the refusal of Mr Jellett's application for restoration to the register. I have held that the CCC erred in not making a conditions of practice order, but even there, I have criticised some of the conditions suggested by the Council.

The second factor is that the HPC did put forward, particularly in a letter of 19 October 2004 enclosing correspondence showing the position agreed between it and Mr Jellett, a proposed means of settling the appeal and having the matter reconsidered by the CCC. It seems to me that, in substance, though not in every detail, what was put forward by the HPC with Mr Jellett's agreement accorded with the outcome produced by my judgment. There is one factor that I should mention specifically which is that the proposal contemplated that the CCC would be left with a discretion to refuse Mr Jellett's application altogether, albeit that the HPC would be submitting that the appropriate course was a conditions of practice order. It seems to me that it was entirely correct that the proposal should not seek to fetter the discretion of the CCC, but that this point was, in any event, favourable to the Council and should not be held against the HPC. I do however note that the proposal was put forward without any admission that the CCC had erred at all.

Looking at those two factors together, it seems to me that the position is this. There was an error that properly triggered an appeal, but the appeal was put forward on far too wide a basis and the Council declined what I regard as a sensible attempt to bring proceedings to an end on a basis that accords well with my ultimate judgment. But the fact that that proposal was not expressed in the terms of a Part 36 offer is not decisive against the HPC. It should not cause me to disregard an offer made clearly in correspondence. In all the circumstances, I consider it inappropriate to order the HPC to pay the Council's costs from 19 October. One possibility would be to order the HPC to pay the Council's costs up to 19 October and order the Council to pay the HPC's costs thereafter. I am satisfied, however, that good sense and the overall justice of the case is reflected by making no order for costs as between the Council and the HPC.

That leaves me with Mr Jellett, whose position is entirely separate, as it seems to me. He has adopted the stance throughout, both before the CCC and in the appeal, that he accepted that a conditions of practice order could properly be imposed and he expressed a willingness to submit to such an order. He has in truth been the innocent victim, first of an erroneous decision by the CCC not to impose a conditions of practice order, and secondly by the Council's commencement of an appeal on an unduly wide basis and its continuation of that appeal when a reasonable proposal for settlement was put forward to it. Indeed, I note that a Part 36 offer so expressed had been put forward on Mr Jellett's behalf even before the compromise suggested by the HPC in mid October. As I have said, Mr Jellett supported the HPC proposal. The suggestion of disposing of the case on what I regard as sensible terms was also followed up closer to the hearing. The outcome of the appeal was in line with what was submitted on Mr Jellett's behalf, save that I refused to make a conditions of practice order myself, thinking it more appropriate that the matter should be remitted for a decision by the CCC.

There is an additional consideration in relation to Mr Jellett which is that he incurred substantial costs in filing further evidence, most of which, as it seems to me, was triggered by erroneous points made on appeal by the Council. I do not accept that Mr Jellett acted wrongly or unreasonably by failing to adduce that evidence before the CCC. I accept that some of the evidence included documents that were placed before the CCC and that had been omitted by mistake from what came to the Council and was placed before this court, but I do not regard that as material to the overall picture. When the further evidence was sought to be placed before this court, the Council opposed the application. That necessitated the attendance of Mr MacLean at the hearing on behalf of Mr Jellett in order to make the application that the evidence be admitted. He succeeded on that point for the reasons given in my judgment. So the Council's attempt to resist the admission of the evidence failed, both as regards the legal argument and the merits.

In all those circumstances, it seems to me that the right course in relation to Mr Jellett is that he should recover his costs. In my view, it is only right that the HPC should pay his costs up to 19 October because it was the CCC, the HPC's Committee, that made the erroneous decision not to impose a conditions of practice order and that caused the appeal to be brought. But the Council should pay Mr Jellett's costs thereafter, including the costs of the hearing.

The overall message that emerges from those observations is that, whilst this appeal was properly brought, its continuation was unnecessary. The Council needs to give very careful consideration in cases of this kind to proposals for disposal of the case. If it refuses to accept those proposals and at the end of the day does not get significantly more than was offered by way of a compromise, it can expect to be penalised in costs.

MR MACLEAN: My Lord, I think it follows from that judgment that your Lordship is simply not in a position to summarily assess the costs as an overall sum -- to split it up -- because I am not in a position to assess --

MR BOYLE: I think it has to go for detailed assessment, if not agreed. I would hope very much that it can be agreed and that the parties will avoid incurring further costs in that process.

MISS RICHARDS: Can I, on behalf of the HPC, invite Mr MacLean's solicitors to resubmit a schedule showing their costs up until 19 October, then I have no doubt whatever that that is going to be agreed.

MR COPPEL: My Lord, the same for us in relation to the periods after the 19th.

MR JUSTICE RICHARDS: Thank you. No further applications?

MR COPPEL: No, My Lord.

MR JUSTICE RICHARDS: Thank you very much for your assistance throughout the case.