practice was very busy and things were difficult. In response to questioning by the Tribunal, the Respondent stated that Mr McCullough said he would have someone else countersign forms in order to maximise profit. The Respondent stated that Andy McCullough's evidence, in relation to whether the Respondent had suggested that another optometrist signs his forms, was untrue. The Respondent stated that he did not know whether he had submitted a prior invoice for £250 or £275 to Mr McCullough before submitting the final one for £300, but accepted that was possible. In re-examination, he explained that he charges £300 for a Saturday and that he had reduced his bill to £275 in return for immediate payment.

6.139 The Respondent was referred to a file note of 26th February 2008 in relation to a phone call from Jacqui Miller, Vision Express. The Respondent stated that he had a conversation with Jacqui Miller. He stated that he had contacted her to ask why he had not been paid and was told it was because he had not signed forms. The Respondent stated that he did not believe he would have told Ms Miller that he would provide a list number because he did not have one. The Respondent accepted that the telephone call had been intimidating and threatening and abusive but later denied it was abusive. His evidence was that he had not been angry, but it was being implied that he had not told Mr McCullough that he was not registered. The Respondent stated that he did not obtain payment from Vision Express and accepted that he had suggested he would take Mr McCullough to court. The Respondent stated that he said he wanted to be paid for work carried out under the conditions imposed by Mr McCullough.

6.140 The Respondent did not accept Mr McCullough's evidence that 10% of his customers were recalled and stated that Mr McCullough had not raised the issue with him. In re-examination, the Respondent stated that recalls could be due to a number of factors, including the dispensing. He stated that he had never heard of a recall rate of 10% and that, even for someone new to the job, he would expect a maximum of 1 / 1.5% recalls. In re-examination, the Respondent stated that a maximum of 20 eye tests could be carried out in a day so there was no need to test quickly. He stated that the length of the test depends on the patient.

6.141 The Respondent stated that between 1986 and 2004 most of his locum work was private, albeit he did sign NHS forms. The Respondent then stated in response to further questioning

that he worked in Inverness, Grampian, Perth, Glasgow, Dumfries and England during that period. As far as the Respondent was aware, he thought that practices had been paid by the Health Service for his work, however he had not checked.

6.142 The Respondent accepted that he was not registered in Tayside, Grampian, Forth Valley or Fife and that the only areas in which he had been registered (in Scotland) were Shetland, Lothian, Greater Glasgow and Argyll & Clyde.

6.143 The Respondent could not say whether he was aware of the change to the Regulations in the lead up to 2006 because of personal difficulties. He accepted that he had worked in Health Board areas other than Lothian and Glasgow after the Regulations were in force, but had understood that he had "grandfather rights" in those areas. That is because he had worked in those Health Boards before, he understood he could work in them again. He stated that it never occurred to him to check whether he was on a Health Board list before he carried out work.

6.144 The Respondent stated that, from mid 2007, he considered he could not register with a Health Board that he had not worked for previously because of Tribunal proceedings. The Respondent stated that he could not recall whether he had read the 2006 Regulations by this time. The Respondent stated that he was not aware, prior to the Regulations coming into force, that they would result in a dramatic change for locum work. The Respondent stated that he was, however, aware (from his father) that there was going to be a greater training requirement for optometrists wishing to perform sight tests. The Respondent stated that he was aware of a grace period for re-training.

6.145 The Respondent stated that he did not recall receiving the 2006 Memorandum sent to all practices regarding the new Regulations, although it was possible he had received it. He stated that he probably would have read the Regulations, if received. The Respondent accepted that he should have read the part of the Regulations that applied to locums.

6.146 The Respondent accepted that, by 20 February 2008, he knew that Mr Adams of Gregory

Pecks was not being paid for the Respondent's work. He accepted that he knew he was not on the Tayside list and that any other work he carried out in Tayside from that point on was unlikely to be paid. He accepted that his understanding of "grandfather rights" was not correct. He stated that he did continue to work in Tayside after 2008 at Vision Express, Dundee but on the basis that he would not sign forms. The Respondent accepted that he understood that he could not sign forms because he was not registered. The Respondent stated that he arranged not to sign forms with Steven Firth (Regional Manager of Vision Express) before carrying out any work. The Respondent stated that he carried out work on this basis for 4 days and was paid between £250 and £300 per day. He could not indicate whether or not he was asked to sign forms after that time in 2008, but stated that he would not have been surprised to have been asked as staff may not have been aware of his arrangement with Mr Firth. He stated that he would have refused to sign forms. The Respondent stated that he had not signed any forms for Tayside since July 2007.

6.147 The Respondent stated that he had worked in Vision Express in Dunfermline, but had not appreciated that Dunfermline was in Fife. He stated that he had signed forms in Vision Express in Dunfermline after July 2007 but had thought he was on the relevant list. The Respondent thought he was eligible to work in the practice belonging to Tikoni Harry because he was registered in Lothian.

6.148 The Respondent accepted that he had not advised Lothian Health Board that he had ceased to work with Browns in September 2005 and could not recall why. He did not recall having an obligation to tell the Health Board, but accepted now that he did have such an obligation.

6.149 The Respondent was referred to a letter of 28 June 2005 from Louise Hockaday advising him to give the Board three months' written notice of a decision to cease practising. The Respondent stated that he could not recall receiving the letter but accepted that he had never given such notice. The Respondent did, however, recall receiving the list number referred to on that letter.

6.150 The Respondent stated that by 12 March 2007, he wanted to apply for inclusion on Part 2 of

the Lothian list because he was no longer working in a Part 1 capacity for Browns. He believed he had worked at "For Eyes" Opticians since late 2006 or early 2007, by which time he knew of the existence of the 2006 Regulations.

6.151 The Respondent was referred to a letter of 16 May 2007 from Dr Mike Winter of Lothian Health Board which stated that he was included in the NHS Board's list with the address of Browns Opticians. He accepted that this suggested that he had not advised the Board that he was not working at Browns. The letter of 16 May 2007 raised a number of issues. Firstly, the Respondent's application of June 2005 did not state that he was on the Shetland list, which the Respondent accepted he should have stated. The Respondent explained that he had assumed that he had been taken off the Shetland list because he had left Shetland some time ago and this oversight was due to his mental breakdown. He accepted that the purpose of this question was to allow the new Health Board to check whether there were any issues with the old Health Board. Secondly, the Respondent accepted that he had not fulfilled his obligation in terms of giving notice that he had stopped working at Browns and could not explain why. Thirdly, the Respondent had been asked for paperwork in relation to Part C Schedule 2, of the 2006 Regulations but he understood that he had already signed a criminal declaration. The Respondent was also asked to explain why he had failed to keep NHS Lothian up to date with addresses from September 2005 and to confirm whether he had received (and was aware of the content of) the 2006 Regulations. The letter stated that the Respondent was only included in Part 1 of the list.

6.152 The Respondent accepted that he had advised Greater Glasgow Health Board that he had submitted his one-off paperwork to another Health Board, but had in fact not done so. He stated that he had not intended to mislead, but accepted (initially) that the information provided to the Health Board was misleading. He stated that he was going through a difficult time and that there was no malicious intent. He later stated, however, that in fact his answers in relation to not being on any other Board's list, submitting one off paperwork to another Health Board, and the fraud investigation were not misleading.

6.153 The Respondent stated that he had filled in an additional addresses form because he had

been asked to do so by Ms Harry, who was having difficulty obtaining payment. The Respondent stated that he listed "For Eyes" on the form because he was working there regularly. The Respondent stated that he had otherwise been working successfully in Lothian, in that he had been paid and he had assumed the person he was working for had been paid. In re-examination, the Respondent stated that he did not consider he required to sign application forms but did so to ensure that Ms Harry received payment.

6.154 The Respondent explained that he did not feel it was necessary to tell the Board that he was being investigated for fraud because he had lodged an appeal and therefore a final deliberation had not been reached. The Tribunal had made a determination on 5 January 2007. The Respondent's application was signed on 7 March 2007. The Respondent did not accept that this was not a candid position. In re-examination, the Respondent was referred to correspondence from the Scottish Executive to the Chief Executives of NHS Boards stating that they would write to the Respondent when the outcome of the appeal was known.

6.155 The Respondent explained that he had asked for his application to be "reinstated" but accepted that the terminology was not correct. He had wanted to "remain" on the list. The Respondent stated that in May or July 2007, his understanding was that he had to be on Lothian's list in order to practice in Lothian. He could not, however, explain why he thought he could practice in other areas if he was not on their list but referred again to "grandfather rights".

6.156 The Respondent was referred to a letter of 17 July 2007 which stated that his name had been included in Part 1 of the Ophthalmic List for Brown Opticians since 1 April 2006 as a result of the transitional provisions incorporated the 2006 Regulations. The Respondent accepted that he was required to submit an enhanced application following receipt of that letter. He accepted that he had not yet submitted the one-off exercise declaration. He could not explain why he had not simply signed and returned the fresh application. The Respondent stated that he continued to work in the Lothian area after 6 September 2007 as he was never told not to do so.

6.157 The Respondent accepted that optometrists have to be on the Ophthalmic List on the Board of the area that they are going to be working in pursuant to the 2006 Regulations. He accepted that this was the position since 1 April 2006. He accepted that he had been incorrectly working in Health Board areas where he was not registered on the list. His evidence was that this has never been brought to his attention because practices were presumably receiving payment, with the exception of the practices in Broughty Ferry and Huntley.

6.158 In further cross examination the Respondent stated that he did not think there was anything wrong with a qualified optometrist doing work under the General Ophthalmic Regulations in a health board area where he was not listed. He did not recall accepting some incorrectness about doing that previously. The Respondent then accepted that where a qualified optometrist was doing NHS work and would be signing GOS forms, it would be incorrect for an optometrist to be doing that work if he was not on the list for the relevant area. He accepted that if an optometrist did so, he either does not understand the regulations or disregards them. He did not accept that he had done NHS work in breach of the GOS Regulations because he had either not familiarised himself with the regulations or because he had disregarded them. The Respondent's evidence was that there was also a third possibility whereby the optometrist believed that he was on the list, as he did.

6.159 The Respondent was asked about two problems with his work on 1 April 2006, (1) where he carried out NHS work for a practice when he was not on the relevant list and (2) where he was on the he list but was not registered for that practice and the practice had not been paid. The Respondent's evidence was that some practices were prepared to "take the hit" on fees and that he did not carry out NHS sight tests in other practices. In response to questioning by the Tribunal , the Respondent stated that he did not explain that he was operating privately to patients as he considered it was up to the practice whether or not to "take the hit" for the vouchers.

6.160 The Respondent's evidence was that he carried out work because he incorrectly assumed that he was registered or had "grandfather rights". The Respondent did not accept that the Tribunal could find he was doing NHS work incorrectly because where he had worked in a

practice in an area for which he was not registered, he would not have carried out NHS work. The Respondent did not accept that he had carried out NHS work that he was not entitled to do since the 2006 Regulations came into force.

6.161 The Respondent was referred to correspondence from Louise Hockaday in June, July and August 2005 relating to his original GOC registration certificate. The Respondent confirmed that he had telephoned Ms Hockaday to advise that he was unable to provide his certificate as it had been lost. In re-examination, the Respondent stated that he could not say for certain that whether, or when, he received the correspondence from Ms Hockaday, which was addressed to him care of Browns Opticians.

6.162 The Respondent was again referred to correspondence from Dr Winter in May and September 2007. The Respondent did not know whether he had advised the Health Board that he had received the Regulations. He accepted that he had not kept the Board up to date with addresses. He accepted that he had not told Lothian Health Board that he was working at "For Eyes" in March 2007. He accepted that this was discovered after an audit. The Respondent stated that despite Dr Winter's correspondence of September 2007 requesting information, the Respondent considered he had submitted the required information to Lothian Health Board.

6.163 The Respondent was referred to correspondence from Mrs J Glen of Greater Glasgow Health Board dated 6 September 2005 advising him that he was included in the Board's list from 7 June 2005, reminding him to notify the board of any changes to the information provided within 14 days, and advising him to notify the board if he decided to cease providing services in the Greater Glasgow area. The Respondent accepted that he subsequently stopped working at Browns Opticians in Glasgow but had not notified the Health Board as it was not clear that he would never work there again.

6.164 The Respondent was referred to correspondence of 16 November 2005 from Catherine Richardson of Greater Glasgow Health Board noting that the Respondent appeared not to be involved in the provision of GOS within the Greater Glasgow area. The Respondent accepted

that there was no response to this letter, despite being obliged to provide notice to the Health Board. The Respondent accepted that there has been a pattern of him failing to keep Greater Glasgow Health Board updated with changes to his practice locations since 2008, but did not think this was unique as a Greater Glasgow Health Board newsletter in 2010 stated that approximately 350 contractors had failed to comply with data collection.

6.165 The Respondent was referred to a passage of evidence of Mr Zappia in which it was suggested that Greater Glasgow Health Board had information from contractors that they were not happy with the Respondent's performance. The Respondent stated that he was not aware of anybody telling him that they were uncomfortable with him working in their practice.

6.166 In re-examination, the Respondent stated that he had worked in excess of 30 practices since the middle of 2007 and accepted that it was difficult to remember details. He stated that, in the last year, he has worked for Tesco Opticians, Dalkeith Eye Care and other practices. He has spent 5 of 8 days in the Lothian Health Board area.

6.167 The Respondent's evidence was that if he was disqualified, he would suffer devastating consequences, both financially and in relation to his future career as an optometrist. He accepted, however, that he could still work in the private sector, England, laser clinics, hospitals and as a dispensing optician without being on a list.

6.168 In relation to conditional disqualification, the Respondent's view was that supervision by a qualified individual would be impractical. He stated that most of his work (99%) is carried out when he is the only qualified optometrist in the practice. He considered that it was practical for a dispensing optician or a practice owner (who would normally be present) to supervise him. He did not consider that the supervisor required to be subject to the GOC because his clinical competency was not in question and unqualified supervisors could be sanctioned through withdrawal of their licence, although he accepted that this was an extremely serious if not impractical sanction.

6.169 In cross-examination, the Respondent stated that he had no issue with the proposed

conditions other than the requirement for a supervising optometrist. The Respondent accepted that there have been problems with notifying Health Boards of his home address in the past, but stated that these issues would be addressed and that he would be very careful in future.

6.170 In re-examination, the Respondent explained that he envisaged some difficulties with the conditions as he works at different locations and is called in at the last moment for a single day. This meant that he would have difficulty in intimating work in advance. He estimates that 80% of his work is arranged in advance and 20% is arranged at the last minute.

7. SUBMISSIONS – THE COMPLAINERS

7.1 Mr Stuart for the Complainers submitted that the Tribunal should, in terms of S.29B(2) of the 1978 Act unconditionally disqualify the Respondent from the ophthalmic list of Shetland Health Board and all lists of ophthalmic optician or optometrists undertaking to provide, and of persons who are approved to assist in providing, general ophthalmic services; and failing that, the Tribunal should, in terms of S.29C(1) of the 1978 Act make an Order for the conditional disqualification of the Respondent.

7.2 Mr Stuart reminded the Tribunal that its function was one of balancing the interests of the public in relation to the proper operation of the health system and the interests of persons such as the Respondent in pursuing his professional career and quoted the dictum in *Bolton -v- The Law Society 1994 1WLR 512 and 519*: "A profession's most valuable asset is its collective reputation and the confidence which that inspires".

7.3 The Complainers referred to the Inner House of the Court of Session's decision in *Dad v a Decision of the General Dental Council Professional Conduct Committee (2010) CSIH 75* at paragraph 13, wherein the division had stated that although the comments in Bolton were made in the context of a member of the solicitors profession they were equally pertinent to a dentist. The Court added: "The public are entitled to rely upon the integrity of dentists. Members of the public may require to take important financial decisions in connection with their treatments and, as such, must be able to rely upon the honesty of the dentist treating them. Such treatments may also lead to significant charges being borne by the National Health Service." The Court further added: "In the context of professional misconduct it does not appear to us to be significant that the Appellant repaid the money which he had obtained by fraud. Such repayment would be beneficial to him in the criminal proceedings but it does not detract from his dishonesty, which was the issue of concern for the Respondents."

7.4 The Complainer's representative set out the principal factors in which the Complainers relied including fraud, other dishonesty or sharp dealing, the Respondent's character, the unsatisfactory provision of services by the Respondent since 1999 and his failure to cooperate

with the Health Authorities.

7.5 Insofar as the fraud is concerned, the Complainers submitted that the Respondent knowingly and with intention to deceive the Complainers submitted, or instructed his staff to submit, GOS 4 Forms, pretending them to be for repairs and replacements whereas they were in fact submitted for payment in respect of the supply of spare pairs by the Respondent to his patients, that this fraud involved 616 patients and that the Respondent's purpose in perpetrating the fraud was to deceive the NHS into making additional payments to him and as a result of which he gained a dishonest financial advantage over the Complainers and that he breached the obligations of trust and good faith which operates between the Health Boards and practitioners. The Complainers submitted that the Respondent's fraud was planned and not spontaneous, and perpetrated over a period of about five years in relation to over 600 patients. It was effected during the period in question in a manner calculated to avoid detection, and was discovered through a detailed examination of the Respondent's records and not, for example, by the voluntary disclosure by or on behalf of the Respondent.

7.6 Whilst the Tribunal's original Statement indicated that the fraud "was not on a grand scale" it was nevertheless, a significant and substantial sum of money and that the Respondent was motivated by greed and a reckless disregard for the consequences. It was submitted that the circumstances of the fraud were sufficiently serious as to be likely to damage the reputation of the profession of optometrists and that it was likely to undermine the confidence in the profession and that it was unlikely that either the health authorities or other practitioners could in the future with any confidence rely on the integrity or honesty of the Respondent given the particular circumstances of his fraud. This, the Complainer submitted, was regardless of whether the Respondent might in the course of his future practice as a locum optometrist have responsibility for claim forms or have a direct financial interest in the volume of business generated by his employer.

7.7 As to other incidences of dishonesty or sharp dealing, the Complainers submitted that the evidence of Andrew McCullough of Vision Express. That the Respondent had said to him that whilst he could not sign NHS forms for work that he had carried out that McCullough could

secure another optometrist to sign them and that the Respondent would not say anything. Such a course of action would have been improper. GOS forms in force in 2007 made it clear that it was the practitioner who conducted the eye examination who was to sign that part of the form.

7.8 It was suggested to Mr McCullough on cross examination that it was he (Mr McCullough) who would obtain another optometrist to sign the forms. This suggestion was denied by Mr McCullough. Indeed his evidence was that the forms in question were still in his store. The suggestion by the Respondent that Mr McCullough would have another optometrist sign the forms was a serious one.

7.9 The Complainers accepted that McCullough's evidence was uncertain and that this was explainable by the fact that he was starting afresh with the business and that it was "an absolute nightmare" finding different locums for different days and, further, that the events in question occurred more than two and a half years before he gave evidence.

7.10 It was McCullough's evidence that the Respondent had, when resubmitting his invoice altered the amount due from either £250 or £275 to £300 without prior warning.

7.11 As to the Respondent's character, the Complainer's submitted that the Tribunal had previously found that the Respondent was in cross examination hesitant, evasive and contradictory and that his evidence in the current proceedings had been equally unsatisfactory in that he had been found to be prevaricating and avoiding giving a straight answer. He was evasive in responding to questions and his overall conduct in giving evidence suggested that he had not approached the exercise of giving evidence on oath with sufficient gravity. There was no evidence offering acknowledgement on the part of the Respondent either in the original proceedings or the current one that he had committed a serious wrong. Although the Complainers accepted that the Respondent had in these current proceedings acknowledged that he had submitted fraudulent claims for financial gain, this came under cross examination and had not been volunteered by him by giving evidence in chief to that effect.

7.12 The Complainers suggested that the Respondent's banking arrangements reflected poorly on his character in that cheques in payment for his locum work were made out to his son and paid into a bank account in the name of his son and that he had done so since late 2005 and that such an arrangement is unprofessional and will tend to bring the Respondent and his profession into disrepute.

7.13 The Complainers submitted that there was evidence of abusive conduct on the part of the Respondent, in that in the course of telephone conversations he had had with Jacqueline Miller, the Respondent had become "a bit abusive" and she felt that nature of the conversation to be confrontational and intimidating.

7.14 The Complainers submitted that the Respondent had conceded in evidence in previous proceedings that he was too lazy to read the relevant regulations and that he was unfamiliar with them. This reflects poorly on the Respondent's professionalism.

7.15 The Complainers submitted that the Respondent had not repaid a sum of £16,938 (from an original sum defrauded of £29,398.70), and given that the Respondent had still not been paid the outstanding balance, it might reasonably be inferred that he has no intention of doing so. This reflects poorly on the Respondent's character.

7.16 As to the question of whether the Respondent had provided a satisfactory service since 1999, it was submitted by the Complainers that he had not done so in that the Respondent had carried out locum work in circumstances where the practices for which he had worked had been unable to obtain payment from the Health Board for his work. In particular Gregory Pecks in Dundee had lost between £1,500 - £2,500 in respect of the claim forms submitted for which the Health Board would not pay; similarly Fred Watt of Huntley for whom the Respondent had acted as a locum was unable to recover monies due from Grampian Health Board; Optimeyes in Broxburn for whom the Respondent had acted as a locum did not receive payment from Lothian Health Board for the Respondent's work. These contractors had trusted the Respondent to be appropriately qualified and registered to do the work and that the Respondent's conduct was accordingly a breach of trust. He breached the National Health

Services (General Ophthalmic Services) Scotland Regulations 2006 by purporting to provide or to assist in providing general ophthalmic services while not entitled to do so, as he was either not registered on the Ophthalmic List of the Health Board within the area in which he was practising, or not registered on the Ophthalmic List of that Health Board to provide general ophthalmic services at the practice premises in question. His claim that he was providing private ophthalmic services was not supported by the evidence.

7.17 The evidence of the Complainer's witnesses was that it was quite clear that the new 2006 Regulations would require an optometrist who provided general ophthalmic services to get registered in the area where he practiced, and that it was unlikely that any practitioner would be unaware of the then forthcoming changes to the Regulations. On a balance of probabilities, the Respondent would have been aware by 1st April 2006 of the requirements of the 2006 Regulations so far as they related to the need for him to be registered to work in a Health Board area or practice.

7.18 As to his failure to cooperate with the Health Authorities, it was submitted on behalf of the Complainers that the Respondent submitted inaccurate or incomplete information when applying for inclusion on the Ophthalmic List of Health Boards. In particular , in the Respondent's Application Form in June 2005 for inclusion on the Ophthalmic List of Greater Glasgow Primary Care Trust, he failed to disclose that he was on the Ophthalmic List of Shetland Health Board and, indeed, answered "no" to the question "Are you currently on the Ophthalmic List of any other Primary Care Trust/Island Health Board," when in fact he was on the Ophthalmic List of Shetland Health Board. His response was misleading.

7.19 Further, in the Respondent's Application Form in June 2005 for inclusion in the Lothian Primary Care Trust Ophthalmic List, he failed to disclose that he was on the list of Shetland Health Board and that said response was misleading and that he could not be relied upon to cooperate with the Health Authorities in providing accurate and complete information to them. It was submitted on behalf of the Complainers that in the Respondent's Application Form in 2007 to Lothian Health Board for inclusion on the second part of the Ophthalmic List, he failed to disclose that he had been investigated for fraud. When specifically asked in the form "Are

you being or have you been where the outcome was adverse investigated by NHS Services Scotland in relation to fraud" he ticked the "no" box and added no further information. At the time of completion of that form (7th March 2007) this Tribunal had already made a finding of fraud against him as per their statement dated 5th January 2007 and, as such, the Respondent's answer was misleading and demonstrates that he cannot readily be trusted to provide accurate and candid information in response to requests from the Health Authorities.

7.20 The Complainer submitted that the Respondent exhibited disdain in his evidence in respect of Lothian Health Board's requests for documentation from him, which generally he ignored or otherwise failed to obtemper. Similar requests from Greater Glasgow Health Board were equally ignored.

7.21 The Respondent had failed to keep the Health Authorities updated with his current work and personal information, in that a practitioner is obliged to notify the Health Board of any change affecting the entries which the Ophthalmic List is required to obtain in relation to him (2006 Regulations, Reg 7(2)). The period for doing so was fourteen days up until 1st April 2010 with effect from which date it was to be reduced to seven days (NHS (GOS) Scotland (Amendment) Regulations 2010 Reg 3(3)(c)). It was necessary and desirable in the interests of sound administration for the Health Authorities to have accurate information for practitioners including contact information at work and at home, the latter particularly in the case of a peripatetic locum.

7.22 The Respondent failed to give notice of ceasing to practice at Browns to both Lothian and Greater Glasgow Health Boards and, despite having been written to by Greater Glasgow Health Board, the Respondent did not reply. Further, the Respondent had failed to tell Lothian Health Board that he was working at For Eyes in Edinburgh.

7.23 The Complainer submitted that the Tribunal should disqualify the Respondent unconditionally in terms of Section 29B(1)(b) and (2) of the 1978 Act as amended on the basis of a planned fraud perpetrated by the Respondent over a lengthy period involving a large number of patients and involving a large sum of money, some of which has still not be repaid. Further,

that the Respondent had more recently engaged in other dishonest dealings in relation to Vision Express Ayr in that he had been evasive both in giving evidence and in his dealing with the Health Authorities, engaged in verbal abuse of an individual in the course of business, demonstrated a lack of professionalism (for example as to his admission that he was "too lazy" to read the Regulations which applied to his practice) or failed to demonstrate genuine contrition and that it was unlikely that conditional disqualification would remedy the Respondent's poor character. It is further submitted that the Respondent's provision of Ophthalmic Services since 1999 had been unsatisfactory in that, for example, he had carried out locum work in circumstances where practices for which he had worked had been unable to obtain payment from the Health Board for his work and that the Respondent had failed to cooperate with the Health Authorities, that he had submitted inaccurate or incomplete information, failed to comply with transitional arrangements following the commencement of the 2006 Regulations and failed to respond within a reasonable time to reasonable requests from the Health Authorities with information.

7.24 It is further submitted that the Respondent had accepted that there would be alternative lines of work available to him in the event of full disqualification such as working as a dispensing optician, private sight testing or work in laser clinics and that conditional disqualification would involve an element of monitoring which would be likely to impose a burden of cost of administration upon the Health Authorities. The Complainers submitted that in the event that conditions are imposed on the basis of a conditional disqualification the Complainers had lodged a draft set of conditions which, if imposed, should apply for a period of at least two years and that, if imposed, to restrict the Respondent to two practice areas, i.e. Lothian or Greater Glasgow Health Boards and that supervision should be by an optometrist in order to secure and ensure the integrity of any supervision and that any supervisor should not be a relative of the Respondent and, further, that the Respondent should be required to keep a diary of his practice and to have a supervisor countersign the Respondent's diary. In addition, the Respondent should be required to make his diary routinely available to the Health Authorities so that the claims which are made in respect of his work could be monitored and audited.

8. SUBMISSIONS – THE RESPONDENT

8.1 It was submitted by Mr McKenzie on behalf of the Respondent that, in terms of Lord Clarke's comment in *Kelly v Shetland Health Board 2009 CSIHV* at paragraph 16: "The Tribunal's function is rather one of balancing both the interests of the public in relation to the proper operation of the health system and the interests of persons such as the Appellant in pursing his professional career" and that it would be accordingly unjust to disqualify the Respondent for reasons that the admitted fraud took place between 1995 and 1999, that the criminal proceedings resulted in the Respondent paying back the sum of £12,400, and that these proceedings were subsequently deserted by the Crown. He also submitted that the Tribunal had expressly stated that the fraud was not "on a grand scale" and that since 1999 the Respondent had continued to operate as an optometrist in Shetland and since 2005 had worked as a peripatetic locum optometrist.

8.2 It was submitted that the Respondent had no other qualifications other than optometry and there was nothing to suggest that the Respondent was other than a first class optometrist nor had he ever been the subject of any complaint in relation to his clinical capabilities nor had committed or attempted to commit any fraud since 1999.

8.3 As a locum optometrist his responsibility is for carrying out NHS sight tests and he has no responsibility as to the submission for payment of a sight test voucher.

8.4 It was submitted on behalf of the Respondent that as a result of the admitted fraud, his marriage had broken down, the business with his wife had collapsed and he had suffered a nervous breakdown.

8.5 It was submitted on behalf of the Respondent that both the 1986 and 2006 Regulations were complex. The provisions of the 1986 Regulations obtained when the Respondent was operating as a locum from 2005 until the enactment of the 2006 Regulations. The 1986 Regulations, as amended, provided; 6(2) that "the Ophthalmic List (of a Health Board area)

shall be divided into two parts... the first part shall relate to ophthalmic medical practitioners... second part to optometrists." In terms of 6(3) each part shall contain the names of persons entitled to be included therein, the addresses of any places in the Health Board's area in which they have undertaken to provide GOS, details of the days and hours they would normally be available at these addresses and the name of each ophthalmic medical practitioner or optometrist regularly engaged as a deputy, director or employee in the provision of GOS at these addresses. These Regulations further provide that a contractor will notify the Health Board of any changes within fourteen days.

8.6 We were directed to the "Terms of Service" and in particular Regulation 7 and 8 thereof which provided, inter alia, that an ophthalmic medical practitioner may arrange for sight to be tested by another ophthalmic medical practitioner, and may arrange for a patient's sight to be tested by another optometrist, and that any contractor who makes an arrangement for the regular provision of services by a deputy shall notify the Board of the arrangements. If the Deputy is not already a contractor, the obligation is to "secure that he applies for inclusion in the Ophthalmic List" and that such contractor shall be responsible for all acts, omissions of any person acting as his Deputy and of an employee of that person.

8.7 It was submitted that in terms of Schedule 6 to the 2006 Regulations, the 1986 Regulations were amended in eighteen instances by way of statutory instrument, where a "contractor" is defined as a person who has undertaken to provide GOS and whose name is included in the Ophthalmic List. Mr McKenzie submitted that as at 1999 the Respondent was an optometrist and remained on the Shetland Health Board list. That being so there was nothing in the Regulations which precluded a locum, such as the Respondent, working for a contractor whose name is on that Health Board's list, even though the locum himself is not on the list. In terms of the 1986 Regulations, if the contractor "regularly" employed the locum then steps should be taken, not by the locum, but by the Contractor to have the locum included on the list. If a locum works regularly at a practice then he goes on the list and becomes a contractor himself.

8.8 Mr McKenzie submitted that when the Respondent asserted that he worked in Shetland and

also did locum work, he was entitled to do so, and that when he ceased working in Shetland, he was entitled to work as a locum in other Health Board areas. The Respondent had thought that he had "national rights and grandfather rights", and that as he did not work at any such practice regularly, there was no requirement for him to go on that Health Board's Ophthalmic List. He stated that it was the Respondent's evidence that he was asked by Brown's Opticians, who have premises in Glasgow and Edinburgh, to work "regularly" for them and accordingly, he applied to go on to the Glasgow and Lothian lists and which he did. It was his view, accordingly, that prior to the introduction of the 2006 Regulations, the Respondent's only failure was not to let Lothian Health Board know that he was no longer working for Browns. He stated that the Respondent's failure should be seen against a background of the Respondent working as a locum on a virtually full time basis, throughout Scotland and that without any difficulties. Whether or not the Respondent read or understood the Regulations, he was actually practising within them.

8.9 It was submitted that as to the 2006 Regulations, 6(2) provides: "The Ophthalmic List shall be divided into two parts – (a) the first part of which shall be ophthalmic medical practitioners and optometrists who have undertaken to provide general ophthalmic services under arrangements with the Board in terms of these Regulations, and (b) the second part of which shall be of ophthalmic medical practitioners and optometrists who are approved by the Board to assist in the provision of such services". These are similar provisions to those applicable to the 1986 Regulations as to the information required e.g. names, addresses etc with the addition of each persons professional registration number and the date of that person's first registration. In addition, there is a provision that an ophthalmic medical practitioner or optometrist may not provide ophthalmic services in a Health Board area unless that person's name is included in the first part of the list of that Board, nor may an optometrist assist in the provision of GOS Board area unless that person's name is included in the first or second part of the Ophthalmic List of that Board. Mr McKenzie submitted that the evidence before the Tribunal was that the "first part" related to premises and the "second part" related to peripatetic optometrists or locums such as the Respondent. He suggested that the intention of the 2006 Regulations (as opposed to the 1986 Regulations) was that to do any work as an optometrist, he or she required to be on either the first or second part of the Board's

Ophthalmic Lists

8.10 In terms of Regulation 7: "Application for inclusion on Ophthalmic List and notification of changes" – it is provided that an optometrist who wishes to be included in the Board's List shall submit a written application to that effect either on the first or on the second part of the list, and shall include an undertaking in relation to an application in the first part to provide GOS and to otherwise comply with the terms of service and, in the case of an application in the second part, an undertaking to comply with various paragraphs contained in the terms of service, and shall notify the Board of any changes or additions within fourteen days".

8.11 Mr McKenzie then referred to the Terms of Service at paragraphs 9 and 10 which provided that an optometrist may arrange for eye examinations to be carried out on his behalf by another optometrist, provided that the other optometrist (deputy) is included in the Board's List for the area, and that any contractor who makes an arrangement for the regular provision of services by a deputy shall notify the Board of these arrangements. Further, an optometrist who employs a person to carry out eye examinations shall employ only another optometrist from the Board's List for the area in which such eye examinations are to be carried out, and that an optometrist who employs another to carry out eye examinations shall employ only another optometrist on the Board's List for the relevant area or a person acting under his continuous personal supervision who is authorised to carry out eye examinations in terms of the Opticians Act 1989.

8.12 It was submitted that in terms of Regulation 10 any such contractor who makes an arrangement for the regular provision of services by an employee shall notify the Board of the arrangement.

8.13 In terms of Regulation 26, Mr McKenzie stated that the first part of the Board's Ophthalmic List on 1st April 2006 shall be deemed to include the name of any person who was included in the Ophthalmic List of that Board kept under Regulation 6 of the 1986 Regulations (known as "the previous Ophthalmic List") on 31st March 2006. He stated that in terms of Regulation 6 any person whose name is deemed to be included in the Board's List in terms of paragraph (3)

shall no later than 30th June 2006 submit to the Board an Enhanced Criminal Certificate and that any person who wishes to be included on the second part of the Board's List can conduct GOS in the Board's area without being included on the list until 30th June 2006

8.14 Mr McKenzie stated that in terms of Regulation 26 of the National Health Service (Tribunal) (Scotland) Regulations the Respondent could not be added to any list until the Tribunal proceedings had been finally concluded.

8.15 Following upon this preamble, Mr McKenzie submitted the following propositions:-

(a) As at 1st April 2006, the first part of Lothian's list was deemed to include the Respondent;

(b) By virtue of Regulation 26(8) the Respondent could assist in the provision of GOS, as a locum, without being on the second part of the list until 30th June 2006. In the event he did apply to be on the second part of the Lothian List.

(c) The 30th June date was extended to at least 30th December 2006 It was the evidence of Anne Shaw and Louise Hockaday that there were problems getting people to comply and that compliance took years and in the circumstances, the Respondent was entitled to operate as a locum in Lothian Health Board until at least the point of when the one off exercise was completed. He submitted that no date was known and there was no evidence before the Tribunal that the Complainer was writing to tell the Respondent that the date for compliance with Regulation 26(6) had passed.

(d) That for the purposes of the 2006 Regulations, the Respondent is not a "contractor" as he is not a person who has undertaken to provide GOS, and that only someone who had complied with the transitional provisions and applied to go on Part 1 of the list could be a contractor.

(e) It was submitted that, as the Respondent was not a contractor, and that since his application to go on to Part 2 of the list was never accepted, the "Terms of Service" did not apply to him. *Esto* the Terms of Service did apply to him, he would not be subject to the conditions set out at paragraphs 9 and 10 which relate to an optometrist working as a deputy or as an employee "regularly". Since 1st April 2006, the only premises at which the Respondent worked regularly was "For Eyes". In any event, intimation to the Health Board of an optometrist working "regularly" was the responsibility of the "contractor" which the Respondent was not. In addition, there is no requirement on someone such as the Respondent from working as a locum, to intimate any changes to his working practice, as in terms of 7(2) a person on Part 2 is only required to intimate any change or addition affecting the entries which that list is required to contain in relation to that person. The 2006 Regulations, unlike the 1986 Regulations, do not require someone in Part 2 to provide the address of practices within the Board's area when they are providing ophthalmic services. *Separatim* Regulation 7(2) relates to someone whose name appears on the Ophthalmic List, having applied under Regulation 7 and complied with its requirements, and who has therefore been accepted on to either a Part 1 or Part 2 List of the Health Board. The Respondent, he stated, did not fall into that category.

8.16 Accordingly, it was submitted on behalf of the Respondent that due to the transitional provisions including the fact of the 30th June deadline having been extended, as well as the ongoing Tribunal proceedings (which prevented the Respondent being added to either Lothian's Part 1 or Part 2 List), the Respondent was effectively in a state of limbo. It was submitted that the Lothian Health Board did not know how to treat an optometrist who was deemed by the judicial provisions to have gone on to the Part 1 List, and it would be unsurprising if the Respondent did not understand the Regulations and what was expected of him.

8.17 In relation to the Respondent's employment with Tonika Harry and Optimeyes in Broxburn, it

was accepted that the Respondent was working there occasionally and not "regularly". He submitted that Tonika Harry was aware by February 2007 that she was not being paid and when asked by the counsel for the Complainer why he thought he was eligible to work at her practice, the Respondent replied "I was registered in Lothian". Mr McKenzie submitted that as a matter of fact by virtue of the transitional provisions and the fact that the deemed date had been put back, he was entitled to work at her practice. One could think of no reason as to why that optometrist was not paid. Furthermore, there was no requirement, in terms of the Regulations for the Respondent to provide an "additional working address form". He made reference to page 18 of the Complainer' Sixth Inventory. He stated that the Respondent was not a "contractor" and that accordingly, there was no substance in the Complainer's assertion in their Statement of Facts that the Respondent "has indicated to optometrists practice managers or owners that he is eligible to work in that practice as a locum and he has known or ought to have known that he is not so eligible".

8.18 As to the Complainer's assertion that the Respondent knowingly submitted inaccurate information when applying for inclusion on the Ophthalmic List of at least one Health Board, it was assumed in Submissions on behalf of the Respondent that this was a reference to the application for inclusion on the second part of Lothian's list and signed by the Respondent on 7th March 2007 (the Complainers Sixth Inventory page 33 et seq), and that the answer to the question "Are you being or have you been where the outcome was adverse investigated by the National Health Services Scotland in relation to fraud?" Thereon the Respondent had answered "no". It was submitted on behalf of the Respondent that the latter explained in evidence that as of March 2007 he had appealed a decision of the Tribunal dated 5th January 2007 and therefore was of the view that there was no such outcome. In connection with this issue, Mr McKenzie stated within the Complainer's Fifth Inventory (page 15) there was a letter from the Scottish Executive to the Chief Executive of NHS Boards stating "I am writing to inform you that the NHS Tribunal has directed the national disqualification of Mr Brian Kelly... an appeal against the Tribunal's determination has been made and, should the appeal be unsuccessful, disqualification will take effect when the appeal process is exhausted. I will write to you again when the outcome is known". Mr McKenzie stated that that letter was dated 14th March, one week after the signing of the aforesaid form by the Respondent. It was his

assertion that against that background it could hardly be said that the Respondent knowingly submitted inaccurate information.

8.19 Mr McKenzie stated that there was criticism of the Respondent's failure to state that he was currently on the Shetland List when he applied to go on the Glasgow List in June 2005 (page 43 of the Complainer's Fifth Inventory). The Respondent had stated under cross examination that it must have been an oversight. Mr McKenzie asked us to note that when he came to apply to Argyle & Clyde in November of the same year, he indicated, correctly, that he was currently on the Shetland, Edinburgh and Glasgow Lists, thus underscoring the Respondent's assertion that his omission in June was in fact an oversight.

8.20 As to the Complainer's assertion that the Respondent had delayed or failed to respond to reasonable information requested by at least one Health Board and that he had failed to comply with the new legislative provisions in relation to GOS introduced in April 2006, Mr McKenzie submitted that the Respondent had lodged an application to go on Lothian's Part 2 List and which application was dated 7th March 2007 (page 33 of Production 5) but it being suggested to the Respondent that he should withdraw from Part 1, he declined to do so until he was successfully entered on Part 2 and that Louise Hockaday had not said anything about any requirement to complete the paperwork in relation to the Respondent's "deemed" inclusion on the Part 1 List.

8.21 With reference to the letter from Dr Winter dated 16th May 2007, addressed to the Respondent in which he stated inter alia that the Respondent had failed to submit a signed declaration of criminal offences (which Mr McKenzie submitted contradicts the letter of 28th March from Louise Hockaday) and there was no reference that the Respondent cannot be added to any list, he submitted that Dr Winter could not have been familiar with the new Regulations. It was submitted that it was only in the second letter from Dr Winter in September 2007 that the Respondent was advised that he cannot be added to any list. Mr McKenzie stated that it was contradictory for the Respondent to have been paid for his work at For Eyes and not for his work at Optimeyes on the basis that he had an address in Lothian Health Board Area care of Browns in Bonnyrigg. Mr McKenzie averred that it was unsurprising that the Respondent

would find this confusing.

8.22 As to the assertion that the Respondent had indicated to optometrists' practice managers or owners that he was eligible to work in that practice as a locum when he knew or ought to have known that he was not so eligible, Mr McKenzie submitted that insofar as the Huntly and Broughty Ferry practices were concerned, the Respondent appeared to have worked at these premises in December 2006 and January 2007 and that it had to be accepted that the Respondent had read and understood the 2006 Regulations and that he would have had to apply to be on the Grampian and Tayside Part 2 lists in order to work in these locations. However, Mr McKenzie submitted that the Respondent had explained in evidence that since he had previously worked in those Health Board areas, that he understood that he had "grandfather rights" and could continue to work there. He submitted that it was the responsibility of the practice owner to satisfy themselves that a locum was eligible to work as that is what the Regulations said. Had the owners made such an enquiry, the Respondent would either not have been offered the work or alternatively he could have carried out the work on the basis that he would not sign the sight test vouchers.

8.23 Mr McKenzie submitted that insofar as the evidence on Andrew McCullough, the store director of the Vision Express premises in Ayr is concerned, this could not be relied upon as being either credible and reliable. At the time of the Respondent working there Mr McCullough was 23 years of age and had just taken over the franchise at Vision Express in Ayr a few weeks previously. Mr McCullough had stated that he had asked the Respondent about signing forms and had explained to the Respondent that he was not going to send the forms out as he was not registered. He stated that Mr McCullough knew that the Respondent would not be signing forms and that he was prepared to take a "hit" on the sight test. Mr McCullough had also stated that he was to withdraw a statement he had given to the Respondent's solicitors. It was submitted on behalf of the Respondent that by the end of the first day at the Vision Express premises in Ayr that Mr McCullough knew that the Respondent could not sign the forms and engaged him again and paid him again on the second occasion and accepted that he was taking a hit, and that there was no justification for Mr McCullough withholding payment of the third invoice.

8.24 Mr McKenzie invited us to accept that Mr McCullough's evidence that 10% of Mr Kelly's work was subject to recall was inherently unbelievable standing that other witness gave evidence that the Respondent was an excellent optometrist, and in particular the evidence of Ian Campbell at For Eyes where the Respondent had worked on a regular basis for a period of approximately six months, and he could recall only one incidence of a recall relating to the Respondent's work.

8.25 In connection with Mr McCullough's evidence that he had remembered a discussion after speaking to the Respondent, the Respondent had said "I can't sign them (the GOS forms)... if you get Kimberley to sign to sign them... I will not say anything". Mr McKenzie stated this assertion made little sense as both parties knew that the Respondent would not be signing the forms.

8.26 It was submitted that the evidence of Jacqueline Miller (Vision Expresses Regional Manager) was that she recalled that she did not speak to the Board about the Respondent until the end of February 2008, and it was accordingly reasonable to conclude that as at this point Mr McCullough had made no mention to his Regional Manager about any difficulties he had in trying to secure payment for the sight tests done.

8.27 In relation to the aspect of conditional disqualification and the draft conditions lodged by the Complainers, the Tribunal should not be constrained by the evidence of Nic Zappia that it was "not really our job to supervise optometrists" and that "there should be no expense on our part to ensure that contractors comply with what we consider to be day to day requirements". Mr McKenzie stated that these views should not influence the Tribunal but if there was any restriction on the Tribunal's ability to impose conditional disqualification under reference of cost implications, then the 1978 Act would have so provided and does not.

8.28 Mr McKenzie stated that in terms of Section 29(C)(5)(b) of the Act the Tribunal may by direction confer functions on any Health Board for the purpose of or in connection with the imposition of any conditions, and that the Tribunal had the ability to confer functions upon the

Board such that any conditions could operate even where the creation of such functions would be likely to have cost implications. It was further submitted that the Tribunal could take into account the comments of Lord Clarke that "such a scheme involved does not exclude the possibility of a conditional discharge being an appropriate disposal of a case even in fraud cases were there has been a serious breach of trust... that is for the Tribunal when that has been proposed to it as a suitable means of disposal to address carefully the factual and legal reasons which point against it".

8.29 It was submitted that if the Tribunal are contemplating conditional disqualification, then any supervision did not require to be put in place to oversee the Respondent's clinical work, as there had been no substantial criticism of it, but rather relating to the prevention of some sort of fraud being perpetrated on a Health Board. Standing that the Respondent only carries out sight testing as a locum, he has no responsibility for the submission of GOS vouchers or indeed making any claim against the Health Board. The Tribunal would require to be satisfied that "the conditions" prevented any risk or detriment being caused to a Health Board Scheme by the Respondent. He submitted that if the Respondent is only to operate on Part 2 of the Lothian and Glasgow Lists as a locum optometrist, and without responsibility for making any claim on the Health Board, what risk to the detriment of a scheme would any conditions prevent? Mr McKenzie submitted that it was difficult on the evidence led to define where the risk of detriment to a Health Board Scheme lies, and that to impose a conditional disqualification in the absence of identifiable risk would be unjust, but he accepted that the Tribunal might be able to identify some future risk in terms of Section 29(7). It was on this basis that the Respondent had accepted in evidence that, so far as the majority of the conditions were concerned, he had no difficulty with them. In terms of Section 29(C)(2)(c) he would undertake to assist in the provision of ophthalmic services only in Lothian and Glasgow. He submitted that it would be unjust that any "supervision" be carried out by a Part 1 optometrist. It was submitted that a large number of premises that the Respondent had worked for had only a single Part 1 optometrist and that he was asked to provide cover at those premises due to absence of that optometrist perhaps due to illness, holidays or some other reason, and that he would invariably be the only optometrist present.

8.30 It was submitted that it would be impossible to achieve a situation whereby a Part 1 optometrist would sign off the Respondent's work, and whilst the Respondent could keep a paper diary, if he failed to submit it at the end of the month, then he would become liable to the provisions of Regulation 11 of the 2006 Regulations and become liable to a suspension and likely referral to the Tribunal. He submitted it would be unlikely that an optometrist was going to check for work effected by the Respondent. The true test was whether or not the Respondent would be signing off his work as accurate and that if it was shown that he had not, he would suffer the consequences.

8.31 Mr McKenzie submitted that the draft Conditions were overly onerous and unjust, and would impede the Respondent's ability to work as a locum optometrist.

8.32 Finally, it was submitted on behalf of the Respondent that there should be no disqualification, and if there is to be a disqualification it should be conditional, based upon the draft proposed conditions but under deletion of the requirement to have a Part 1 optometrist to sign off the daily diary. There would be no difficulty with a Practice Manager or owner signing off the diary.

9. DISCUSSION

The Law

9.1 The 1978 Act sets out three possible ground or "conditions for disqualification" for the making of representations to the Tribunal and the consequent holding of an Enquiry by the Tribunal. The second of these conditions is defined in Section 29(7)(a) of the 1978 Act and is referred to as a "fraud case" (see sub-section 11); and

"the second condition for disqualification is that the person concerned (a) has (whether on his own or together with another) by an act or omission caused, or risked causing, detriment to any health scheme by securing or trying to secure for himself or another any financial or other benefit; and (b) knew that he or (as the case may be) the other was not entitled to the benefit."

9.2 Where the Tribunal finds a case established against a practitioner, the first requirement set out in the 1978 Act is that the Tribunal "shall disqualify him" for inclusion on the List to which the case relates and all equivalent list (1978 Act, Section 29B(2). The only qualification is that the Tribunal "shall not make a disqualification... under this Section, if they are of the opinion that it would be unjust to do so (Section S.29B(4)).

9.3 Section 29C deals with conditional disqualification. Section 29C(1) states:

"The functions of making disqualifications under Section 29B include making a conditional disqualification, that is, a disqualification which is to come into effect only if the Tribunal determine (on a review under Section 30) that the person subject to the Enquiry has failed to comply with any conditions imposed by them".

9.4 Section 29C(2) then states:

"Conditions may be imposed by virtue of sub-section (1) with a view to...

(b) preventing any acts or omissions within Section 29(7)(a).

(c) ensuring that the person –

(i) performs, undertakes to provide or assists in providing only services specified (or of a description specified) in the condition..."

9.5 Section 29C(4) specifies that "Section 29B(4) applies to a conditional disqualification as applies to disqualification".

9.6 The requirement to consider the justness of a disqualification arises whether that disqualification is immediate or conditional. In effect, conditional disqualification is a sub-category under disqualification, a modified application of the Tribunal's power. In our view, in statutory terms, it would be open for the Tribunal to find one or more of the conditions for disqualification established but then not to impose any disqualification at all, if satisfied in the circumstances of a particular case that disqualification would be unjust. Whatever form of disqualification the Tribunal imposes must be justifiable by reference to the case established against the practitioner and, in relation to conditional disqualification, the aptness of the proposed conditions.

9.7 In the case of conditional disqualification, the clear expectation implicit in the terms of Section 29C(2) is that any conditions imposed must be such as would allay the concerns established against the practitioner, and they should be designed to remove or minimise the risk of behaviour detrimental to any health scheme, whether by limiting the right to practice in some way, by requiring the practitioner to undertake training or some other activity, or by prescribing certain conduct. Taking into account the relationship betweens Section 29B and 29C, what is required in practical terms is that if the Tribunal finds the case established, it must firstly consider whether it would be unjust to impose any form of disqualification. Unless satisfied that any form of disqualification would be unjust, the Tribunal must then consider whether conditional disqualification would be appropriate, workable and proportionate in removing any prejudice to the Health Service and, if not, then unconditional disqualification would apply. Taking account of the wide discretion granted under Section 29C(2) as to possible conditions, the Tribunal has to ensure that whatever form of disqualification it imposes is no more than is required to provide a proportionate and efficacious answer to the difficulties established in the

case. The purpose of the proceedings before this Tribunal is to address inefficiency, fraud or unsuitability. If conditions can be devised that the Tribunal is confident will remove the prejudice to a health scheme then it would be unjust to go further and impose immediate (i.e. unconditional) disqualification. In determining such questions the Tribunal must, having regard to all the evidence, at all times balance the interests of the Practitioner in pursuing his career with those of the public in relation to the proper operation of the Health System.

9.8 We therefore require to consider the following questions on the basis that the fraud case has been made out:

(i) Would it be unjust, having regard to all of the evidence, to disqualify Mr Kelly,whether conditionally or unconditionally?

(ii) If disqualification would not be unjust, and in balancing those interests, are there conditions which the Tribunal could appropriately impose that would efficaciously address the proven detriment to the Health Service while allowing he Respondent to pursue his career?

The Evidence

9.9 Mr McKenzie developed a number of propositions arising out of his understanding of the relevant legislation and which we propose to address prior to coming to our conclusions drawn from the evidence.

9.10 Regulation (6)2 of the 2006 GOS Regulations divided the Ophthalmic List of each Health Board into two parts – the first part applying to those ophthalmic medical practitioners and optometrists who have undertaken to provide General Ophthalmic Services and the second part applying to those ophthalmic medical practitioners and optometrists who are approved by the Board to assist in the provision of such services. Part 2 was intended to include locum optometrists such as the Respondent. The purpose of these Regulations was that for any work to be effected by an optometrist in a particular Health Board area that optometrist required to be on either the first or second part of that Board's Ophthalmic List.

9.11 These Regulations came into effect on 1st April 2006. Transitional provisions were incorporated in Regulation 26 and that in terms of 26(3) the first part of the Health Board's Ophthalmic List was deemed to include the name of any person whose name was included in the Ophthalmic List of the Board under the previous (1986) Regulations together with all the information relating to that person which was contained in the previous Ophthalmic List. In terms of 26(4) any action taken by or on behalf of a Board prior to 1st April 2006 in relation to its previous Ophthalmic List would have effect on or after 1st April 2006.

9.12 In terms of Regulation 26(6) "any person whose name was deemed to be included in the Ophthalmic List of a Board in terms of paragraph (3) shall no later than 30th June (a) submit to the Board an Enhanced Criminal Certificate in relation to himself.. and (b) provide the Board with declarations specified in Part C of Schedule 2 and (c) consent in writing to a request by the Health Board.... for information relating to a current investigation, or an investigation where the outcome was adverse into that person...."

9.13 In terms of 26(7) the Health Board may extend the period prescribed in sub-paragraph (6) for such time as it considers appropriate in the circumstances of the case, *if it thinks it is not reasonably practicable for that ophthalmic medical practitioner or optometrist to provide it with such certificates, declarations and consents within the prescribed period.* (Our emphasis).

9.14 Regulation 26(8) states: "Any person who wishes to be included on the second part of a Board's Ophthalmic List shall be entitled to assist in the provision of General Ophthalmic Services in the Board's area without that person's name being included in that list until 30th June 2006 provided that person is an ophthalmic medical practitioner or optometrist ".

9.15 Regulation 7(2) states: "The contractor shall within fourteen days of any change or addition affecting the entries which that list is required to contain in relation to him notify the Committee accordingly".

9.16 In the interpretation section of the Regulations a "Contractor" is defined as "a person who has undertaken to provide General Ophthalmic Services and whose name is included on the first part of the Ophthalmic List".

9.17 Regulation 26 of the National Health Service (Tribunal) (Scotland) Regulations (2006)

provides that "A Health Board that receives notice pursuant to Regulation 9(3) may not add the practitioner subject to the Enquiry to any list until proceedings in that case are finally concluded (Regulation 9(3) deals with the situation where a Respondent is subject to an Enquiry).

9.18 The 2006 GOS Regulations placed the Respondent on Part 1 of the Lothian Health Board List for the transitional period. As he had applied to be included in Part 2 of the List, the transitional provisions of Regulation 26 applied. The transitional period in which to apply and have the application processed had been determined as concluding on 30th June 2006, but we heard evidence from Nic Zappia that this period had been extended informally to 15th December 2006. There was some evidence from Anne Murray and Louise Hockaday that this period had been extended in individual cases and we noted the evidence of Louise Hockaday that full compliance with Regulation 26(6) took years.

9.19 We accept Mr McKenzie's proposition that as at 1st April 2006, the first part of Lothian's List was deemed to include the Respondent and that by virtue of Regulation 26(8) the Respondent could assist in the provision of General Ophthalmic Services (as a locum) without being on the second part of the List until at least 30th June and perhaps up to 15th December 2006 (but subject to his adherence to all the Regulations obtained at that time). We accept that the Respondent did apply to be on the second part of the Lothian List, although the information supplied by him in his application both in relation to Part 1 and Part 2 was either incomplete or incorrect.

9.20 It has not been established precisely when the transitional period ended. It is specifically provided to have ended on 30th June 2006. In terms of 26(7) Health Boards were given discretion to extend the period if they considered it "not reasonably practicable" for an optometrist to provide them with the necessary certificates, declaration etc. There was no evidence that any such discretion had been exercised in favour of the Respondent. Given the evidence of Nic Zappia and Louise Hockaday, however, our understanding and interpretation of these witnesses' evidence was that up to 15th December 2006 and beyond Health Boards were dealing with individual applicants who were not compliant with the Regulations. It was pellucidly clear that the Respondent was pursued by Lothian Health Board during the course

of 2006 and the following year and considerable efforts were made to have him complete the process. The Respondent did not respond to efforts to have him complete the application and did not provide the information requested and, furthermore, when he did so he gave inaccurate information in terms of his declarations.

9.21 Mr McKenzie suggested that for the purpose of the 2006 Regulations, the Respondent is not a "contractor" since he is not a person who has undertaken to provide General Ophthalmic Services and that only someone who had complied with the transitional provisions and applied to go on Part 1 of the List could be a contractor. A contractor is defined as a person who is included on Part 1 of a Health Board's List. Regulation 26(3) declares that Part 1 is deemed to include the name of any person whose name was included in the previous Ophthalmic List of the Board. The Respondent was on that list by virtue of his former regular employment at Brown's Opticians in Bonnyrigg in 2005.

9.22 Accordingly, we are of the view that the Respondent was in fact a contractor and as such the Terms of Service incorporated in the 2006 Regulations would have applied to him. We do accept that the conditions set out in paragraphs 9 and 10 of the Terms of Service would not have applied to the Respondent as these conditions clearly apply to those employing either a locum or an employee.

9.23 Ms Hockaday's evidence was that she sent an email to the Respondent dated 20th June 2005 acknowledging his application for inclusion in Lothian Health Board's List in respect of premises at Browns Opticians at Bonnyrigg. She reminded the Respondent in that email of his obligation to give the Board three months written notice should he decide to cease practising at that address. She explained that in terms of the Regulations, three months notice was required if he were to cease practising. She also explained that fourteen days notice would be required if he intended to practice as a locum at an address within the Lothian Health Board area.

9.24 During her evidence she explained that after the introduction of the 2006 Regulations the Ophthalmic List was split into two – Part 1 for those who were providing services at particular premises and Part 2 in respect of those who were assisting in the provision of services e.g. a

locum. The Respondent automatically remained on Part 1 of the List in view of the transitional provisions until his Part 2 application had been processed. She explained and we accepted, that there remained a legal obligation in the meantime for a locum to advise the Health Board of any changes of addresses.

9.25 Miss Hockaday's evidence was that the Respondent did not apply to be included on Part 2 of the List until March 2007, some two months after the determination of this Tribunal's original decision in the proceedings against the Respondent.

9.26 Miss Hockaday stated that if someone required to apply to go on Part 2 of the List and had been subject to a fraud Enquiry they could not be added to that List and that any such application would be deferred until the final Tribunal outcome was known (in terms of Regulation 26 of the NHS (Tribunal) Scotland (Regulations) 2006 referred to). In respect of the Respondent's application for Part 2 registration, there required to be a Criminal Records Certificate, proof of identity, GOC Certificate of Registration and a Certificate of Training. There were some elements of the Respondent's Part 2 application missing and it was, in any event, set aside until completion of the necessary paperwork in connection with his deemed placement on application on Part 1 of the List. What was outstanding, insofar as the latter was concerned was a signed enhanced declaration regarding criminal offences.

9.27 The exchange of correspondence with Dr Mike Winter is illuminating. In Dr Winter's first letter dated 16th May 2007, he indicated to the Respondent that according to Lothian's records his name was included on Lothian Health Board's Ophthalmic List as at the address care of Browns, 47 High Street, Bonnyrigg. Dr Winter has noted in this letter that when the Respondent applied to join Lothian's List in June 2005, he failed to indicate that he was included on the Shetland Ophthalmic List at that time. Dr Winter also reminded the Respondent that he would have received a letter from Miss Hockaday dated June 2005 reminding him of his obligation to give NHS Lothian three months written notice should he cease practising at Browns Opticians. Dr Winter stated that no such notice had been received and that the Respondent had not practised at that address since September 2005. Further, the Respondent was reminded that he had failed to complete the necessary one-off exercise paperwork under the 2006 Regulations and that Miss Hockaday had written to him in February

and March 2007 concerning the outstanding paperwork. In addition, he had failed to return a signed declaration regarding criminal offences (under Part C of Schedule 2 of the 2006 Regulations, the Part 1 transitional provisions). Dr Winter also noted in this letter that the Respondent's application for Part 2 inclusion was inaccurate in that he had failed to acknowledge that he had been investigated by NHS National Services Scotland in relation to fraud. The Respondent was reminded in this letter that his Part 2 application for inclusion on the List in respect of the addresses for Optimeyes and For Eyes were not being processed and that his name was included only in Part 1 in respect of Browns in Bonnyrigg. The Respondent was requested to explain the discrepancies and deficiencies.

9.28 The Respondent replied to this letter on 17th July. He claimed in this letter to have sent all necessary papers to Miss Hockaday including criminal disclosures in March 2007. He claimed that as he had appealed this Tribunal's earlier decision that it "effectively puts the decision of the Tribunal in abeyance" and that he was not <u>being</u> investigated for fraud as "the investigation has now ended".

9.29 Dr Winter replied on 6th September 2007. He informed the Respondent, again, that his name had been included in Part 1 at the address of Browns in Bonnyrigg. The Respondent was reminded that the information was still required (and had been requested from him in March 2006 and February and March 2007) in connection with the transitional provisions were the Enhanced Criminal Record Certificate, a completed application form, forms of identification, signed declarations in respect of Part C of Schedule 2. He was advised that the Board would not be in the position to transfer his name to Part 2 of the Ophthalmic List whilst Tribunal proceedings remained outstanding. The Respondent was also requested to provide the Board with a list of practices at which he had worked since 1st April 2006. He was also requested to confirm, again, whether he had received and read the 2006 Regulations.

9.30 Dr Mike Winter had written to the Respondent on 16th May 2006 and 6th September 2006 the terms of both of which appear to us to be perfectly limpid and our view is that notwithstanding any extensions that may have applied at that time, the Respondent purposely and deliberately avoided obtempering the requirements necessary to complete his application for inclusion on Part 1 of the List. We do not agree that the correspondence in relation to the Part 2

application could in any way be construed as a conclusion to the outstanding issues remaining on the Part 1 one-off exercise. The letters from Dr Winter reminded the Respondent of his failure to return the signed declaration regarding criminal offences and could not have been clearer.

9.31 Further, in his application for inclusion on the second part of the List, the Respondent failed to disclose that he had been investigated for fraud. He had been asked the following question on the form: "Are you being or have you been where the outcome was adverse, investigated by NHS National Services of Scotland in relation to fraud?" The form offered a "yes" or "no" option. There was a following section which stated: "If yes, please provide details". The Respondent ticked the "no" box and added no further information. He did this in the full knowledge that he had been investigated for fraud prior to the proceedings which had, of course, not yet been concluded, in an attempt to conceal his involvement in these proceedings.

9.32 When the 2006 Regulations were introduced, as part of the one-off exercise, Part 1 optometrists were required to apply for Enhanced Disclosure, provide a signed declaration regarding criminal offences and submit a Certificate of Training. The Respondent had been reminded of this in letters from Miss Hockaday dated 15th February 2007 and copied to another address on 12th March 2007 by which time it would have been evident to the Respondent that he was still being chased for the Part 1 paperwork and that in advance of these requests being repeated by Dr Winter in May and September 2007.

9.33 Up until 5th January 2007, when this Tribunal issued its decision, no application for inclusion on Lothian Health Board List had been lodged by the Respondent. He then completed the application form on 7th March, the Tribunal having made a finding of fraud against him. Admittedly, an Appeal had been marked against that finding and that the effect of that Appeal was that these proceedings could not be finally concluded until that process was exhausted. We concur with the view expressed by Mr Stuart that the current Tribunal proceedings form part of the fraud investigation of the Respondent by NHS National Services Scotland and, in the circumstances, when the Respondent completed the application form in March 2007, he was in fact being investigated in relation to fraud. We do not believe the Respondent when he

states that he thought the lodging of the Appeal meant that a final deliberation had not been reached regarding his fraud and that notwithstanding a prior existence of an investigation and his admission of fraud in the Joint Minute in the earlier proceedings against him. We consider his explanation to be entirely disingenuous. There is no doubt in our minds that the Respondent completed that form knowing that his answer was untruthful.

9.34 The application to go on to Part 2 of the List was part of the transitional arrangements outlined in the 2006 Regulations and that the transfer from the "deemed" Part 1 to Part 2 would be coterminous once the application for both Part 1 and Part 2 had been satisfactorily completed. We do not accept Mr McKenzie's assertion that the Respondent was in "a state of limbo". He was in material breach of the Regulations in that he had failed to satisfactorily complete both parts 1 and 2 applications.

9.35 We do not accept that there was any degree of lack of clarity in the correspondence from Lothian Health Board to the Respondent. We heard sufficient evidence from both Nic Zappia and Louise Hockaday that Boards understood the transitional arrangements relating to those in the Respondent's position and although there were some delays in their implementation there were, according to Nic Zappia, a small number of practitioners including the Respondent who caused significant problems. We accept both the evidence of Mr Zappia and Mr Whittaker that the procedures were well publicised in the Optical press and that most optometrists understood what was required. We do have the Respondent's evidence in the previous proceedings that he never read the Regulations because he was too lazy or, in these proceedings if he did read the Regulations he did not understand them. He appears to have made little effort in determining what they either meant or what the consequences would be for not honouring them.

9.36 It was contended on behalf of the Complainers that the Respondent carried out locum work for practices in which he had worked and which practices had been unable to obtain payment from the Health Board for his work. In particular he worked at Gregory Pecks in Dundee as a locum from about November 2006 to January 2007 for about four or five days. At this point, the Respondent was not registered on the Ophthalmic List of Tayside Health Board in whose area the practice operated. Mr Adams, the owner of Gregory Pecks accepted that he did not

carry out any checks as to whether the Respondent was qualified to sign the relevant GOS forms and simply took him at his word and on trust. Mr Adams reported that he was out of pocket in the amount of between £1,500-£2,500 as a result of the Respondent's claim forms being rejected by the Health Board. Mr Adams had discussed the matter with the Respondent who advised him that he had thought he was registered. The Respondent had stated in evidence, however, that the first he knew about Mr Adams difficulties was as a result of the current proceedings. We preferred the evidence of Mr Adams on this issue.

9.37 In addition, the Respondent worked for a Fred Watt in Huntly within the Grampian Health Board area as a locum in December 2006 for seven days. He performed sight tests and vouchers in respect of those tests were submitted to Grampian Health Board for payment. In that instance, the Respondent was not registered on the Ophthalmic List of Grampian Health Board and as a result Fred Watt's practice in Huntly did not receive payment from the Health Board for the work that had been done. In both these instances we were of the view that the Respondent did this knowingly and without any concern as to the consequences for the proprietors of these businesses.

9.38 Mr McKenzie accepted in his submissions that had the Respondent read and understood the 2006 Regulations he ought to have appreciated that he would have had to apply to be on the Grampian and Tayside Part 2 list in order to work in these locations. He did go on to state that the Respondent had explained in evidence that since he had previously worked in those Health Board areas prior to 2006, and that without difficulty, he understood that he had "grandfather rights" and could continue to work there. "Grandfather rights" were never fully explained other than by Mr Whittaker who stated that prior to the introduction of the 2006 Regulations an optometrist who was registered within a Health Board area could work anywhere else in that Health Board area with another optometrist signing the relevant forms but this changed after the 2006 Regulations were brought in. He said that these regulations were a major change and he considered it unreasonable for any practitioner to be unaware of the changes that came into force on 1st April 2006.

9.39 We do accept that it is the responsibility of the practice owner to satisfy himself that a locum such as the Respondent was able to work at that practice and could simply have found out

by telephoning the Health Board. They did not do so and clearly have been punished financially as a result. Nevertheless, they did take the Respondent on trust that he was, as was clearly implied, if not actually stated by him, registered. He certainly carried out work and he knew or ought to have known that he was not so registered and whilst the Respondent was paid for that work he knew or ought to have known that those who employed him would not be paid.

9.40 A similar situation occurred when the Respondent worked at Optimeyes in Broxburn as a locum in December 2006 to January 2007. Ms Takoni Harry's evidence was that she had asked the Respondent whether he was registered with Lothian Health Board. She was aware that a form required to be submitted before work was carried out as the Health Board did not require to accept any claims for work effected prior to the form being submitted. She stated that the form was not complicated and that Louise Hockaday would deal with the forms expeditiously. It was her practice to ask locums to submit the form to her (Ms Harry) so that she could check them and then forward them to the Health Board to ensure that it had been done. It was Ms Harry's evidence that the Respondent had told her that he did not need her to submit the form as he was already registered with the Health Board. Ms Harry accepted that if a locum is required at short notice there still requires to be a check that they are registered before commencing work otherwise locums are employed at the owners own risk.

9.41 It was Mr McKenzie's submission that he could see no reason why, given that the Respondent was registered in Lothian Health Board by virtue of the transitional provisions, Ms Harry's practice had not been paid. We do not agree with that view. The Respondent had, during the course of 2006 and 2007, failed to submit any information required regarding either the outstanding documents in terms of the Part 1 registration or any application in relation to Part 2. During the course of 2006, he was still subject to this Tribunal's Enquiry (the Tribunal did not issue its decision until 5th January 2007) and for him to have stated that he thought he was registered with Lothian at that time, standing his failure to submit the necessary documentation, was a distortion of the truth. Further, he was registered on Lothian Health Board's List as an employee of Brown's of Bonnyrigg which, in fact, he was not.

9.42 Our view is that the Respondent would have known or ought to have known that had Ms Harry

submitted the application timeously, Lothian Health Board would have rejected it on the basis that no application for Part 2 had been submitted by the Respondent and that he was still subject to the Tribunal's proceedings and that notwithstanding whatever period of grace had been allowed for the submission of any forms.

9.43 We are in no doubt notwithstanding the evidence of the Respondent that Mr Kelly was being devious and duplicitous and was fully aware of the likelihood if not the certainty that Ms Harry and the other contractors referred to would not be paid for his employment.

9.44 This was not the only occasion in which the Respondent had submitted inaccurate information when applying for inclusion on the Ophthalmic List of Health Boards. For example, in the Respondent's application form for inclusion on the Ophthalmic List of Greater Glasgow Primary Care Trust in June 2005 (during the course of the original Enquiry) he failed to disclose that he was on the Ophthalmic List of Shetland Health Board. He was asked specifically in the application form "are you currently on the Ophthalmic List of any other Primary Care Trust/Island Health Board". The Respondent answered "no". He was in fact at that time on the Ophthalmic List of Shetland Health Board who had initiated these proceedings against him. There was a similar omission by him in his application in June 2005 for inclusion in the Ophthalmic List of Lothian Primary Care Trust where, once again, he failed to disclose that he was on the Ophthalmic List of Shetland Health Board when specifically asked the question. The Respondent stated when cross examined on this issue that he could give no explanation for these omissions other than oversight and that he accepted that in terms of his letter to Dr Winter dated 17th July 2007, he stated "you are correct in stating that in June 2005, I was included in the Shetland Ophthalmic List". Having been unable to give an explanation he did acknowledge that he ought to have stated that he was, in fact, included on the Shetland List.

9.45 We have mentioned above Lothian Health Board's requirement that the Respondent complete the necessary documentation and application for inclusion on Part 1 of the Lothian Health Board Ophthalmic List before they could consider the application in respect of the Part 2 List. What was required was an Enhanced Criminal Disclosure Certificate in respect of the Part 1 requirements. The Respondent did submit an application for a Criminal Record Certificate and

cheque dated 27th February 2007. However, the application form was not correctly completed in that it was an application for a Standard Disclosure Certificate as opposed to an Enhanced Certificate. The transitional Regulation 26(6)(a) specifically prescribes an Enhanced Criminal Certificate. The application form as completed by the Respondent, indicates "x" in the Standard Disclosure box and not the Enhanced Disclosure box. Dr Winter wrote to the Respondent on 6th September 2007 stating that the Enhanced Certificate was still required.

9.46 This letter from Dr Winter simply states to the Respondent "should you wish to practice in the Lothian area you should submit a fresh application". The Respondent was asked in evidence whether he did submit a fresh application and he stated that he did not do so. Further, he stated in evidence whether he understood that if he did not submit a fresh application that he would not be able to practice in the Lothian area to which he replied in the affirmative. He accepted in evidence that he continued to work in the Lothian area, notwithstanding that he had not returned the fresh application. His view was, bizarrely, that as he had not been told that he could not work in the Lothian area, he continued to do so notwithstanding his failure to submit a fresh application and having been told that he could not work in the Lothian Health Board area without having done so.

9.47 Further, the Respondent was asked to comment upon Dr Winter's request in the 6th September letter: "Please provide the Board with a list of the practices you have worked at as well as the dates you have worked in each of these practices since 1st April 2006". The Respondent confirmed that he did not do that and did not know why he did not do it. He did acknowledge that he could have done so but did not and could not give a reason why other than, perhaps, that he did not receive the letter but "if I did get the letter I don't know why I ignored it. Is there any proof that I actually got this letter?"

9.48 The Respondent was referred to Dr Winter's letter of 16th May 2007 in which he was asked: "If you would confirm you received a copy of the NHS General Ophthalmic Services (Scotland) Regulations 2006 and whether you are aware of the content of the enclosed". The Respondent acknowledged that he did not reply to that and further stated that he had only received a copy of the Regulations since the Tribunal had been convened as it was incorporated in the productions and that he did not have a copy of the Regulations in his

current position as a locum. This ran counter to the Respondent's earlier evidence in examination-in-chief when he stated that he had first seen the 2006 GOS Regulations when he had proposed to set up practice in Gourock. In Duncan Miller's evidence he confirmed that the Respondent had not replied to the points raised in Dr Winter's letter.

9.49 The Respondent was selective in the answers he would give to correspondence from the Health Board. He was clearly concerned about the Enhanced Disclosure he was required to effect to satisfy the conditions relating to the Part 1 application and consistently ignored requests to return the documentation relating to that application. He was not so diffident about sending in documentation in respect of the application for inclusion on Part 2 of the List as this was less searching. He had submitted the Part 2 application papers without completing Part 1. We cannot come to any other conclusion that he set out consciously to conceal his involvement with this Tribunal in his reluctance and failure to complete the requirements of the transitional Part 1 as also to fail to acknowledge that he had been investigated for fraud in his application to Part 2. This appears to us to be further evidence of his duplicity which he displayed both before his involvement in the first hearing and during that hearing and since.

9.50 Lothian Health Board's position was that because the Respondent had not successfully applied to go on to Part 2 of the List within the transition period he could only operate under the terms of Part 1 of the List at the practices at which he was listed i.e. Brown's of Bonnyrigg. The Health Board made it very clear that that was the position. It was equally clear to us that the Respondent was well aware of this thus the reason why he had not disclosed that he was working as a locum at For-Eyes when his employment there was picked up during a Health Board audit.

9.51 In Mr Zappia's evidence, which we accepted, he stated that the Respondent had told Greater Glasgow Health Board that he had submitted his "one-off" documentation following on the introduction of the 2006 transitional provisions to another Health Board. Greater Glasgow checked whether this was the case and found that it was not so. In fact, the Respondent failed to produce the one-off paperwork to Greater Glasgow Health Board.

9.52 It was submitted on behalf of the Respondent that when he applied to be added to the Argyll &

Clyde list in November 2005, he indicated that he was currently on the Shetland, Edinburgh and Glasgow Lists. This was pleaded as giving credence to the Respondent's assertion that his omission to mention to Shetland Health Board in the other applications was an oversight. We do not accept this. On two applications he declared that he was not on Shetland Health board's List and on a subsequent one he declared that he was. Whatever reason he had for including Shetland it did not seem to us that honesty was one of them.

9.53 We have had the benefit once again, of observing the Respondent in cross examination. As in the first hearing we found him to be evasive. Whenever questioning became difficult for him, he would constantly claim that he did not know why he either did something or did not do something. There were numerous examples:

(a) In cross examination he was asked whether he had read the 2006 Regulations. He replied "I may have read them but I may not have read them";

(b) When asked whether he had received the 2006 Memorandum that Lothian Health Board sent to all practices, he stated that he did not recall receiving it. He subsequently stated that it was possible that he did receive it. When asked if he had received it, did he read it. He said that he did, but thereafter did not recall receiving it. He again then stated that he did not know whether he had received the Regulations but that if he had received them, he stated he would have looked at them. He then stated that he knew the system was changing in or around 2006 but he did not know the Regulations were about to come out.

(c) He accepted that he did not consult any Health Board in relation to the 2006 Regulations. When asked why he did not consult any Health board on the Regulations the following exchange took place:

Mr Khurana: "Why didn't you ask the Health Board about the Regulations?"

The Respondent: "I don't know."

Mr Khurana: "Can you explain why you don't know?"

The Respondent: "I don't know".

Mr Khurana: "Why is it you do not know, can you explain that?"

The Respondent: "I don't know".

Mr Khurana: "Well is it because your memory is bad?"

The Respondent: "I don't know".

Mr Khurana: "You appear to be adopting a particular attitude in that you are saying that you do not know to everything that I ask; When you came to the realisation that you had been working in the Health Board areas after 2006 where you were not listed when did you realise that you were not permitted to do that?"

The Respondent: "I don't know".

Mr Khurana: "I am asking you when you came to that realisation did it occur to you – 'oh no I have been doing this wrong for the last year'?

The Respondent: "I don't know".

Mr Khurana: "What do you think about it now?"

The Respondent: "I don't know".

Mr Khurana: "I am asking you at the present time what you think about it"

The Respondent: "I don't know".

Mr Khurana: "Were there any other areas than Grampian, Shetland and Highlands and Islands that you thought you were registered in as of 2007?"

The Respondent: "I don't know."

Mr Khurana: "Well have a think about it".

The Respondent: "I don't know."

Mr Khurana: "Did you think you were registered in Tayside Health Board?"

The Respondent "Yes".

Mr Khurana: "As of 2007?"

The Respondent: "Yes".

Mr Khurana: When did you come to the realisation that you weren't registered in Tayside?"

The Respondent: "I don't know".

9.54 We considered that the disdain for requests which were made to the Respondent by various Health Boards for documentation became translucently evident during the course of such exchanges.

9.55 Lothian Health Board had asked the Respondent by letter dated 28th June 2005 to give three months written notice if he decided to cease practising at Browns opticians. That letter was sent to Browns in Bonnyrigg where the Respondent had intimated he would be practising. The Respondent did not give notice of ceasing to practice at Browns and the Respondent conceded in evidence that he did not tell the Board that he had stopped practising at Browns.

9.56 The Respondent failed to tell Greater Glasgow Health Board that he had stopped working at Browns opticians in Glasgow and had failed to tell Lothian Health Board that he was working for For Eyes in Edinburgh before a practice inspection on 21st March 2007 identified that he was working there.

9.57 The evidence surrounding the Respondent's employment at the Vision Express store in Ayr in May/June 2007 caused us some concern. We heard the evidence of Andrew McCullough who was the store joint venture partner at the Vision Express store. He had newly taken on the responsibility for the store and employed the Respondent as a locum optometrist in or around June 2007, approximately one month after Mr McCullough having taken up his position. Mr McCullough stated that he was aware that the Respondent had worked for a previous proprietor of the Business and he stated that he required an optometrist urgently and his evidence was that on the second day of Mr Kelly's employment as a locum, he realised that he had not been signing any forms and that the Respondent had advised Mr McCullough that he could not do so because he was not registered.

9.58 Mr McCullough stated that he was not aware of this prior to the Respondent being employed by him, but thought that he would be able to phone the Health Board and have the Respondent registered quickly or retrospectively. He had continued to employ the Respondent because he hoped that matters could be resolved with the Health Board at a later date. He did advise that he had badly needed a locum and had hoped the Respondent could sign but understood that he might not be able to. The witness had stated that the Respondent had suggested to him to have a Kimberley Dunsmore, who was a registered optometrist in the store, sign the forms and that the Respondent had said "I will not say anything". The witness

Mr McCullough stated that he thought this might have been fraud and had told the Respondent that he could not do that.

9.59 The witness Jacqueline Miller who was the Regional Manager for Vision Express gave evidence that Mr McCullough made her aware of an issue with the Respondent in that the Respondent had not been registered and she subsequently discovered from Ayrshire & Arran Health Board that the Respondent was not on their list and that she had subsequently instructed that a final payment due to the Respondent should not be paid. She thought that this conversation with the Health Board had taken place towards the end of 2007. She stated in evidence that when the Respondent had been advised that he would not be paid, he had contacted her and had been abusive on the phone to her.

9.60 The Respondent gave evidence that he had worked in Ayrshire & Arran Health Board area between January 2005 and July 2007. He had stated that he had worked for Vision Express but only on the basis that he would not sign the GOS voucher forms. He stated that that arrangement had been reached with the previous Practice Manager (Michael Hussain). He had advised Mr Hussain that he was not on the Ayrshire & Arran Health Board List. The Respondent stated that he had no idea whether these forms were subsequently submitted. He accepted that Vision Express would not recover any money for the sight tests if the forms had not been signed by him. After Mr McCullough had taken over the management of the store in May/June 2007, the Respondent stated that he had told Mr McCullough that he was not registered to work in Ayr and that he would not sign the GOS voucher forms. He stated that Mr McCullough did not care as the practice was very busy and that things were difficult. It was Mr McCullough who said to him, the Respondent, that he would have someone else to countersign the forms in order to maximise profits. He did not make any such suggestion himself. He accepted that his original invoice for the unpaid work was for £250 or £275 which he admitted he had changed subsequently to £300 but had agreed with Mr McCullough to reduce that to £275 in return for immediate payment. Mr McCullough had stated that the Respondent had asked that cheques be paid to an account in name of the Respondent's son "A Kelly". The Respondent had stated that he had access to those funds and explained that he had set up his affairs in this way because he was hoping to go into business with his son who was an optometrist in Edinburgh. The Respondent had earlier stated that an order for his

sequestration was granted in January 2006 but that his Trustee had not yet been discharged.

9.61 It may be appropriate for us at this point to highlight an exchange between Mr Stuart (for the Complainers) and the Respondent in relation to the alteration of the invoice to £300. It, perhaps, illustrates the difficulties this Tribunal had in accepting much of his evidence.

Mr Stuart: McCullough's evidence was that you had submitted an invoice of £250 or £275. He asked you to send in a replacement because he had lost the original and when you sent him the replacement you changed the number to £300 without any agreement to that effect. What is your response?

Mr Kelly: Mr Chairman am I still bound by your instructions? (the Chairman had, on an earlier occasion, admonished the Respondent for prevarication in his earlier evidence).

Chairman: Just answer the question.

Mr Kelly: I think it is important that I find because you asked me not to prevaricate last time we met so in this question I would like to give a full answer but failing to do that then I should ask yes, no, I don't know, you have instructed.

Chairman: Give us as full an answer as you are capable of doing.

Mr Kelly: But that would be taken as prevarication.

Chairman: I think you just give a full answer to the question.

Mr Kelly: I don't know.

Chairman: Are you saying you don't know whether you submitted a second invoice for £300?

Mr Kelly: Well I did submit a second invoice for £300 because that is the invoice that is here.

Chairman: Did you submit an invoice for £275 before that?

Mr Kelly: I don't know.

Mr Stuart: Do you accept that you did submit a replacement invoice on which you had changed the number to £300 without any prior agreement.

Mr Kelly: It may not have been the case as well.

Mr Stuart: Could you accept it may have been the case?

Mr Kelly: I also said it may not have been the case.

Mr Stuart: But you don't know. You tell us.

Mr Kelly: I don't know.

Mr Stuart: So you accept it may be the case.

Mr Kelly: I can't accept something I don't know.

Mr Stuart: I am asking you to accept a possibility.

Mr Kelly: I accept the possibility that it may have been a small amount, yes.

9.62 We were not impressed with the evidence of Mr McCullough. In part it did not ring true. For example, the suggestion that it was the Respondent who had encouraged Mr McCullough to have the forms signed by Kimberley Dunsmore was unconvincing. That he continued to employ the Respondent after he knew that he was not registered (if he had not known before) undermined his evidence that he was initially unaware that the Respondent was not registered with Ayrshire and Arran Health Board. There was the evidence of Limara McCloy who referred to a conversation that she had had with Mr McCullough in February 2008, where McCullough was noted to have stated that when he came into the store the day after the Respondent had worked there, he was told that the Respondent had tried to get Kimberley Dunsmore to sign off the paperwork on his behalf. Mr McCullough's evidence, however, was that Kimberly Dunsmore was not in the office the previous day. The complaints to Head Office at Vision Express and the conversation with Limara McCloy at the Health Board, some months after the events, again undermined Mr McCullough's evidence.

9.63 We do, however, accept McCullough's evidence that the Respondent had, without prior agreement, altered the amount on the final invoice when he resubmitted it to Vision Express from £250 or £275 to £300 without prior warning and thereafter reduced it to £275 in the hope of achieving a quicker settlement. That aside, we place no reliance on Mr McCullough's evidence and are prepared to give the Respondent the benefit of the doubt in relation to the events surrounding his employment at Vision Express and that Mr McCullough was aware that the Respondent was not registered in Ayrshire & Arran Health Board and that, it being a busy practice, Mr McCullough was prepared to take a "hit" on the employment of the Respondent.

9.64 This Tribunal took the opportunity of re-assessing the evidence in the original Hearing which resulted in our decision issued in 5th January 2007. It was the evidence of Gerard Lowery, who was Head of Audit and Counterfeit Services at the NHS that there was post dating of vouchers by the Respondent into the following month from vouchers already submitted, such

that the Health Board would be led to believe that the voucher was for a genuine replacement. There was in fact no way of knowing that it was a second or spare pair or free pair given at the earlier visit of the child whose glasses had been prescribed and that, accordingly, it was a breach of trust by the Respondent. Mr Lowery had explained that batches of vouchers would arrive at the Health Board's offices every month and in no particular order and that they were paid in trust and in good faith.

9.65 The Respondent had admitted in a Joint Minute signed by him in the original proceedings that he was paid for two pairs of glasses, one pair being paid on the basis that it was a replacement for allegedly damaged glasses. In this Joint Minute the Respondent had agreed that his firm had "made a substantial number of inaccurate and inappropriate claims for the use of spare, second or free pairs of glasses to children under 16 years of age... shortly after issuing the original pair of glasses; repairs and replacements not provided; repair and replacement for adults who did not qualify under the scheme". The Respondent had also admitted that there was a system in operation by him and within his knowledge whereby spare pairs of glasses were provided and claimed for by post dated forms and as a result of which he had benefited financially.

9.66 In the original proceedings, we heard evidence of a series of claims for spare pairs. For example, in the case of the sisters Laura and Sarah Muldoon, there was a pattern of these two sisters receiving spare pairs or replacements spanning a four year period. Both sisters attended the Respondent's practice on the same date, obtaining sight tests and receiving two pairs of glasses on each occasion. The second or spare pair was supplied under a GOS 4 (Repair and Replacement) Claim. The Respondent had stated in his evidence in these earlier proceedings that Laura Muldoon readily broke her spectacles and that they were damaged on a regular basis because he believed that the child was being bullied at school. We subsequently heard evidence from Laura's mother who stated that she had taken her daughters for a check-up every six months where they each received a new pair of glasses and a spare pair were supplied in addition. This was a regular occurrence. Two pairs of glasses for each daughter on every occasion. She denied the suggestion that the Respondent had offered in evidence that the children had asked for spare pairs. She was specifically asked if Laura had been bullied at school and she denied that that had happened. Both girls

were "careful with their glasses" and none had been irreparably broken. This appeared to us then to be one of the many examples where the Respondent simply lied and produced expedient responses in the face of fairly damning evidence against him. He did add in the particular case of Laura Muldoon, whilst it did generate additional income for his practice, it was of a negligible amount. What he failed to appreciate was that his fraud involved 616 patients, with a cumulative amount defrauded of approximately £30,000.

9.67 The Respondent had also stated in the original proceedings that his knowledge of the Regulations was based upon acceptance and rejection of vouchers by the Health Board and stated that he did not look at the Regulations on the basis that he was essentially a lazy person and that there was no need for him to consult the Regulations. He had felt, then, that the Health Board in its role to protect public money would understand the Regulations and therefore if they felt that they were not due to pay any of the vouchers that he had submitted, that they would have rejected them. This was a staggeringly naïve suggestion in that the Health Board would have had no way of knowing that the voucher forms submitted by him where indeed fraudulent and that, of course, the Respondent was well aware of this.

9.68 In the original proceedings, the Respondent admitted that he had instructed his staff to post date forms but he expressed that he did not know the reason for so asking them. When he was asked during these proceedings what other reasons there could be other than deception, he stated that he did not know and that he had never intended to deceive. This, once again, was a bewildering statement and we did not believe him. Having admitted in the Joint Minute that the submission of these forms was inappropriate, his statements in evidence appeared contradictory and cynical. What was also bewildering was that there was never any expression of remorse or regret at his actions.

9.69 We had established in our original Statement that the Respondent's purpose in perpetrating the fraud was to deceive the NHS into making additional payments to him, whereby he gained a dishonest financial advantage over the Complainers. Mr Lowery had stated in his evidence at the original hearing that the system operating between the Health Board and practitioners requires to be based on trust else the system of submission of forms and payment would grind to a halt and it would be impossible to carry out proper checks given that, certainly in the case

of Shetland Health Board, there was submission of claim forms in the order of 300/500 in a month. It would be impossible to effect any meaningful checks on those.

10. CONCLUSION

10.1 The Respondent has been found to have committed a fraud and whilst not having been convicted, the fraud is of a criminal nature and it was committed with a view to benefiting himself at the expense of a Health Scheme. That fraud was an abuse of trust which was planned and perpetrated over a period of five years in relation to over 600 patients. That, in our view, alone, is a major issue and raises serious questions as to the integrity of the Respondent.

10.2 In our original Statement we found that the Respondent was, in cross examination, "hesitant, evasive and contradictory". We noted that he had weighed up each question carefully and asked on numerous occasions that simple questions be repeated, giving the impression that he was considering his response to put himself in the best possible light. When specifically asked whether post dated forms could be construed as concealing fraudulent behaviour, he found difficulty in giving a clear and coherent response, notwithstanding his admissions to that effect in the Joint Minute.

10.3 The Respondent's evidence in the current stage of the proceedings has been equally open to criticism. He was evasive in response to questions as to how often he had worked for practices and about contradictions which had arisen where he felt he could practice in some Health Board areas without being registered on the basis of "grandfather rights". He then stated on one occasion that as he was not on the Lothian List he would not be able to practice there. In general we considered his evidence to be incredible and unreliable.

10.4 His evidence smacked of self justification and displayed a seminal lack of concern as to the gravity of his position, reflecting poorly upon his character. He was unquestionably prevaricating and avoided giving a straight answer as we have highlighted in extracts earlier in this Statement. The Respondent had been put on oath but his evasiveness, in our view, ran counter to that oath. He was argumentative, disrespectful and rude to the Tribunal.

10.5 During the course of his evidence on his employment at Vision Express, he requested his employers that the initial payments be made to him in the account of his son "A. Kelly". He

stated that this was the only business account which he conducted. At that time we understand, based on his evidence, that he had been declared bankrupt. We were invited to agree that such an arrangement was unprofessional and would tend to bring the Respondent and his profession into disrepute. It may be that such an arrangement was unusual bearing in mind that a Trustee had been appointed. The Respondent did not acknowledge that there was anything unusual in such an arrangement and in the absence of any evidence to the contrary we are unable to find that this arrangement was necessarily wrong.

10.6 We were invited to have regard to the fact that a significant part of the sum which the Respondent obtained from the Complainers by fraud has yet to be repaid. The sum defrauded was £29,398.70 of which £12,460 has been repaid. The outstanding balance is accordingly £16,938. The Respondent acknowledged in his evidence that he was liable to repay that money but had not done so. Given that over six years have passed since the criminal proceedings against the Respondent had been called in Court and that he has paid nothing towards the outstanding balance, the Complainers submitted that it should be inferred that he has no intention of doing so and that, accordingly, this reflects poorly on the Respondent's character and professionalism. We agree with that submission.

10.7 In his dealings with Health Boards he was, to our mind, unreliable, either not responding to enquiries by various Boards or if responding was being duplicitous in his responses.

10.8 The Respondent has not satisfactorily provided services since 1999 in that he has carried out some locum work in circumstances where the practices for which he has worked have been unable to obtain payment specifically Gregory Pecks in Dundee, Fred Watts in Huntly and Optimeyes in Broxburn to all of whom he claimed that he was appropriately registered with the various Health Boards when he knew that he was not and equally knew or ought to have known that these practices would not receive payment from the Health Board for his work. The Respondent has conceded that where he had worked in the Health Board Areas since 1st April 2006 without being registered in that area, he had been doing so incorrectly. Notwithstanding that these practices had a responsibility to ensure whether the Respondent was on the appropriate Ophthalmic List, they trusted him that he was qualified and registered. Their trust was misplaced.

10.9 His failure to cooperate with the Health Authorities was typified by his submission of inaccurate or incomplete information when applying for inclusion on Ophthalmic Lists and, further, he failed to comply with the transitional arrangements following the commencement of the 2006 Regulations. In addition, he failed to respond within a reasonable time to reasonable requests from the Health Authorities for information. Specifically, he failed to keep Lothian and Glasgow Health Boards updated with his current work and personal information.

10.10 By his own admission, if he is to be believed, he is either too lazy to read the Regulations or if he has read them he does not understand them. During his evidence in these current proceedings he admitted such. His representative pointed out that there were eighteen separate amendments to the 1986 Regulations. Having regard to his admitted failures regarding the current Regulations, we consider it highly unlikely that he will read or comprehend any future amendment to them. The Respondent's failure to read the Regulations arose at the original Enquiry and, despite that, he appears to have made no effort to read the current Regulations before this Enquiry.

10.11 The Respondent knew or at least ought to have known that before the commencement of the 2006 Regulations, he required to be registered in the Health Board Area or practice where he was to work. It is not credible that the Respondent would not have known the relevant changes in the Regulations that would affect his livelihood as a locum, whether by word of mouth or by contact with other optometrists. We are left with the inescapable conclusion that he was sufficiently aware of the Regulations and ignored them in his attempt to disguise the fact that he had been investigated for fraud in the event that this would have a disadvantageous affect upon his locum work.

10.12 The Respondent failed to disclose to Greater Glasgow Primary Care Trust that he had been on the ophthalmic list of Shetland Health Board. In fact, he specifically replied to that question in the negative. It was misleading. He was equally misleading in his failure to disclose to Lothian Health Board that he had been or that he was on the Shetland Health Board ophthalmic list, knowing, as he must have, that he was so listed. His responses to Dr Winter's

letters in July and September 2007 were both inaccurate and misleading.

10.13 In the Respondent's application form to Lothian Health Board dated March 2007, he was asked "are you being or have you been , where the outcome was adverse, investigated by NHS Services Scotland in relation to fraud". The Respondent ticked the 'no' box and added no further information, notwithstanding that the Tribunal had made a finding of fraud against him some two months earlier. His failure was both dishonest and misleading and his explanation disingenuous.

10.14 The Respondent's failure to produce an Enhanced Criminal Record Certificate was in our view calculated to obfuscate and mislead, notwithstanding that he had specifically been asked to produce such by Dr Winter.

10.15 The Respondent had told Greater Glasgow Health Board that he had submitted his "one off documentation to another Health Board", but Mr Zappia's evidence was that he had checked and that the Respondent had not done so. We believed Mr Zappia. This, in our view, reflects poorly on the Respondent's credibility and reliability as it also indicates that the Health Authorities would find considerable difficulty in trusting the Respondent in the future.

10.16 The Respondent in terms of the Regulations had been required to advise Lothian Health Board that he was working at For Eyes in Edinburgh and failed to do so. It was a practice inspection in March 2007 that identified that he was in fact working there. This was a further breach of Regulations.

10.17 The Respondent had been abusive, confrontational and intimidating to Jacqueline Miller, behaviour which was unprofessional.

10.18 The Respondent since 1997 has a continuous record of disdain, not only for the Regulations but for the Health Authorities with whom he has been found to fail to cooperate. This cannot be for the benefit of the sound administration of a Health Scheme and as a result of which he has benefited and the Health Scheme has not.

10.19 We have reconsidered the terms of our original Statement dated 5th January 2007 (extracts from the Findings of Fact and Conclusions of which are referred to in Appendices I and II hereof) and in which we expressed the view that the original fraud was not one on a "grand scale" and that since then the Respondent lost his business, had become divorced and had suffered a nervous breakdown. Regrettably neither then nor subsequently prior to these proceedings had we been favoured by either party with a list of conditions that would have enabled us to address in detail the issue of conditional disqualification. We have now been so furnished with a draft set of conditions by the Complainers (detailed in Section 4 of this Statement) and which have been produced by them entirely without prejudice to their preferred position that the Respondent be unconditionally disqualified.

10.20 The draft conditions produced by the Complainers dealt with the principal issues of duration of conditional disqualification, whether the Respondent should be restricted to specific Health Board areas, whether any supervision of the Respondent should be by a qualified practising optometrist, whether the Respondent should be required to keep a diary of his practice, whether he should be required to make his diary routinely available to the Health Authorities and whether he should be expressly required to inform the Health Authorities of his current contact details from time to time. The Respondent is generally content with these conditions under deletion of any requirement to have a Part 1 optometrist supervise him.

10.21 In the Decision *Kelly v Shetland Health Board* [2009 CSIH3] Lord Clarke stated "the Tribunal's function is... one of balancing both the interests of the public in relation to the proper operation of the Health System and the interests of persons such as the Appellant in pursuing his professional career..." Later Lord Clarke states "if the legislation contemplates, as it does, conditional disqualification as one of the means of disposal in such a case, it is for the Tribunal, when that has been proposed to it as a suitable means of disposal, to address carefully the factual and legal reasons which point against it, if that is the conclusion that they choose to arrive at."

10.22 On the one hand the Respondent appears to be a competent clinical optometrist and an unconditional disqualification will deprive him of earning a living other than outwith the National Health Service. On the other hand, the Respondent perpetrated a calculated and planned

fraud which took place over a lengthy period involving over six hundred patients and a significant amount of money, a substantial part of which has not been repaid. He has since then demonstrated an ongoing dishonesty in his dealings with Health Boards and employers alike for his own personal gain. Further, and as we have noted, there was no evidence of regret or contrition on the part of the Respondent or, indeed, any genuine insight into the concerns his past conduct has created. On the contrary, during the first hearing he sought to deny in evidence the very fraud that he had admitted in the Joint Minute (and which we in any event after evidence subsequently found to have been established) that there was a system operated within his knowledge whereby spare pairs of glasses were provided and claimed for by post dated claim forms and that he had accepted responsibility for that system and that in the period April 1995 to December 1999 his firm made a substantial number of inaccurate and inappropriate claims for the issue of spare, second or free pairs of glasses shortly after issuing the original pair of glasses and, further, repairs or replacements not provided and, in addition, repair and replacement for adults who did not qualify under the scheme operated by the Health Service.

10.23 The Respondent failed to cooperate with the Health Authorities as narrated above and in particular knowingly submitted inaccurate and incomplete information when applying for inclusion on ophthalmic lists, as also failing to comply with the transitional arrangements following on the commencement of the 2006 Regulations and failed to respond within a reasonable time to reasonable requests from the Health Authorities for information and failed to keep the Health Authorities updated with his current work and personal information as he was required so to do.

10.24 The case before us has been pled on the basis of the second condition for disqualification referred to in S29(7)(a) of the 1978 Act that the Respondent "has.. by an act or omission caused or risked causing detriment to any health scheme by securing... any financial or other benefit and (b) knew that he... was not entitled to the benefit". In terms of S29C (2)(b) we are empowered to impose conditions which we feel are likely to prevent any acts or omissions referred to in Section 29(7)(a).

10.25 The difficulty facing us is whether if their preferred position of unconditional disqualification is

not imposed, the conditions proposed by the Complainers (and with a signal exception) accepted by the Respondent are sufficient and appropriate to address whatever risk there may be to a Health Scheme in the Respondent continuing to practice.

10.26 Under cross examination the Respondent accepted the draft conditions in general but did not consider that a qualified optometrist would be necessary as there had been no question as to his clinical ability. He did, however, accept that a practice owner or unqualified optometrist would not be subject to any regulations of the GOC (General Optical Council) nor to any Health Board sanctions.

10.27 The Respondent had indicated during the course of his evidence that it was his intention to restrict himself to practicing within the areas of Greater Glasgow and Lothian Health Boards.

10.28 It was submitted on behalf of the Respondent that the majority of his work is as a peripatetic locum optometrist and that a large number of premises that he worked at had only a single Part 1 optometrist and that he was asked often at short notice to provide cover at those premises due to the absence of full time or Part 1 optometrist due to illness, holidays or some other reason. In fact it was the Respondent's evidence that 80% of his work had been pre-planned and that 20% had been at short notice. It is accepted that in many instances in the past, he would be the sole optometrist practising. The Respondent did state, however, that he was able to do other work without the necessity of supervision in that he could work in laser clinics, act as a dispensing optician or undertake private work. In this event, therefore, unconditional disqualification would not deprive the Respondent of his ability to make a living.

10.29 Given the evidence which we have heard as to his behaviour since the original hearing, we are concerned about the Respondent's ability to conduct his relationship with Health Boards in an honest, reliable and trustworthy manner. We heard from John Cameron that the relationship between the Health Boards and practitioners is, as we have stated, one based on trust. We agree with John Cameron's view and accept his evidence on this. This trust is patently absent in the way in which Mr Kelly conducts himself. Whilst he may be a competent clinician his administrative inability combined with his ignorance of the Regulations, his lack of honesty and integrity in his dealings with Health Boards and his dishonesty in perpetrating the

fraud which led to these proceedings give us no confidence in the capacity of Mr Kelly to comply with any of the conditions suggested. We consider that no conditions would address any future risk in his committing acts or omissions resulting in fraud or otherwise seeking an unentitled benefit for himself.

10.30 Part of the balancing exercise which we require to effect, is a consideration of the unwelcome burden of administration which would be placed upon Health Authorities in having to monitor someone who has repeatedly and consistently demonstrated dishonest intent. We heard evidence to this effect from John Hamilton, Duncan Miller and Nic Zappia. Had the Respondent shown himself to be a reformed character in his conduct since the original fraud came to light, he may very well have earned a degree of trust which would have reduced if not extinguished the requirement for the monitoring of his conduct.

10.31 We have real and serious doubts as to whether the conditions proposed by the Complainers could in any way, given the Respondent's behaviour and character address the issue of a continuing risk to a Health Scheme in securing or endeavouring to secure for himself a financial or other benefit to that Health Scheme's detriment. We are not satisfied that the Respondent is capable of exercising a reasonable standard of professional judgement and behaviour that would remove such risk.

10.32 It is our strongly held view that it is contrary to the public interest to have such an individual as the Respondent practising as an optometrist with the National Health Service and in this respect the public interest clearly outweighs the interest of the Respondent in pursuing a career as an optometrist in a public Health Scheme. He is a man of a deeply flawed character and any conditions imposed upon him would not, in our view, inculcate and restore that basic lack of trust even were he to be supervised by a qualified optometrist. Our view is that the draft conditions are neither adequate not appropriate to protect the public, nor do we consider, in carrying out the balancing exercise which we require to do would they be proportionate.

11. DECISION

11.1 The Tribunal constituted under Section 29 of the 1978 Act as amended being of the opinion that Brian Kelly has by acts or omissions caused or risked causing a detriment to a Health Scheme by securing or trying to secure for himself or B & C Kelly Opticians a financial or other benefit to which he knew he was not entitled FIND that the condition stipulated in subsection (7) of Section 29 of the 1978 Act has been met and THEREFORE in terms of subsection 2(a) and (b) of Section 29B of the 1978 Act DISQUALIFIES the said Brian Kelly from inclusion in (1) Shetland Health Board's List of optometrists or ophthalmic opticians undertaking to provide and persons approved to assist in providing general ophthalmic services and (2) all lists within sub paragraph (d) of subsection (8) of Section 29 of the 1978 Act.

J Michael D Graham
Chairman

12 December 2011

12. Appendix I

Findings of Fact in original Statement dated 5th January 2007

12.1 The following are findings of fact. These will be supplemented by a commentary which will include our reasoning for reaching the view which we have formed from the evidence which we have heard from the various witnesses and from the Productions before us.

12.2 There is a duty on the Complainers to provide certain services for its population of patients under National Health Service (NHS) Legislation and there are various regulations concerning procedural matters in relation to this duty. These regulations are in relation to sight testing and related matters and are set out in (a) the NHS (General Ophthalmic Services) (Scotland) Regulations 1986 (as amended) (b) The NHS Optical Charges and Payments (Scotland) Regulations 1989 (as amended) and (c) the Sight Testing (Examination and Prescription)(No.2) Regulations 1989.

12.3 There are various forms required to be submitted by an optician or optometrist ("optometrist") to the Health Board in relation to patients for whom financial assistance is afforded by the NHS. In particular a GOS (S) (ST) or GOS (S) (1) Form ("GOS 1") is a sight test form which requires to be signed by both the patient and the optometrist. The GOS 1 form is an application by a patient for an NHS sight test and incorporates the name address and date of birth of the patient, date of the last NHS sight test and in what capacity the patient is to receive support from the NHS. A GOS (S) (V) or GOS (S) 3 ("GOS 3") Form is a NHS optical voucher which is in essence the claim by the optometrist to the NHS in respect of the provision of lenses or glasses. It repeats the patient's details and incorporates the prescription determined by the optometrist, a declaration by the patient that the glasses have been supplied to the patient and the amount of the claim against the NHS and which, after signature by the supplier, is submitted to the Health Board along with a GOS 1 Form. A GOS (S) (R) or GOS (S) 4 Form ("GOS 4") is a voucher application form for children under 16 or alternatively under 18 in full time education for whom a repair or replacement of glasses may be applied in the event that the existing pair of glasses has been lost or damaged.

12.4 In terms of the Joint Minute referred to it is admitted by the Respondent that there was a system operated within his knowledge whereby spare pairs of glasses were provided and claimed for by post dated GOS 4 Forms in the period between about April 1995 and about December 1999; it is further admitted by the Respondent that the firm Messrs B&C Kelly made a substantial number of inaccurate and inappropriate claims for the issue of spare, second or free pairs of glasses to children under 16 years of age (or 18 years of age in full time education) shortly after issuing the original pair of glasses; repairs and replacements not provided; repair and replacement for adults who do not qualify under the NHS scheme in particular, the NHS (Optical Charges and Payments) (Scotland) Regulations 1989 (as amended).

12.5 The Respondent knowingly and with intention to deceive the Complainers submitted GOS 4 Forms or instructed his staff to submit GOS 4 Forms pretending them to be for repairs and replacements whereas they were in fact submitted for payment in respect of the supply of spare pairs by the Respondent to his patients all as detailed in the Schedule prepared for the Complainers (Appendix 4).

12.6 The Scottish Office Department of Health issued a circular dated 20 April 1998 NHS: 1998 PCA (03) which states at paragraph 29 "no patient has ever been automatically entitled to a spare pair of glasses of the same prescription but exceptionally – e.g. where a child with a disabling illness is breaking his/her glasses with such frequency and his/her education is being disrupted – permission may be sought from the Health Board to supply a second pair. Where permission is received a Form GOS 3 should be used to claim redemption of the voucher annotated with the name of the person at the Health Board who gave authority. A GOS 4 should not be used unless there has been a repair or replacement. Patients who have been issued a spare pair of glasses under these arrangements may have either pair repaired or replaced provided they are children or the Health Board has accepted the loss/breakage was due to illness. " (Appendix 5)

12.7 The Scottish Council of the Association of Optometrists, the Association of British Dispensing Opticians and the Federation of Ophthalmic and Dispensing Opticians issued a guidance to members entitled "Making Accurate Claims" published in March 1999 referring to the NHS

circular and stated inter alia at paragraph 35 that "The PCA indicates that, in exceptional circumstances, Health Boards may be approached for approval for a second pair. In that case a GOS 3 (not a GOS 4) form should be used.....it is also illegal to post-date the vouchers". (Appendix 6)

12.8 Paragraph 16.1 of The National Health Service (Optical Charges and Payments) (Scotland) Regulations 1989 provide that a payment shall be made to meet or contribute towards any cost accepted by .....Board as having been incurred....for the replacement or repair of an optical appliance for which a prescription is given in consequence of the testing of sight....."

12.9 The sum inappropriately obtained by the Respondent from the Complainers was £29,398.30 of which £12,460 has been repaid leaving a balance of £16,938.30 retained by the Respondent..... "

13. APPENDIX II

Extract from Conclusions in original Statement dated 5th January 2007

13.1 The Complainers represent that the Respondent has whether on his own or together with another by an act or omission caused or risked causing detriment to a health scheme by securing or trying to secure for himself or another a financial or other benefit and knew that he or (as the case may be) the other, was not entitled to that benefit. We have set out our findings of fact and our reasons for reaching our conclusions on the facts. In light of the evidence, we now set out our conclusions on the single question which was before us, viz. whether the Respondent knowingly intended to deceive and defraud the Complainers in his submission of the GOS 4 forms as described during the course of the evidence.

13.2 It was both helpful and, indeed, appropriate that the Respondent agreed a Joint Minute which incorporated an admission by him regarding the submission of claim forms, that there was a system operated within his knowledge whereby spare pairs of glasses were provided for by post-dated GOS 4 forms, that he accepted responsibility for that system and that he made a substantial number of inaccurate and inappropriate claims. That he admitted as much undoubtedly saved this Tribunal much time and expense as well as witness inconvenience.

13.3 The situation here is that the Respondent has, on his own admission, post-dated GOS 4 forms. He instructed his staff to do likewise. He gave no explanation for the post-dating. The witnesses: Messrs Lowery, Whittaker and Pirrie could give no reason for the post-dating of these forms other than a fraudulent one, that this was a deliberate attempt to conceal and to defraud the NHS. They were not challenged on their evidence. Mr Kelly admitted that there was no agreement with the Health Board. He stated that he accepted that he should pay back the remaining outstanding amount in the Schedule. The logic of his concession was not only were they inappropriate claims but Mr Lowery was correct in his assessment.

13.4 In response to cross-examination Mr Kelly was hesitant, evasive and contradictory. In the course of his evidence, we noted that he weighed up every question carefully. He asked on numerous occasions that a simple question be repeated. The strong impression given was

that he was carefully considering his response to put himself in the best possible light. When he was asked whether post-dated forms could be construed by anyone else as concealing fraudulent behaviour he found difficulty in giving an articulate and coherent response. When asked, hypothetically, if an optician, knowing that the Regulations did not allow for the issue of spare pairs and knowing of the guidance to seek authority from the Health Board and thereafter submitted forms, would that be a fraud on the NHS? As we have noted in his evidence he denied initially that that would be so but later admitted that it would be fraudulent. We are of the view that if Mr Kelly could not advance any reason for post-dating the clear inference is that it is a deception. We found the evidence of the Complainers' witnesses, Mr Lowery, Mr Whittaker, Mr Pirrie and Mrs Muldoon to be entirely credible and we preferred their evidence to Mr Kelly's where they differed.

13.5 Mr Kelly felt that it was really a matter for the Health Board to advise him whether or not they considered that what he was doing was fraudulent. This did not ring true with the Tribunal. Mr Kelly claimed not to have read the Regulations. He had engaged in correspondence which was produced which indicated that in certain other respects (regarding the signature of under 16 year olds on GOS forms) he had read the Regulations. Even had we believed that he had not read the Regulations what sort of professional practitioner was he?

13.6 Notwithstanding the case referred to of A –v- B which we do not regard to be in point, Mr Kelly did say that the nature of the initial enquiry was such that he accepted that it would have made little difference to Mr Lowery's conclusions. In other words, the fact that he was not spoken to by Mr Lowery earlier in the investigation in no way affected either the enquiry or fairness of its conclusion. Given Mr Kelly's admissions, we are unable to see that the enquiry, which, we have to so say, appears to have been conducted with fairness, could have resulted in any other conclusion.

13.7 There is nothing in the Regulations referred to us that allowed for spare pairs. It was accepted by us, however, standing the evidence of Mr Lowery, Mr Whittaker and Mr Pirrie that certain relaxations would be given by Health Boards in cases where there would be a pressing need for a spare pair eg. in children suffering from a significant disability where breakage may be anticipated. We were referred to "confusion" within the profession as to the meaning of the

Regulations where no mention had been made with regards to a spare pair. By any reasonable stretch of the imagination, one would have to ask oneself why spare pairs ought to be given to children when this was an obvious and unnecessary expense to the NHS. Mr Lowery had stated that he had come across 25 such instances for the whole of the UK. Were a private patient to ask for a spare pair he would obviously be charged for it and the beneficiary would be the Optometrist. Here was an instance where the NHS did not know that spare pairs were being issued or that GOS 4 forms were being submitted at a separate date in order to secure a payment for the spare pairs. Presumably, there had been instances where opticians had been securing for themselves an unlawful payment through the submission of GOS 4 forms which may have triggered the NHS (Optical Charges and Payments) (Scotland) Regulations 1998 and the guidance which followed. Certainly, those Regulations underscored the requirement as to the submission of GOS 4 forms for replacement(s) or repair(s) in consequence of loss or damage. In any reading of the previous GOS(S)(R) forms, and the relevant patients' records it was quite clear that these were for repairs and replacements and not for spare pairs.

13.8 We found no evidence whatsoever that the glasses being issued in consequence of the submission of the GOS 4 forms by Mr Kelly and detailed in the Schedule (Appendix 4) were as a result of any loss or damage. These glasses were issued as spare pairs. They were submitted on GOS 4 "Repair and Replacement Forms". Why there should have been any confusion in the profession as to the meaning of these Regulations, we do not know. We are satisfied, in any event, that there was no confusion in Mr Kelly's mind. Mr Kelly's solicitor acknowledged that payments are only entitled to be made and accepted if properly made under the Regulations and the Regulations, as Mr Kemp conceded, do not allow any latitude. He argued that what appeared to be allowed in the past was an element of shoehorning into an existing form a new category that did not, exist in law although it existed, in his view, as a matter of common sense. As we have stated above, we can understand that in relation to a child who may have some disability that causes him/her to break glasses regularly so that there will always be a spare pair available. It is an entirely different matter, however, that spare pairs should be issued, as a matter of course on every occasion.

13.9 Mr Kelly endeavoured to justify the issue of spare pairs on the basis that either children or the parent/guardian had asked for them. There was no evidence for that. Indeed, in the case of Mrs. Muldoon, quite the contrary.

13.10 The position here is that without any reasonable doubt the Complainers have been the victim of fraud. The proper functioning of the Health Service requires trust and good faith between Health Boards and the practitioners providing services. The Board has to trust the information that it receives in the GOS forms. It is reasonable to expect that the information on the GOS forms matches that on the patients record cards. In this case, the record cards did not reflect repairs or replacements. Mr Kelly's conduct involved deception in which he gained a dishonest financial advantage over the Complainers. By using post-dated forms, there is no doubt in our mind that this was a means of receiving a second pair through the NHS. We have no doubt that Mr Kelly was aware of this. We also have no doubt that Mr Kelly would be aware of the Regulations. Consistently post-dating can only have one meaning and that would be to deceive the NHS into making additional payments to him. There was no agreement with the Board that would have permitted this practice, nor was there any credible evidence of a "local exception".