



Neutral Citation Number: [2005] EWHC 93 (Admin)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Case No: CO/4576/04

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 4 February 2005

Before :

**THE HONOURABLE MR JUSTICE RICHARDS**

Between :

**Council for the Regulation of Health Care  
Professionals**

**Appellant**

- and -

**(1) Health Professions Council  
(2) Peter R Jellett**

**Respondents**

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

Hearing dates: 13 December 2004

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**Judgment Approved by the court  
for handing down  
(subject to editorial corrections)**

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**Mr Justice Richards :**

1. The Council for Health Care Regulatory Professionals (known as the Council for Healthcare Regulatory Excellence, and referred to in this judgment as "the Council") appeals under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act") against a decision of the Conduct and Competence Committee ("the CCC") of the Health Professions Council ("the HPC") in the case of Mr Peter Jellett, who is a physiotherapist. The decision was to the effect that Mr Jellett should be restored unconditionally to the register of professionals maintained by the HPC pursuant to article 5 of the Health Professions Order 2001.
2. The Council's case is that the decision was wrong and should be quashed, and that the case should be remitted to the CCC to reconsider and dispose of Mr Jellett's application for restoration to the register (either by dismissing it or by imposing a conditions of practice order) in accordance with the directions of the court. The HPC and Mr Jellett resist the Council's case.

**The appeal: statutory framework**

3. The background to the 2002 Act and the functions of the Council are described in the judgment of the Court of Appeal in *Ruscillo v. (1) Council for the Regulation of Health Care Professionals and (2) General Medical Council and Council for the Regulation of Health Care Professionals v. (1) Nursing and Midwifery Council and (2) Truscott* [2004] EWCA Civ 1356 ("*Ruscillo/Truscott*"), at paragraphs 5-9.
4. Section 29 empowers the Council to refer certain disciplinary cases to the court. By subsection (1) the section applies to decisions to take disciplinary measures. By subsection (2) it also applies to certain decisions not to take disciplinary measures or to restore a person to the register: it is common ground that the decision under challenge in this case falls within subsection (2). Subsection (4) reads:

"29.(4) If the Council considers that -

(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or

(b) a relevant decision falling within subsection (2) should not have been made,

and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court."

5. In the present case the Council considered, under section 29(4)(b), that the decision should not have been made and that it would be desirable for the protection of members of the public to take action under the section. It therefore referred the case to the court. Section 29(7) provides that if the Council does so refer a case, the case is to be treated by the court as an appeal by the Council against the relevant decision (even though the Council was not a party to the proceedings resulting in the relevant decision).
6. By section 29(8), the court's powers on such an appeal are (a) to dismiss the appeal, (b) to allow the appeal and quash the relevant decision, (c) to substitute for the relevant decision any other decision which could have been made by the committee concerned, or (d) to remit the case to the committee concerned to dispose of the case in accordance with the directions of the court.
7. In *Ruscillo/Truscott* the Court of Appeal held that appeals to the High Court under section 29 are subject to the relevant procedural provisions of CPR Part 52. In particular, by CPR 52.11:
  - “(1) Every appeal will be limited to a review of the decision of the lower court unless:
    - (a) a practice direction makes different provision for a particular category of appeal; or
    - (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing.
  - (2) Unless it orders otherwise, the appeal court will not receive:
    - (a) oral evidence; or
    - (b) evidence which was not before the lower court.
  - (3) The appeal court will allow an appeal where the decision of the lower court was:
    - (a) wrong; or
    - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
  - (4) The appeal court may draw any inference of fact which it considers justified on the evidence.”
8. The Court of Appeal held that the powers of the High Court on appeal, as set out in section 29(7) of the 2002 Act, are in no way incompatible with CPR 52.11. The two have to be read together.

9. At paragraph 68 of the judgment in *Ruscillo/Truscott* the Court of Appeal stated that, although section 29(4)(b) says nothing about undue leniency, "it seems to us implicit that the Council will not refer a case to the High Court unless it considers that the failure of the disciplinary tribunal to impose any penalty is unduly lenient to the practitioner". In my judgment, and contrary to a submission made by Mr Coppel for the Council, the same implicit point about undue leniency also applies in relation to a decision to restore a practitioner to the register. I see no sensible reason why the underlying policy should be different in relation to this one category of decision. Nor do I see any difficulty in principle in examining such a decision by reference to the concept of undue leniency, either on the basis that it is unduly lenient to restore the practitioner to the register at all or on the basis that the terms on which the restoration is ordered are unduly lenient.
10. The court in *Ruscillo/Truscott* went on to deal with the general approach of the High Court to a reference (paragraphs 69-78). Although the passage relates in terms to decisions on the imposition of a penalty, in my view the general tenor of the guidance can and should be applied, with the necessary modifications, to a decision to restore a practitioner to the register:
- “69. We have concluded that the concerns of the Council which can entitle it to refer a case to the High Court are (i) that the decision in relation to the imposition of a penalty is unduly lenient and (ii) that it is desirable in the interests of the public to take action under the section. Where a reference is made, what is the task of the Court when considering the reference? The Act does not deal with this, save for the important provision that the reference is to be treated as an appeal by the Council *against the relevant decision*. Thus the Court is concerned with the decision as to the penalty.
70. If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate ....
71. If the Court decides that the decision as to penalty was 'wrong', it must allow the appeal and quash the relevant decision, in accordance with CPR 52.11(3)(a) and section 29(8)(b) of the Act. It can then substitute its own decision under section 29(8)(c) or remit the case under section 29(8)(d).
72. It may be that the Court will find that there has been a serious procedural or other irregularity in the proceedings before the disciplinary tribunal. In those circumstances it may be unable to decide whether the decision as to penalty was appropriate or not. In such circumstances the Court can allow the appeal and remit the case to the disciplinary tribunal with directions as to how to proceed, pursuant to CPR 52.11(3)(b) and section 29(8)(d) of the Act.

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

...

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

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

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

## The Health Professions Council: statutory scheme

11. The HPC and its committees are governed by Part II of the Health Professions Order 2001, made under the Health Act 1999. Article 3 of the 2001 Order establishes the HPC and provides in paragraph (4) that its main objective in exercising its functions shall be "to safeguard the health and well-being of persons using or needing the services of registrants". Extensive provision is made for the establishment and maintenance of a register of members of the relevant professions.
12. Article 27 lays down the functions of the Conduct and Competence Committee (the CCC, as defined above). They include consideration of any application for restoration referred to the CCC by the Registrar. By article 33, a person who has been struck off the register and who wishes to be restored to the register must apply to the Registrar, who must refer the application to the relevant committee (in this case the CCC) for determination. The central provision governing the committee's consideration of the application is contained in article 33(5):

“(5) The Committee shall not grant an application for restoration unless it is satisfied, on such evidence as it may require, that the applicant not only satisfies the requirements of article 9(2)(a) and (b) [i.e. that he holds an approved qualification award and is capable of safe and effective practice] but, having regard in particular to the circumstances which led to the making of the order under 29, 30 or 38 [striking off etc.], is also a fit and proper person to practise the relevant profession.”
13. The committee may make the granting of the application subject to additional requirements and, by article 33(7)(b), may in particular make a "conditions of practice order" with respect to the applicant. By article 33(8), the relevant provisions of articles 29 and 30 have effect in relation to such a conditions of practice order. Article 29(5) defines a conditions of practice order as "an order imposing conditions with which the person concerned must comply for a specified period which shall not exceed three years". Article 30(1) provides that, before the expiry of such an order, the committee must review the order and may *inter alia* extend, or further extend, the period for which the order has effect. By article 30(5), an order may not be extended by more than three years at a time.
14. Although Mr Jellett had been removed from the register before the 2001 Order came into force, the provisions referred to above concerning restoration to the register were applicable by virtue of transitional provisions.
15. The reason why Mr Jellett applied for restoration to the register, and why the application was so important to him, was that, again by virtue of the 2001 Order, from 9 July 2005 he would not be able to style himself as a physiotherapist or physical therapist of any kind unless he were restored.

## The proceedings before the CCC

16. Mr Jellett's application for restoration to the register came before the CCC on 26 August 2004. The case was opened by the HPC's solicitor, who dealt with the regulatory framework and then outlined the circumstances that had led to Mr Jellett's removal from the register in 1996. After that, the committee received evidence from Mr Jellett in the form of a statutory declaration and accompanying documents, setting out the history since his removal from the register. Various matters were amplified orally by Mr Jellett in evidence in chief and in answer to questions from the committee. The HPC's solicitor did not cross-examine him, stating that it was for Mr Jellett to satisfy the committee that he was a fit and proper person. For the same reason, the HPC's solicitor did not make any substantial closing submissions, though he did deal later with certain matters arising from closing submissions on behalf of Mr Jellett. After hearing closing submissions from Mr Jellett's solicitor and submissions and legal advice on the procedural matters, the committee retired, before returning to announce its decision.
17. The evidence before the CCC was to the following effect, starting with the circumstances that led to his original removal from the register.
18. In June 1996 Mr Jellett was convicted of three offences of indecent assault upon female patients in the course of his practice as a physiotherapist. The circumstances were that a patient complained that when she had been treated by Mr Jellett in respect of low back pain at a private hospital in May 1995, he had removed her bra and had given her a full massage from her pubic features up to her neck, including her breasts, and had at one stage for a short period put his hands inside her pants. Following the complaint, Mr Jellett was interviewed by the police and denied any question of indecency. But the matter got into the press and as a result of that coverage another lady, Miss B, came forward and said that a similar thing had happened to her when she visited Mr Jellett at his private practice in April 1995. Mr Jellett was again interviewed by the police. He said that he could not remember anything that had happened with Miss B. He then sent a questionnaire to a number of his patients asking them to confirm that he had not indecently assaulted them. One of the recipients of the questionnaire, Miss C, contacted the police and said that she had been indecently assaulted by Mr Jellett in March 1992, when she had been to see him for a neck injury and he had massaged her breasts. Mr Jellett was interviewed once more by the police but said that he could not remember anything about that patient. He was charged with the three offences of indecent assault, contested the case but was convicted and sentenced to 9 months' imprisonment.
19. In November 1996 the predecessor body to the HPC, namely the Council for Professions Supplementary to Medicine, decided in disciplinary proceedings that Mr Jellett's name should be removed from the register. At the time this meant that he became ineligible for NHS or local authority employment but was entitled to continue in private practice as a physiotherapist.

20. At about the same time the Chartered Society of Physiotherapy ("the CSP") removed him from membership, which meant that he could no longer style himself as a "chartered physiotherapist" but only as a "physiotherapist".
21. Mr Jellett gave evidence that on his release from prison in November 1996 he initially found work as a builder's labourer. Unexpectedly, however, he found that a number of former patients requested his services as a physiotherapist. He was advised that he could still provide physiotherapy services provided that he made it clear that he had no professional status. He also found that local doctors were prepared to send patients to him. As a result of these matters, he was able to resurrect his practice. All of this happened in knowledge of his conviction and his non-professional status. He lived in Louth, a small market town, and his conviction had received extensive local publicity.
22. In 1999 the CSP's Professional Conduct Committee heard and granted an application by Mr Jellett for restoration of his CSP membership. The decision was recorded in a letter dated 6 May 1999 in these terms:

"We are minded to restore your name to the membership register of the Chartered Society of Physiotherapy, subject to the undertakings you have given, the form of which we outline as follows.

We consider membership of the Chartered Society of Physiotherapy is a privilege, which carries with it the responsibilities of awareness of, and adherence to, the Rules of Professional Conduct and standards of good practice.

Inherent in our standards is respect in the trust put in us by our patients and this trust is not to be abused.

The decision to restore your name to the CSP Register is based on the particular facts of your case and the undertakings you have given as follows:

1. That you undertake only to see and/or treat female patients in the presence of a chaperone.
2. That your practice will be regularly monitored for a period of 3 years by an independent member of the Society, nominated by the Chair of the Professional Conduct Committee.

You will be informed of the name of the independent member of the Society who will monitor your practice.

In fulfilling your undertaking to the PCC, I require the following from you:

- (A) A clear statement of the **permanent** arrangements you will have in your practice to ensure that you only see



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

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

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

23. Mr Jellett was required by the CSP to sign a declaration giving a binding commitment to the undertakings listed in the letter and acknowledging that failure to adhere to them would be deemed a serious breach of the CSP’s professional disciplinary rules.
24. On 12 July 2002 the CSP informed Mr Jellett that he had been reinstated as a member in good standing:

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

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

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

25. Mr Jellett's evidence to the CCC was that, from the time he started seeing patients again, he ensured that a chaperone was present for female patients, though these arrangements became more formal later, in compliance with his undertaking to the CSP. He said that most of his female patients provided their own chaperone, but where that was not possible he ensured that his wife (who is a state registered nurse) or his mother were present. He explained that he had a typed notice in the hallway and in each treatment room regarding the need for a chaperone.
26. In support of his application to be restored to the HPC's register, Mr Jellett submitted a report dated 15 August 2003 from Mrs Jenny Archer MCSP SRP, an independent chartered and state registered physiotherapist, concerning a survey of Mr Jellett's patients which she had carried out at the request of his solicitor. Mrs Archer had acted as an expert witness for the defence at Mr Jellett's trial. She had also carried out a survey at the time of his application for restoration to membership of the CSP. On the present occasion the survey involved sending a letter and questionnaire to a random sample of 20 patients, equally split between men and women, chosen by her from Mr Jellett's list of patients. She had received 17 replies. In her opinion the replies demonstrated that Mr Jellett's patients had considerable confidence in his treatment and the arrangements he made for the treatment of patients. She drew particular attention to the chaperoning arrangements (in that the replies supported the view that Mr Jellett had been complying with the requirements imposed by the CSP).
27. In addition to Mrs Archer's report, Mr Jellett provided the CCC with the letters of support he had used for the purposes of his application for restoration to membership of the CSP, together with a number of more recent references.
28. Mr Jellett was also asked questions by the CCC about his continuing professional training.
29. In closing submissions, Mr Jellett's solicitor placed weight on the decisions taken in respect of Mr Jellett by the CSP and the fact that Mr Jellett had been conducting a practice as a chartered physiotherapist for some time. It was submitted that the chaperoning system had been shown to work. Mr Jellett was described as "rehabilitated". It was made clear that Mr Jellett was willing to give a permanent undertaking in the same terms as he had given to the CSP, and also to have a conditions of practice imposed. There was some discussion as to the status of any such undertaking, for which no provision is made in the 2001 Order. There was also considerable discussion as to how a conditions of practice order could be implemented: the HPC's solicitor expressed concern about how compliance could be verified.
30. After a short retirement, the CCC's decision was announced by the chairman in these terms:

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

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

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

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

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

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

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

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

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

## Fresh evidence before the court

31. Mr Jellett seeks to adduce before this court certain evidence that was not before the CCC. A witness statement from him deals with his chaperoning arrangements, his undertakings to the CSP (including the monitoring of those undertakings by the CSP) and his continued willingness to submit to a conditions of practice order on certain terms. A witness statement from his solicitor, Mr Cordingley, provides further information concerning Mrs Archer's report. Much of the further evidence is submitted in response to criticisms made by the Council about the evidence on which the CCC relied in reaching its decision.
32. Mr Coppel, for the Council, objects to the admission of parts of the evidence, on the ground that Mr Jellett could and should have placed that evidence before the CCC. He submits that the principles laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 apply in this situation and that the criteria for the admission of fresh evidence on appeal have not been met.
33. In paragraphs 79-83 of *Ruscillo/Truscott* the Court of Appeal considered issues of procedural shortcomings and fresh evidence. In paragraph 81 it referred to the situation where the Council is led to believe that a case has been "under prosecuted" or the relevant evidence has not been put before the tribunal, with the consequence that the tribunal's decision is flawed. The court indicated that careful consideration was needed before material that was not before the tribunal was placed in the public domain, since arrangements may have been made for the protection of complainants. But it went on:
- "82. At the same time there will be cases where it is in the public interest that additional evidence should be placed before the court on a reference under section 29. This may be necessary to ensure that a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk.
83. Where an application is made to the Court to adduce additional evidence pursuant to CPR 52.11(2) the Court should not apply the principle in *Ladd v. Marshall* [1954] 1 WLR 1489. The principles in that case have no application to a reference under section 29. The fact that the evidence could have been, but was not, placed before the disciplinary tribunal can have no bearing on whether it should be admitted by the Court. The Court will, however, be concerned, just as the Council should be, to be sure that the introduction of such evidence is truly in the public interest."
34. Mr Coppel submits that what was said in paragraph 83 of *Ruscillo/Truscott* was intended to apply only to the admission of fresh evidence in support of an appeal by the Council. The test in that context has to be one of public interest, rather than the

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

35. I reject the submission that the test for the admission of fresh evidence on appeal differs according to whether it is the Council or the practitioner who seeks to adduce that evidence. What the Court of Appeal said in *Ruscillo/Truscott* was expressed in entirely general terms - that the principles in *Ladd v. Marshall* "have no application to a reference under section 29" - and I decline to read into it the heavy qualification that Mr Coppel's submission would place upon it. It seems to me that the correct approach should depend on the nature of the case rather than the identity of the party. An approach that has particular regard to the public interest is as workable in relation to applications by a practitioner to adduce fresh evidence as it is in relation to applications by the Council. Where a practitioner is simply seeking to bolster the case advanced before the disciplinary tribunal, the public interest is likely to tell against allowing the application. But there will be cases where it can properly be regarded as being in the public interest to admit further evidence on the appeal.
36. In the present case there are particular circumstances that make it in the public interest that the further evidence be admitted. I read it *de bene esse* at the outset of the case and considered, in the course of the appeal hearing, how it impacted on the submissions made. It seems to me that, if it were left out of account, there is a real risk that an injustice would be done to Mr Jellett. The CCC is criticised in part for acting without evidence or without adequate investigation of the evidence; but Mr Jellett provided all the information that was asked of him and the fresh evidence indicates that the factual picture presented by him was indeed correct.
37. Since I propose to take account of the fresh evidence when considering the issues, it will be convenient for me to summarise that evidence here.
38. In his witness statement Mr Jellett gives further details of the arrangements in place to ensure that no female patient is treated without the presence of a chaperone. He also exhibits the patient consent forms in use at the material time and as amended following receipt of the notice of appeal. He explains that the arrangements in place are exactly in accordance with the undertaking given to the CSP. He refers to the CSP's appointment of Mr Ian Rutherford MCSP, Head of Physiotherapy Education at the University of Nottingham, as his mentor in August 2000. He describes three meetings held with Mr Rutherford at Mr Jellett's surgery in August 2000, January 2001 and July 2001, as well as a number of telephone conversations with Mr Rutherford. He also refers to the CSP's appointment of Ms Rosemary Woodley

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

39. A further matter covered in Mr Jellett's witness statement is his continued willingness to submit to a conditions of practice order and to offer a permanent undertaking. He comments on the appropriateness or otherwise of various conditions that have been suggested by the Council.
40. The witness statement of the solicitor, Mr Cordingley, exhibits his letter of instruction to Mrs Archer and a letter from Mrs Archer describing how the patients to be surveyed were selected at random by her from Mr Jellett's appointments diary, albeit that the letters were sent to the patients by Mr Jellett himself in order to preserve patient confidentiality. Mr Cordingley also exhibits some additional character references which had been before the CCC but had apparently not been included in the bundle of documents subsequently given to the Council.

### **The case for the Council**

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

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

43. Turning to the CCC's decision itself, Mr Coppel submits that it was wrong in the light of the need for protection of the members of the public, the need for general deterrence, and the need for public trust in practitioners and to maintain public confidence in the system of regulation. Three particular aspects of the decision come in for particular criticism: (1) what the CCC said about rehabilitation, (2) the CCC's reliance on the CSP, and (3) the CCC's rejection of a conditions of practice order.
44. As to (1), Mr Coppel submits that the CCC relied heavily on its opinion that "it is possible for an individual to rehabilitate himself". It did not find in terms that he had rehabilitated himself; but if it made an implicit finding that he had done so, that finding could not be sustained on the evidence. Moreover the CCC failed to play a sufficiently proactive role in ensuring that the case before it was properly presented and that the relevant evidence was produced for its consideration. The following features of the evidence are said to be significant in relation to the question of rehabilitation: (i) Mr Jellett had been convicted only eight years previously of extremely serious offences going to the very essence of the relationship between practitioner and patient. (ii) He continued to deny his guilt and so displayed a total lack of insight into his wrongdoing. (iii) Various criticisms are made of Mr Jellett's chaperoning arrangements, which are described as "ad hoc, casual arrangements involving his wife and mother or anyone the patient wished to bring along"; and it is not accepted that his wife and mother are suitable chaperones, since neither are sufficiently independent of him to safeguard public confidence in the profession. Points made about lack of evidence of compliance with his undertakings to the CSP are considered below. It should, however, be noted that the concerns originally expressed about the chaperoning arrangements have had to be toned down in the light of the fresh evidence from Mr Jellett. (iv) It was originally suggested that the CCC had not been provided with up to date character evidence, but this point falls away in the light of the fresh evidence. (v) Criticisms are made of Mrs Archer's survey of patients. Here, too, the concerns have had to be toned down in the light of the fresh evidence. But it is still asserted that the CCC should have shown greater caution about the survey, since it was commissioned on behalf of Mr Jellett from a practitioner who was sympathetic to him: it should have been commissioned by the regulatory body itself. In any event it was based on a very small sample and is not sufficient evidence of rehabilitation.
45. As to (2), Mr Coppel submits that the CCC relied very heavily on the CSP, describing the CSP's findings and decisions as "adequate protection for the public". Again the CCC should have played a more proactive role and should not have relied as it did on the CSP. In particular: (i) Mr Coppel submits that the CSP's primary function is to

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

46. As to (3), Mr Coppel submits that there was ample evidence on which the CCC could have refused altogether to restore Mr Jellett to the register, but that at the very least the CCC was wrong to restore him without making a conditions of practice order. Mr Jellett himself accepted that a conditions of practice order was appropriate. Yet the HPC sought, erroneously, to convince the CCC that such an order should not be made because it could not easily be policed and enforced. It is submitted that this amounted to a procedural irregularity. Moreover the CCC could not rationally have accepted the HPC's argument whilst at the same time relying on the continued existence of analogous undertakings to the CSP which equally required to be policed and enforced.
47. As a further instance of procedural irregularity, Mr Coppel suggests that the CCC may also have been misled by the advice of the legal assessor that a conditions of practice order could only be made for a maximum of three years; advice which is said to have been misleading because it did not allow for the possibility of a further order being made before the expiry of the three year period.
48. Mr Coppel submits that there was a range of conditions that the CCC should have considered imposing in order to protect the public and safeguard public confidence in the profession. Any conditions would have to be appropriate, workable and measurable. Such conditions could have included conditions that Mr Jellett undergo psychosexual counselling, that he be supervised in his practice, that he work in a group practice and/or acquire a mentor, and that he treat female patients only in the presence of a chaperone. I do not understand Mr Coppel seriously to pursue a



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

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

### **The case for the HPC**

50. Miss Richards took me through the evidence before the CCC with a view to showing that the CCC had ample evidence on which to base the decision it reached. She submits that the CSP is a chartered society of considerable reputation and standing, which has had its own "fitness to practise" system for many years; and that the CCC was entitled to place weight on the decisions taken by the CSP and the basis of those decisions. In relation to Mrs Archer's survey, she points to the fact that there were 17 out of 20 responses (including 10 out of 10 of the women surveyed) and that they were all favourable to Mr Jellett. There were also character references from a wide range of people, both from 1998 (which he had used in support of his application to the CSP) and more recently. From the transcript of the hearing, it is clear that the CCC was fully aware of the offences of which Mr Jellett was convicted. Further information about chaperoning and other relevant matters was given by Mr Jellett in his evidence. The fact that Mr Jellett was willing to give a permanent undertaking and to have a conditions of practice order imposed was something that the CCC was entitled to take into account in his favour. There was, it is submitted, no inaccuracy in the legal advice.
51. In relation to the Council's criticisms of the CCC's approach to the question of rehabilitation, Miss Richards submits: (i) It is true that Mr Jellett had been convicted of serious offences, but the CCC also had evidence of the resumption of his practice as a physiotherapist, at the request of former patients who knew of his conviction, and without any further complaints. (ii) A denial of guilt does not preclude rehabilitation or restoration to the register. There are other ways of minimising risk, such as avoidance of the situation in which further offending can take place. That was achieved by the permanent chaperoning arrangements instituted by Mr Jellett. The CCC had the benefit of hearing from him and evaluating his commitment to the arrangements. (iii) The CSP's letters in 1999 and 2002 made clear that it was satisfied that Mr Jellett was complying with the chaperoning arrangements, and that is confirmed by the fresh evidence. (iv) It is clear that the CCC had up to date character references, from professionals and patients, in support of Mr Jellett. (v) All the criticisms of Mrs Archer's survey are bad. The fact that Mrs Archer had given expert evidence for the defence at Mr Jellett's trial did not affect her independence. The CCC was entitled to rely upon her report. The survey confirmed that the chaperoning arrangements were working well.

52. In relation to the criticisms of the CCC's approach towards the CSP, Miss Richards submits that the CSP is a highly reputable body and that it was plainly reasonable to place reliance on its view that Mr Jellett had complied with his undertaking, and on the fact that the undertaking was permanent and that there was a continuing liability to inspections.
53. As to a conditions of practice order, Miss Richards submits that at no stage did the HPC suggest that such an order *could not* be made. It continues to acknowledge that such an order *could* be made, though the workability of the order would depend upon the particular conditions imposed. But the CCC's decision to restore Mr Jellett to the register without imposing a conditions of practice order was reasonably open to it. The decision was not manifestly inappropriate or wrong, nor was it vitiated by any serious procedural irregularity.

### **The case for Mr Jellett**

54. Mr Maclean put in detailed written submissions on behalf of Mr Jellett but sensibly limited himself in his oral submissions to adopting Miss Richards's submissions and adding just a few points of his own. Amongst other matters, he pointed to further details in the evidence concerning the chaperoning arrangements, in support of a submission that those arrangements cannot be dismissed as ad hoc or casual. As a further reason why the CCC was entitled to place weight on the chaperoning arrangements, Mr Maclean observed that those arrangements were in place to protect Mr Jellett himself as well as his patients.
55. Mr Maclean relies on the passage in Mr Jellett's witness statement which comments on the conditions which the Council now suggests should have been considered by the CCC (some of which it would be impossible to comply with). He makes clear that Mr Jellett was and is entirely content to abide by conditions of registration, applicable in the first instance for three years, that (a) he does not see or treat female patients without the presence of a chaperone, (b) unless the chaperone is the husband or partner of the patient, the chaperone shall be female, (c) all female patients shall provide written consent to the presence of a named chaperone prior to being seen or treated by Mr Jellett, and (d) the chaperone will also sign confirmation of having been present throughout Mr Jellett's treatment of a female patient. It is submitted that those are reasonable conditions and that, if the court concludes that the CCC was wrong not to impose a conditions of practice order, the court itself should substitute an order imposing those conditions. Alternatively, it should remit the matter to the CCC, but on a basis that makes clear that Mr Jellett is to be restored to the register and that the only issue for the CCC is whether and on what terms to impose a conditions of practice order.
56. A further respect in which Mr Maclean elaborated on Miss Richards's submissions was in relation to the question of deterrence. He submitted that deterrence has no significant role at the stage of a decision whether to restore to the register. The time for deterrence is at the penalty stage, i.e. when the decision is taken whether to strike

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

### Concerns expressed by the CSP

57. After the hearing and before I had written my judgment in the case, solicitors for the CSP wrote to the court to raise points of concern about various matters in Mr Coppel's skeleton argument for the Council, which had only recently been drawn to the CSP's attention. The CSP had learnt of the proceedings too late to apply to join them as an interested party. The concerns expressed in the letter related in part to adverse comments by the Council on the role of the CSP as an independent regulator of the profession, and in part to factual matters which have largely now been dealt with by the fresh evidence before the court.
58. Mr Coppel objected to my taking the CSP's letter into consideration, both on the basis that it seeks to adduce new evidence and on the basis that CSP is not a party to the proceedings. Mr Maclean submitted that the letter should be taken into consideration. I have concluded that I ought not to take it into consideration, for the reasons given by Mr Coppel. But because I am concerned in this case with matters of public interest, I reached that conclusion only after reading the letter and satisfying myself that its contents would not materially affect the outcome of the case. Had I taken a different view I would have considered whether to re-open the case and invite the CSP to apply to be joined as an interested party and to regularise the basis upon which its concerns could be placed before the court.

### Conclusions

59. In my judgment the concerns expressed by the Council in relation to the CCC's decision are substantially overstated. It is true that the evidence before the CCC was somewhat thin, in part because of a failure on the part of the HPC to explore that evidence and bring out some of the detail underlying it. The fresh evidence before this court indicates, however, that such exploration of the evidence would have led to confirmation and amplification rather than to a materially different general picture from that already before the CCC.
60. The CCC's statement that "it is possible for individuals to rehabilitate themselves" must be read together with the rest of the sentence, namely that the CCC "noted the measures in place to ensure the safety of the public". This was not, and did not need to be, an informed psychological assessment. It was a practical assessment that to allow Mr Jellett to practise would not place patients at risk. The CCC took express account of the very serious nature of the offences for which he had been convicted in 1996. It was aware that he continued to deny the offences and that this was therefore not a case of a man who accepted past wrongdoing and displayed an insight into it.

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

61. The CCC clearly attached considerable weight to the undertaking given to the CSP with regard to chaperoning arrangements, and to the CSP's finding that he had complied with that undertaking. I see no objection in principle to the CCC placing weight on an assessment of that kind made by a professional body, and indeed on the fact that the practitioner concerned had shown his commitment by giving an undertaking to that body and co-operating with it over a substantial period. On the material before the court I have no reason to doubt the CSP's good standing as a regulator, even if it also provides assistance and advice to members. Moreover this is something that the CCC, as a specialist committee, was well placed to judge. It would have been better if, before deciding how much weight to place on the CSP's assessment, the CCC had had evidence of the operation in practice of the CSP's mentoring and monitoring measures. But the further evidence placed before this court shows that the CSP did have a substantial basis for making the decision it did to reinstate Mr Jellett as a member in good standing; and I reject the view put forward by Mr Coppel that it does not amount to satisfactory evidence of an enthusiasm or capacity to enforce the undertakings.
62. That Mr Jellett had been complying with his undertaking with regard to chaperoning arrangements was also supported by Mrs Archer's report. I reject Mr Coppel's criticisms of the survey carried out by Mrs Archer. There is no reason to doubt her credentials as an independent expert even though she had given expert evidence for the defence at Mr Jellett's trial. It is true that a relatively small number of patients were sampled, but the evidence supports the view that they were a random sample. The replies received tended to confirm the existence of an established chaperoning system and its proper operation in practice, as well as voicing more general support for Mr Jellett. I should add that in my view it was acceptable to rely on an independent report commissioned by Mr Jellett and was not necessary for the HPC or the CCC to commission an independent report of its own.
63. As to Mr Coppel's criticism of the fact that Mr Jellett's wife and, occasionally, his mother act as chaperones, I am not persuaded that there is any hard and fast rule that makes it wrong for a practitioner's relative to act as a chaperone. It may not be appropriate as the primary form of chaperoning; but as a fall-back, if a patient cannot find a chaperone of her own and the patient consents, it does not seem to me to be necessarily objectionable. The fact that in this case the practitioner's wife is herself a state registered nurse is a further relevant consideration. The CSP plainly saw no objection to Mr Jellett's arrangements. Nor did the CCC. There is no sufficient basis for interfering with that judgment on the material before the court.

64. I therefore take the view that the CCC was entitled to find that Mr Jellett's chaperoning arrangements provided adequate protection for the public. In the light of that and the evidence as a whole, it was also entitled to find that he was a fit and proper person to practise as a physiotherapist and to direct that he be restored to the register. That was a conclusion reasonably open to it on the evidence. There was no element of undue leniency in restoring Mr Jellett to the register in these circumstances and after a gap of almost eight years since the removal of his name following his conviction. In saying that I take into account all the purposes of the disciplinary regime, but I agree with Mr Maclean's submission that deterrence has little relevance at this stage of the process.
65. A further question for the CCC, however, was whether he should be restored to the register unconditionally or whether a conditions of practice order should be imposed. It is on this issue alone that in my judgment the CCC's decision is open to justified criticism. The continued protection of the public depended on the continued operation of adequate chaperoning arrangements. The CCC relied in this respect on Mr Jellett's undertaking to the CSP and the CSP's letter of 12 July 2002 (in which it sought written confirmation that the arrangements would remain in place for good and indicated that it might make inspections at unspecified dates in the future). In my view, however, the CCC was wrong to rely on those matters alone. Although there is no reason to doubt the CSP's good intentions, there is no *guarantee* that it will ensure compliance with the undertaking by effective monitoring and enforcement of it. Moreover, even if it were found that Mr Jellett had failed to comply with the undertaking and that led to the loss of his CSP membership, it would not prevent his continuing in practice but would only affect his right to call himself a "chartered" physiotherapist. In my judgment, therefore, the effective protection of the public required the CCC to do more, namely to impose a conditions of practice order which would enable the HPC itself to police the chaperoning arrangements and to take enforcement action in the event of a failure to comply with the conditions laid down.
66. I am not surprised that the CCC declined to accept the undertaking offered by Mr Jellett in the same terms as the undertaking given to the CSP. An undertaking of this kind does not fit easily within the regulatory scheme. But Mr Jellett also made clear that he was willing to accept a conditions of practice order, and I am surprised that the CCC did not go down that route. It may well be that it was deterred by the concerns expressed by the HPC about the implementation of such an order. I do not accept that the HPC's stance gave rise to a procedural irregularity. Nor do I accept that the legal advice given was wrong or misleading or gave rise to a procedural irregularity. I do consider, however, that the end result, in the form of the CCC's decision to direct Mr Jellett's unconditional restoration to the register, was wrong and that the decision should not have been made. It failed to impose upon him the conditions reasonably necessary to ensure the continued protection of the public. In that sense it was unduly lenient to him.
67. It follows that the CCC's decision must be quashed. I have considered whether I should substitute an order directing Mr Jellett's restoration to the register subject to a conditions of practice order on terms determined by me. The conclusion I have reached is that the precise terms of a conditions of practice order are best left for the

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

68. It should be clear from what I have said already that I reject the Council's case that a possible outcome of further consideration by the CCC is the *dismissal* of the application for restoration to the register. I have held that the CCC was entitled to conclude as it did that Mr Jellett was a fit and proper person to practise as a physiotherapist and to direct his restoration to the register. I remit the matter not for the purpose of enabling that aspect of the decision to be reopened but only for the purpose of the imposition of a conditions of practice order.
69. I should also make clear that in my view some of the conditions suggested by the Council for consideration by the CCC are unnecessary and inappropriate. This does not seem to me to be a case that calls for psychosexual counselling; and conditions that made it impossible or very difficult for Mr Jellett to carry on his practice would in my view be unreasonable. The CCC's findings as to "fit and proper person" were premised, as it seems to me, on the view that Mr Jellett's existing practice arrangements, in particular as to chaperoning, were satisfactory. That was, as I have said, a reasonable view. The conditions of practice order should be directed towards ensuring the maintenance of a similar level of protection. It does not follow that the CCC is tied to giving continued effect to the precise detail of the existing arrangements. An exercise of judgment is required as to the appropriate conditions, and that judgment will have to be exercised on the material before the CCC at the time. The CCC may, for example, be invited to give further consideration to whether and in what circumstances it is appropriate for Mr Jellett's wife and mother to act as chaperones. But I hope that I have done enough to make clear the relatively narrow parameters within which the CCC's further consideration of the case should fall.
70. For the reasons I have given, the appeal will be allowed, the CCC's decision that the application for restoration to the register be allowed unconditionally will be quashed, and the matter will be remitted to the CCC for it to allow the application subject to the imposition of a conditions of practice order on terms to be determined by it.