



JUDGMENT

Joseph Lennox Holmes (Appellant) v Royal College of Veterinary Surgeons (Respondent)

**From the Disciplinary Committee of the Royal College of
Veterinary Surgeons**

before

**Lady Hale
Lord Kerr
Lord Wilson**

JUDGMENT DELIVERED BY

LORD WILSON

ON

20 December 2011

Heard on 1 November 2011

Appellant
Rowan Morton

(Instructed by Stephensons)

Respondent
Joanna Smith QC
Jonathan Chew

(Instructed by Penningtons
Solicitors LLP)

LORD WILSON:

A: INTRODUCTION

1. Mr Holmes appeals to Her Majesty in Council under s17 of the Veterinary Surgeons Act 1966 (“the Act”) against a direction given on 11 January 2011 by the disciplinary committee (“the DC”) of the Council of the Royal College of Veterinary Surgeons (“the College”) that his name be removed from the register of veterinary surgeons.

2. Mr Holmes is aged about 58. Until earlier this year he had for about 25 years been in sole practice near Grimsby as a veterinary surgeon. A significant number of owners of small animals in the area of Grimsby speak very highly of his treatment of their animals.

3. The DC’s direction dated 11 January 2011 followed its hearing of two complaints against Mr Holmes, namely by Mrs Marsden and Mrs Auckland, which it conducted on ten days between 18 and 29 October 2010 and upon which it announced decisions on 10 January 2011. At that hearing Mr Holmes represented himself and, as now, Ms Smith QC represented the College. Before the Board, however, Ms Morton represents him – very skilfully.

4. The complaint of Mrs Marsden related to the treatment by Mr Holmes of Jake, her King Charles Spaniel, between October 2007 and March 2008, when he was aged six. Ultimately, in May 2008 and at Mrs Marsden’s request, Mr Holmes euthanatised Jake. There were 21 charges against him in respect of his treatment of Jake on five dates, namely

- (a) 25 October 2007, when Mr Holmes performed a staphylectomy upon Jake;
- (b) 1 November 2007, when he performed a second staphylectomy upon him;
- (c) 5 February 2008, when he performed a third staphylectomy upon him;

- (d) 11 February 2008, when he performed a fourth staphylectomy upon him; and
- (e) 14 March 2008, when he performed a tracheostomy upon him.

A staphylectomy is a surgical procedure to cut away part of the soft palate above the throat. A tracheostomy is – or, in what follows, will be taken to describe – a procedure to insert a permanent tube through the neck into the wind-pipe.

5. The 21 charges in respect of Jake can be summarised as follows:

- (a) that Mr Holmes performed the first staphylectomy without having sufficient clinical grounds for so doing (one charge);
- (b) that he had not referred Jake to a specialist (or discussed with Mrs Marsden the option of so doing) prior to performing each of the four staphylectomies (four charges);
- (c) that he had not given adequate consideration to alternative treatment options prior to performing the first staphylectomy and the tracheostomy (two charges);
- (d) that he had not obtained the informed consent of Mrs Marsden to any of the five procedures (five charges);
- (e) that he performed the second, third and fourth staphylectomies when he knew or ought to have known that they were outside his area of competence (three charges);
- (f) that he failed to provide any or any sufficient analgesia to Jake in respect of any of the five procedures (five charges); and
- (g) that he failed to provide adequate post-operative care to Jake following the tracheostomy (one charge).

6. The complaint by Mrs Auckland related to the treatment by Mr Holmes of three of her male Persian cats, namely Henry, Charlie Brown and Dream Topping,

between July and October 2008. There were ten charges against him in respect of his treatment of the cats on three dates, namely

- (a) 14 July 2008, when Mr Holmes extracted Henry's upper back molar teeth;
- (b) 6 August 2008, when he gave Mrs Auckland advice (which she declined to accept) that he should extract Charlie Brown's molar teeth; and
- (c) 29 October 2008, when he extracted Dream Topping's molar and/or upper molar teeth.

7. The ten charges in respect of the cats can be summarised as follows:

- (a) that Mr Holmes extracted the teeth of Henry and Dream Topping without having sufficient clinical grounds for so doing and advised that he should do so in the case of Charlie Brown without having such grounds (three charges);
- (b) that he performed those extractions and gave that advice without having given adequate consideration to alternative options for the treatment of each of the three cats (three charges);
- (c) that in the case of Henry and Dream Topping he performed the extractions without having obtained the informed consent of Mrs Auckland to his doing so (two charges); and
- (d) that he failed to administer any or any adequate pain relief to either of those cats during the anaesthesia and/or immediately post-operatively (two charges).

8. At the hearing the College adduced oral evidence from

- (a) Mrs Marsden and Mrs Auckland;
- (b) two other veterinary surgeons in practice in Grimsby, who had examined Charlie Brown's teeth in October 2008 and July 2009;

- (c) Professor Brockman, a specialist soft tissue veterinary surgeon;
- (d) Mr Crossley, a specialist dental veterinary surgeon; and
- (e) Mr Ash, a veterinary surgeon who had worked in a small animal practice for 25 years and who, like Professor Brockman and Mr Crossley, gave expert evidence.

Mr Holmes gave evidence himself and called his wife to give brief evidence about Jake's condition a few days after performance of the tracheostomy. He did not call expert evidence.

9. Before the DC was also a quantity of written material. It included Mr Holmes' clinical notes relating to Jake and the cats which he was constrained to admit were deficient in important respects. In order to demonstrate his particular expertise in this respect Mr Holmes also produced a schedule derived from his clinical records which indicated that, between 1992 and 2009, he had performed 88 staphylectomies.

10. The DC found all 31 charges proved. It then proceeded to consider the contention of the College that the conduct of Mr Holmes which was the subject of each charge had been "disgraceful.... in [a] professional respect" within the meaning of s16(1)(b) of the Act. In respect of 28 charges it determined the contention to be correct. By contrast it declined to accept that, in failing to refer Jake to a specialist (or to discuss the option of so doing) prior to performing the first and second staphylectomies and in performing the second in the knowledge (actual or constructive) that it was outside his area of competence, Mr Holmes had been guilty of disgraceful conduct in a professional respect.

11. Pursuant to the same subsection, the DC's determination that the conduct of Mr Holmes comprised in 28 of the charges had been disgraceful in a professional respect conferred upon it a discretion to direct that his name be removed from the register or that his registration be suspended. In this respect it considered (or, as Mr Holmes would prefer to say, purported to consider) mitigation which he put forward. But it also – rightly – considered the fact that in 2006 the DC, differently constituted, had found that four other charges against Mr Holmes were proved and had determined that each amounted to disgraceful conduct in a professional respect. The four charges had concerned his inappropriate administration in 2004 of two types of cytotoxic drugs (i.e. drugs which damage or destroy cells), his failure to obtain informed consent for their administration and his inappropriate supply of one of them in tablet form. In these earlier proceedings Mr Holmes had offered undertakings about his future conduct in consideration of which the DC had postponed judgment upon the sanction appropriate to its determination. That judgment remains postponed. It was only at the

specific request of Mr. Holmes, who wished to contend that he had been the victim of unfairness and bias in the course of the earlier proceedings, that the papers in relation to them were placed before the DC for consideration prior to the hearing of the instant proceedings; and at its outset he unsuccessfully argued that it should first consider his contentions in regard to them and make the postponed judgment arising out of them. In the event, for reasons to be explained in para 19(b) below, the DC did not make such a judgment even at the end of the hearing; but such did not preclude its weighing the gravity of Mr Holmes' misconduct in relation to Jake and the cats in the light – among other things – of the determination in 2006.

12. Having given what it called “serious consideration” to an analogous postponement of the judgment upon sanction and having also considered use of its power to direct suspension of his registration, the DC concluded that the only appropriate sanction was a direction for the removal of his name from the register.

B: THE APPEARANCE OF BIAS

13. Mr Holmes contends that features of the general system operated by the College for the determination of disciplinary complaints and features of its operation specific to the instant proceedings represent deficiencies which combined to give rise to an appearance of bias against him on the part of the DC. In the absence of his right of appeal to the Board, it would (so Mr Holmes argues) have infringed the right “to a fair... hearing by an independent and impartial tribunal” conferred on him by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (cmd 8969). He accepts that his right of appeal to the Board, to which (as he concedes) he cannot ascribe any deficiencies relevant to Article 6, would negate any such infringement: *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at para 29. But he rightly submits that, were the DC indeed to have exhibited an appearance of bias against him, the requisite intensity of the Board's review upon the appeal would be substantially heightened: *R v Visitors to The Inns of Court Ex parte Calder* [1994] QB 1 at p 68F, per Staughton LJ.

14. So far as is relevant, the general system operated by the College is as follows:

- (a) The governing body of the College is its Council, which now has 42 members, of whom at least 31 must be members of the College (i.e. registered veterinary surgeons) and at least four must be lay members.
- (b) The Council has a number of committees, of which three are relevant.

- (c) The preliminary investigation committee (“the PIC”) is required to be established by s 15(1) of the Act, by which it is “charged with the duty of conducting a preliminary investigation into every disciplinary case”.
- (d) Paragraph 1(1) of Schedule 2 to the Act requires the PIC to consist of the President and the two Vice-Presidents of the College and three other Council members, whether lay or otherwise. The quorum for a meeting of the PIC is three.
- (e) If the PIC decides that there is a realistic prospect that the registered veterinary surgeon about whom a complaint has been made (“the registrant”) will be found to have been guilty of “disgraceful conduct in any professional respect” (or that either of two other criteria in respect of him will be held to be satisfied), it will refer the case to the DC which must accept and determine it.
- (f) Upon reference to the DC, a charge (or charges) will be formulated against the registrant and brought against him in the name of the College. The College will instruct its solicitors (who may themselves instruct Counsel) to prosecute the charge before the DC, to serve the documentary evidence of the College upon him and to effect disclosure in accordance with rules.
- (g) Paragraph 2(1) of Schedule 2 to the Act requires the DC to consist of a chairman and eleven other members. By subparagraph (2), all twelve of them have to be members of the Council. At least six of them must be registered veterinary surgeons and at least one of them must be a lay member. The quorum for a meeting of the DC is five.
- (h) By paragraph 2 (5) of the schedule, a member of the constitution of the PIC which has referred a complaint to the DC cannot sit on the DC which hears it.
- (i) The duty of the DC is to find the facts: to determine whether, and if so in which respect or respects, they amount to disgraceful professional conduct on the part of the registrant and to pass judgment upon the appropriate sanction. The DC reports its determinations to the Council, which has no power to interfere with them.

- (j) The advisory committee (“the AC”) provides advice and guidance to the Council about the professional conduct of veterinary surgeons. It formulates and updates the “Guide to Professional Conduct”. Theoretically the Council can make amendments to it before publishing it. The DC will take the contents of the Guide into account in determining whether a registrant has been guilty of disgraceful professional conduct.

15. The Board is satisfied that the College has made strenuous attempts to ensure that its disciplinary procedures are fair and, since the coming into force of the Human Rights Act 1998, are in accordance with its obligations to the registrant under Article 6.

16. In particular the College has made elaborate efforts to separate what one might regard, however loosely, as the parts of its system which contribute to the prosecution of the charge against the registrant from the parts which determine it. In one respect, however, the College has found itself hamstrung by the Act, namely by the requirements in paragraphs 1 and 2 of Schedule 2 that the members of the PIC and of the DC must be drawn from members of the Council. The preference of the College, now publicly announced, is that their members should not be drawn from the Council, in particular because, by its AC, it is responsible for setting, albeit only as a guide, the standards of the profession; and it has lobbied the government, so far in vain, to support an amendment of the paragraphs so as to preclude members of the Council from being members of either of the two committees and so as to require that the latter be appointed either by the Council or by an independent appointment process. But, until such an amendment is introduced, it must abide by the clear mandate of the Act.

17. Independently of the suggested statutory reform the College has developed a variety of conventions in order to promote the separation to which the Board has referred. They provide that

- (a) members of the DC should serve a term of four years;
- (b) no one should be a member both of the AC and of either the PIC or the DC simultaneously;
- (c) by way of extension of the statutory provision noted at para 14(h) above, no one should be a member of the PIC and DC simultaneously;

- (d) at least three years should elapse between cessation of a person's membership of the PIC and his appointment to membership of the DC; and
- (e) the panel of the DC appointed to hear a complaint should if possible consist of seven of its members (rather than the quorum of five), of whom the chair and at least two others should be lay members.

18. In that the statute currently confines the DC to twelve members and in the light of the participation of a number of its then current members in the proceedings against Mr Holmes in 2006 (to which, in relation to the undertakings then given by Mr Holmes, the DC had had to give further consideration in 2008 and earlier in 2010), it was impossible for the Council to appoint seven of its members who had not been involved in the earlier proceedings to hear the fresh complaints against him. They appointed six members, including a lay chair, three veterinary surgeons and two other lay members. Two of the veterinary surgeons were Professor Crispin and Ms Shield. The identities of the six members were communicated to Mr Holmes 11 days prior to the hearing. After the first day of the hearing, one of the other lay members unfortunately fell ill and the panel was thereupon reduced to five members.

19. The following are the features to which Mr. Holmes objects:

- (a) The complaints against him were brought in the name of the College but all the members of the DC which heard the complaints were members of the Council of the College. Mr Holmes does not suggest that, within a legitimate system of professional self-regulation such as this, the complaints should be brought otherwise than in the name of the College; and he accepts that statute presently requires that all members of the DC should be members of its Council. But the Board agrees with Mr Holmes that the statute does not, of itself, preclude his seeking to complain about the connection between the prosecution and the committee which it mandates; and it also agrees that, in the light of his concession about the effect of the present appeal upon his rights under Article 6, the complaint can be advanced notwithstanding the absence of any application on his part for a declaration of the incompatibility of the statute with the article.
- (b) The system allows members of the DC previously to have been members of the PIC. The complaint is thus that those who fulfil the judicial role may previously have had a role in the sanctioning of

prosecutions. Within this systemic complaint lies the major complaint of Mr Holmes specific to the instant proceedings. It relates to Professor Crispin, who was a member of the DC in them. There are two aspects of his complaint about the professor: first that she had been appointed to the DC only two years after the cessation of her membership of the PC in breach of the convention that three such years should elapse; and second that she had served on the very PIC which in 2005 had referred to the DC the complaints against him which it determined in 2006. It was the discovery of this last fact which led the DC in the instant proceedings to consider itself unable, even at the end of the hearing, to make the postponed judgment arising out of the 2006 proceedings.

- (c) The system allows members of the DC and of the PIC previously to have been members of the AC; for example in October 2009 at least three of the six members of the PIC had previously been members of the AC. Thus (runs the argument) those who determine complaints or have a preliminary role in sanctioning their prosecution may have helped to craft the Guide which will be taken into account in the determination of issues of professional misconduct.
- (d) The system allows members of the PIC previously to have been members of the DC. The complaint is thus that those who have a preliminary role in sanctioning prosecutions may previously have fulfilled the judicial role. Within this systemic complaint lies the subsidiary complaint of Mr Holmes specific to the instant proceedings. It relates to Mrs Nute, who was – at least nominally – a member of the PIC in the instant proceedings and who had been a member of the DC in the proceedings against him in 2006.

20. Mr Holmes mainly relies on two authorities.

21. First, the decision of the Outer House of the Court of Session in *Tehrani v UK Central Council for Nursing, Midwifery and Health Visiting* [2001] SC 581. A nurse petitioned for a declarator that a proposed hearing by the respondent's Professional Conduct Committee ("the committee") of a charge against her of misconduct would be in breach of her rights under Article 6. Lord Mackay of Drumadoon dismissed the petition on the ground that, were the committee to order her name to be removed from the register, her right to appeal against the order to the Court of Session would negative any breach of the article. The judge, however, proceeded to offer a provisional view that, had it been appropriate to appraise the proposed operation of the

committee on its own, he would have held that it would infringe her rights under Article 6. In this regard he described the factor of greatest significance as being that a member of the committee could also serve as a member of the Preliminary Proceedings Committee during the same period of time although he could not serve on both in relation to the same case. The Board reminds itself that the College does not allow an analogous situation to arise. Nevertheless Lord Mackay identified, at para 87, two further bases for concern, upon which Mr Holmes strongly relies. The first was that prosecutions before the committee were brought in the name of the respondent, of which some members of the committee were also members and which chose the other members of the committee from panels. In expressing concern about that feature Lord Mackay disagreed with dicta to the contrary in a judgment of Elias J given three months earlier and in relation to the same respondent in *Brabazon-Drenning v UK Central Council for Nursing, Midwifery and Health Visiting* [2001] HRLR 6 at para 36. The second was that, in hearing a complaint, the committee might need to consult the code published by the respondent.

22. Second, the decision of the Board in *Preiss v General Dental Council* [2001] UKPC 36, [2001] 1 WLR 1926. A dentist whose registration had been suspended for twelve months by the disciplinary committee of the respondent successfully appealed to the Board. It accepted that, in the absence of a complete rehearing upon the written evidence in its determination of the appeal, his rights under Article 6 would have been infringed by the respondent's disciplinary procedures. In this regard a major factor was that the president of the council who chaired the Professional Conduct Committee in the determination of the charges against the appellant had acted as the preliminary screener (being a role undertaken in the case of complaints against veterinary surgeons by two "case examiners") who had adjudged his case fit to be put before the Preliminary Proceedings Committee. On behalf of the Board Lord Cooke said:

"20. The contention for the appellant that the role of the preliminary screener is prosecutorial cannot be accepted. It is more akin to the role of examining justices or a judge ruling on a submission of no case to answer. But that by no means disposes of the appellant's points under article 6(I). In the opinion of the Board, when the participation of the President both as preliminary screener and as chairman of the PCC is seen in conjunction with the predominance of council members in both the PPC and the PCC, and in conjunction moreover with the fact that the disciplinary charge is brought on behalf of the council, the cumulative result is an appearance and a real danger that the PCC lacked the necessary independence and impartiality. Only the ultimate right of appeal to Her Majesty in Council saves the day."

So the chairman's role as a preliminary screener was objectionable not because it was in itself prosecutorial but because it set in train the process which led to the

prosecution and raised concern that, in that role, he had made a decision, albeit limited, which might colour his later approach to the case as chairman of the committee. Lord Cooke went on to note that the respondent was seeking, just as the College is presently seeking, to secure statutory amendment so as to preclude members of the council from serving on the Professional Conduct Committee. He commented, also at para 20, that:

“If this means a divorce between the general policy-making functions of the council and the distinctive functions of adjudicating on disciplinary charges, it will go far to remove the difficulties that have arisen.”

23. The cases of both *Tehrani* and *Preiss* therefore contained clearly objectionable features absent from the present case. The question is whether the comments, helpful to Mr Holmes, which were there made about subsidiary features are enough to breathe life into his limited argument under Article 6.

24. “The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, at para 103, per Lord Hope. In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2009] SC (HL) 1, Lord Hope described the attributes of such an observer in terms upon which it would be impossible to improve:

“[1] The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively.....

[2] The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious.... Her approach must not be confused with that of the person who has brought the complaint. The ‘real possibility’ test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

[3] Then there is the attribute that the observer is ‘informed’. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

25. The Board considers that the fair-minded and informed observer would not conclude that there was a real possibility that the DC was biased against Mr Holmes. In what follows it adopts the lettering of para 19 above.

- (a) It is one thing for the Board, as it did in *Preiss* in the case of the dentists and as it hereby does in the case of the veterinary surgeons, to support statutory reform so as to enable members of the disciplinary committees to be chosen from outside the council. It is another for it to conclude that the members of the DC, aware that it is presently required to be composed of members of the council of the College in whose name the complaints are brought, might, in the light of their membership of the Council, be thereby motivated to uphold the complaints. The fair-minded and informed observer would find such an argument as elusive as does the Board. In this regard it prefers the dicta of Elias J in *Brabazon-Drenning* above to those of Lord Mackay in *Tehrani* to which it has made reference at para 21 above.
- (b) The College has adopted a convention designed to eliminate co-terminous membership of the PIC and the DC. It is indeed surprising that its system was insufficiently robust to secure full application of its convention to the case of Professor Crispin. But a fair-minded observer would not conclude that, following a gap even of only two years since service on the PIC, a member of the DC might, as a result of that prior service, somehow remain predisposed to uphold a complaint irrespective of its intrinsic strength. The professor’s membership of the PIC which referred the complaint against Mr Holmes heard by the DC in 2006 might, however, have troubled the observer – and thus the Board – had it not been for his request to the DC in the instant proceedings to study in advance of the hearing the papers made available to the DC in the 2006 proceedings. It is fanciful for Mr Holmes to suggest that, as a result of her service on the PIC, the professor might have recalled matters unfavourable to him which were not

visible in the papers made available to the DC in 2006 and thus to the DC in the instant proceedings.

- (c) The College does not permit simultaneous membership of the AC and of either the PIC or the DC; and it may be that, in the event of statutory reform, members of the latter committees will never have been members of the AC. But the Board does not accept that a past contribution, through membership of the AC, to the exposition in the Code of standards of competence could fairly be regarded as predisposing a member of either committee against a registrant; see *Sadighi v General Dental Council* [2009] EWHC 1278 (Admin), per Plender J at para 4.
- (d) The Board perceives no real possibility of bias in previous membership of the DC on the part of a member of the PIC. In any event, however, the Board is asked to appraise a complaint of apparent bias on the part of the DC, not of the PIC. The role of the PIC in the present case is water under the bridge; there is no criticism of its reference to the DC of the complaints against Mr Holmes. On that footing the complaint about Mrs Nute falls away; in fact, however, at the meeting of the PIC on 21 April 2010 when, crucially, it decided to make the reference, she took no part in the discussion by reason of her membership of the DC in 2006.

26. Mr Holmes makes a final complaint of apparent bias which falls into a different category. It relates to Ms Shield. Prior to April 2007 there was controversy about whether the practice of docking a dog's tail accorded with responsible veterinary practice. The controversy largely came to an end on the coming into force of s 6 of the Animal Welfare Act 2006, which made it a criminal offence to remove a dog's tail otherwise than for the purpose of its medical treatment. Mr Holmes had been appointed as Honorary Veterinary Surgeon by the Council for Docked Breeds which strongly opposed the reform. He had had a high profile on behalf of the campaign to preserve a general right to dock a dog's tail. In support of the reform, however, had been "Vets against Docking", supported by the College, which argued that docking represented an unjustified mutilation of the dog. On the sixth day of the hearing before the DC Mr Holmes unsuccessfully objected to the continued participation on it of Ms Shield on the ground that, as he had just discovered, she had been a signatory in support of "Vets against Docking", as was visible on its website which remained on line.

27. In the Board's view no appearance of bias on the part of Ms Shield was generated by the professional stance opposite to that of Mr Holmes which she had adopted in the largely historical debate about an issue in no way related to those raised

in the proceedings. Indeed, had he truly considered that a member of the committee might be biased against him because of his work for the Council for Docked Breeds, Mr Holmes would, during the 11 days prior to the hearing when he was aware of their identities, have inquired whether any of them had given public support for the campaign against docking and would have voiced his objection at the outset of the hearing.

C: FINDINGS AND CONCLUSIONS OF THE DC

28. Mr Holmes seeks to identify a multitude of deficiencies in the findings and conclusions of the DC by reference to the transcripts of the proceedings before it and otherwise. The Board has considered each of them but in the interests of proportionality proposes expressly to address only nine of them. In the paragraphs which follow the Board will identify the argument of Mr Holmes at (a) and its response at (b).

29. (a) The DC failed adequately to explain why it generally preferred the evidence of Mrs Marsden to that of Mr Holmes.

(b) There were factual issues between them and, in relation to one of the more important, namely whether they had first discussed the initial staphylectomy prior to the date of its performance, the DC preferred the evidence of Mr Holmes that they had not done so. The other factual issues between them were largely unimportant. It was, for example, agreed that at no time - not even after the failure of the first and subsequent staphylectomies - had Mr Holmes suggested a referral to a specialist or given Mrs Marsden such advice about options for alternative treatment as would have rendered her consent to the procedures informed. Nor was there any issue about the very limited post-operative analgesia which Mr Holmes provided for Jake and which included Anadin Extra as his recommendation for use in the short term following the second staphylectomy although it is not even licensed for use in animals.

30. (a) The DC drew unfair adverse inferences from the schedule put forward by Mr Holmes which showed that, during 17 years, he had performed 88 staphylectomies.

(b) Although Mr Holmes accepted that he had no experience of performing anything other than an initial staphylectomy, he put forward the schedule in order to demonstrate his familiarity with the procedure. The DC was therefore correct to address the schedule; and it was entitled both to

record Professor Brockman's astonishment at the number of staphylectomies performed by Mr Holmes, as a general practitioner, including upon breeds of dog with no predisposition to oversized soft palates, and to conclude, with appropriate caution, that the clinical justification for them was unclear.

31. (a) In that Professor Brockman said only that it was "questionable" whether the first staphylectomy should have been performed, it was not open to the DC to find that there were insufficient clinical grounds for it.
- (b) The finding was justified by reference to the evidence of Mrs Marsden about Jake's condition, to the explanations of Mr Holmes, which he acknowledged to have been inconsistent, about the reasons for the procedure and to the evidence of Mr Ash that he discerned insufficient grounds for it.
32. (a) On the evidence before it the DC should not have found that there were insufficient clinical grounds to justify the extractions of teeth from Henry and Dream Topping. Mr Crossley accepted that, in the absence of an examination of the cats prior to the extractions, he could not be certain that the grounds were insufficient.
- (b) When asked to address photographs of mouths of cats with different conditions, Mrs Auckland likened those of Henry and Dream Topping to a mouth which, when addressing the same photographs, Mr Ash described as infected with mild gingivitis. His evidence was that extraction was inappropriate for such a condition. It would be impossible for the Board to override the DC's conclusion that the evidence of Mrs Auckland was thoroughly credible. It was also legitimate for the DC to draw an inference from the evidence about Charlie Brown, whose teeth had, notwithstanding Mr Holmes' advice, not been extracted: three months after his advice had been given a second veterinary surgeon in general practice examined his teeth and identified mild gingivitis which in her view did not justify extraction; and a year later a third such surgeon noted that his teeth were perfect.
33. (a) In accepting the evidence of Mrs Auckland that, in signing her consent to the extraction of teeth from Dream Topping, she felt bullied by Mr Holmes, the DC inappropriately considered that the evidence drew credence from his attitude and demeanour when giving evidence, cross-examining witnesses and making submissions. The effect was to penalise him for having been a litigant in person.

- (b) The argument is misconceived. The appearance of a litigant in person at a long hearing presents many challenges but yields to a judicial body a degree of exposure to him which may be valuable to it in relation to issues of credibility, whether it works in his favour or otherwise.
- 34.
- (a) On the evidence the DC should not have found that Mrs Auckland's written consent to the extraction of teeth from Henry and Dream Topping was otherwise than informed.
 - (b) It was the firm evidence of Mrs Auckland that Mr Holmes had not discussed the advantages and disadvantages of extraction in comparison with other forms of treatment. By contrast the evidence of Mr Holmes about such discussions was vague, general and unsupported by notes. The finding is impregnable.
- 35.
- (a) Mr Holmes has now changed his practice in relation to the provision of analgesia following tooth extractions but it was wrong for the DC to infer therefrom that the application of his previous practice to Henry and Dream Topping represented disgraceful conduct.
 - (b) Had the change of practice been the only or even the primary basis for its finding, Mr Holmes' objection might have been valid. But in this regard the other evidence was stark: his view that, by reason of the anaesthetic, there was no need to prescribe post-operative analgesia was described as unacceptable both by Mr Crossley and Mr Ash.
- 36.
- (a) The DC was wrong to find, in respect of any of the 28 charges in respect of which it did so, that the conduct of Mr Holmes had been disgraceful within the meaning of s 16(1)(b) of the Act. At worst, it reflected only genuine clinical misjudgement.
 - (b) The parties agree that the DC was correct to remind itself that disgraceful conduct within the meaning of the section means conduct which falls far short of that which is expected of the profession: see the judgment of the Board, delivered by Lord Carswell, in *Macleod v The Royal College of Veterinary Surgeons* [2006] UKPC 39, at para 21. But the present Board needs also to remind itself of his observations, at para 23, that, in this area of the appeal, which relates to the standards of the profession, the expertise of the DC is entitled to substantial respect. Each of its two decisions culminated in a meticulous consideration of the gravity of each charge which it had found proved; and three of the charges were considered to lack the gravity required by the section.

Although the 28 other charges were correctly considered on an individual basis, they fell into general categories: insufficient clinical grounds for the procedures; a failure to render the consents of the owners informed by a discussion of other options; procedures performed on Jake following the first two staphylectomies which were outside the competence of Mr Holmes instead of referral of Jake to a specialist; and a failure to provide any or insufficient analgesia following the performance of all seven procedures on the three animals. The effect of the evidence of the three experts was that these various failures fell far below the area of clinical misjudgement.

37. (a) The sanction imposed by the DC, namely its direction that the name of Mr Holmes be removed from the register, was excessive and disproportionate; and it was imposed without regard to the mitigation which he had put forward.
- (b) The DC's summary of the mitigation of Mr Holmes in its Decision on Sanction was fair. The points to which it is said to have omitted to refer are either relatively insubstantial (for example that Mr Holmes did not act with a view to financial gain) or incorrect (for example that his career was "unblemished") or at any rate questionable (for example that he showed insight into the deficiencies of his past conduct). The Board is constrained to agree with the DC that, when considered in the light of the "disgraceful" conduct of Mr Holmes found proved against him in 2006, the only sanction appropriate to the catalogue of egregious misconduct reflected in the 28 charges which fell within the section was the erasure of his name from the register. Such was the only disposal which could properly reflect the primary need to serve both the interests of animal welfare and the reputation of the veterinary profession: see the decision of the Board, delivered by Lord Rodger in *Gupta v General Medical Council* [2001] UKPC 61, [2002] 1 WLR 1691, at para 21.

D: CONCLUSION

38. The Board will humbly advise Her Majesty that the appeal should be dismissed. It allows Mr Holmes 28 days in which to file written submissions why the Board should not order him to pay the costs of the College of, and incidental to, the appeal.