Neutral Citation Number: [2016] EWHC 1050 (Admin)

Case No: CO/5692/2015

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Sitting at Manchester Civil Justice Centre

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2016

Before:

THE HONOURABLE MR JUSTICE KERR

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Between :

Katharine Elizabeth Burrows	**Appellant**
- and -	
General Pharmaceutical Council	**Respondent**

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- -

Christopher Hamlet (instructed by **Slater and Gordon LLP**) for the **Appellant**
Kenneth Hamer (instructed by **General Pharmaceutical Council**) for the **Respondent**

Hearing date: 04/05/16

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Approved Judgment

MR JUSTICE KERR:

1. The appellant, Ms Burrows, is a pharmacist who has been removed from the statutory register of pharmacists. She appeals against her removal and seeks an order quashing the removal direction made by the respondent's Fitness to Practise Committee (the Committee). She also asks the court either to substitute a lesser penalty or to remit the case back to the Committee.

2. Ms Burrows became a registered pharmacist in July 1995. She has worked as such for around 20 years with the same employer, with no previous blemish on her character, either under the regulatory regime applying to pharmacists or under the criminal law. She is of modest means but managed to obtain privately funded legal representation during the disciplinary process and before me.

3. The respondent (the GPhC or the Council), regulates the profession pursuant to the Pharmacy Order 2010 (the 2010 Order), the rules scheduled to the General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 (the Rules) and the GPhC's July 2015 guidance document, *Good decision making: fitness to practise hearings and sanctions guidance*, published in the exercise of functions conferred by articles 4, 6 and 48 of the 2010 Order.

4. On 16 July 2013, Ms Burrows purchased two "John Rocha" dresses at Debenhams, Newcastle. Using a bank card, she paid £45 and £31.50 respectively for them.

5. On 9 August 2013, she returned a dress she said was one of them. It was not. It was a less valuable "Manta Ray" dress to which she had fixed the John Rocha label. She thereby obtained a "refund" of £45 credited to her bank card.

6. On 13 August 2013 she went to Debenhams again. By the same method, she returned the other Manta Ray dress, passing it off as the other John Rocha, thereby obtaining a further £31.50 credit to her bank card.

7. Staff at Debenhams discovered the fraud by peeling away the deceiving John Rocha labels. They alerted the police and as a result, on 13 August Ms Burrows was arrested and cautioned at her home where the two John Rochas were found and taken away by the police. On arrest, Ms Burrows was cautioned and made no reply.

8. Interviewed at a nearby police station, she admitted switching the labels, saying she had not intended to make a financial gain, but did it because the Manta Ray dresses were too small. She said she was going to do the same thing with a blouse she had bought from another retailer, Next. The contemporary custody record states that "it wasn't her intention to make financial gain but [she] understands her actions did and admits both offences".

9. A more detailed police report (called an MG5) was prepared, dated 1 September 2013. The offences were stated to be fraud by false representation. Confusingly, the MG5 recorded "none" under the hearing "[r]elevant admissions …" and, under the heading "[d]efendant not suitable for conditional caution because" the words "offence not admitted" appeared.

10. On 15 November 2013, Ms Burrows returned to answer police bail, this time with a solicitor, not from the firm which represented her subsequently, and continues to do so. She signed a "Simple Caution" form, thereby admitting the offences and her understanding of the consequences of a caution. The offences were recorded as follows:

> on two separate occasions false receipt had been presented in order to obtain goods from Debenhams to the value of £75 … .

11. The amount of money involved in the fraud was regarded as less than £100 which, I was told, was a threshold below which there was a policy of normally proceeding by caution instead of prosecution if the crime is admitted and the accused is of previous good character. Ms Burrows thereby avoided prosecution and has not been convicted of any criminal offence.

12. However, it is agreed that under rule 4 of the Rules, Ms Burrows was obliged to inform the Council of the caution within seven days of receiving it. She did not do so. Also, the form she signed included the warning that if (as was the case) she was in a "notifiable" occupation, the police might tell her employer about the caution. They did, in a letter of 28 November 2013.

13. Nothing happened then until June 2014, when a new caseworker started working for the Council. He wrote to the Northumbria Police in July 2014, asking for further information. In August 2014, the response came, attaching the MG5. The caseworker asked for the caution certificate. The police responded that they did not have it, and suggested they ask Ms Burrows for a copy.

14. At this point, she was alerted to the GPhC's investigation by a letter from the caseworker, who wrote to her on 20 August 2014 inviting her (under a "caution" similar to a police caution on arrest) to respond to the proposition that she had been cautioned (in the different sense indicated above) for fraud by false representation and had not declared as much to the Council.

15. She responded on 31 August that she did not have a copy of the certificate, had not been "convicted of anything by the police" [sic] but now realised that the "warning" she had been given was "in the form of a caution and therefore should have been declared to the GPhC".

16. In the same letter, she said of the incident: "in error I used the wrong receipt for a refund at Debenhams", apologised for not declaring the caution and assured the caseworker that the matter was a "mistake" and "not a true reflection of my character".

17. After further delay, charges were eventually formulated in late December 2014. They were notified to Ms Burrows later, on 10 March 2015, when she was also summoned to a disciplinary hearing in London, to be held on 21 July 2015. The charges were that she had received a police caution for fraud by false

representation, failed to declare that caution and as a result, her fitness to practise was impaired by reason of the caution and by reason of misconduct.

18. The letter giving written notice of the hearing explained the procedure, including the right to be represented by a solicitor or counsel and the right to call and question witnesses. The letter also stated that the Committee could proceed in Ms Burrows' absence, should she not attend, and that the available sanctions included removal from the register.

19. Mr Millin, the solicitor-advocate representing the Council, prepared a skeleton argument on 10 July 2015, citing lots of cases and inviting the Committee to impose a suspension, rather than outright removal from the register. Under the Rules, the maximum period of a suspension is 12 months. The skeleton was sent to Ms Burrows, who read it. She instructed her present solicitors on 10 July 2015.

20. She emailed the Council on 17 July asking to be voluntarily erased from the register and asking for confirmation that the hearing, fixed for 21 July, had been cancelled. The Council responded that voluntary erasure could not be considered before the hearing and that it would proceed. The next day, she wrote seeking an adjournment of the hearing, having taken advice, from the solicitors who now represent her.

21. Alternatively, if the adjournment were not granted, she said she would not attend, referring to her ill health as set out in previous emails "attaching supporting medical evidence" and referring to the stress she was under. I was told at the hearing that there was no medical evidence relating to Ms Burrows' ill health, but on enquiring further of the parties after the hearing, it turned out that was incorrect: she had sent the Council details of a particular medical condition back in March 2015.

22. As an alternative to an adjournment, in the same letter Ms Burrows asked for mitigating factors to be taken into account. She said she had not been aware she had received a caution rather than a warning. She had therefore been unaware of the need to disclose it to the GPhC. She queried whether in fact it was a caution at all, since the police apparently did not have a copy of it. She asked for more time to pursue the issue with the police.

23. She went on to say that a suspension would be disastrous for her. She did not address the possibility of removal from the register. That had not been raised as an appropriate sanction in the skeleton argument of Mr Millin. She said she had worked as a pharmacist for 21 years and with the same employer for 20 years. Her employers were aware of the matter. She would lose her position if suspended and, as a single person living alone, would have no way of paying her mortgage or supporting herself.

24. On 20 July 2015, a print out from a record on the police national computer was obtained, stating that Ms Burrows had on 15 November 2013 been cautioned for a "false representation to make gain for self or another or cause loss to another / expose other to risk". This was made available to the Council in time for the hearing next morning, at Canary Wharf in London, Mr Hamlet of counsel appeared for Ms Burrows. His instructing solicitor and client were not present.

25. Mr Hamlet did not accept the police computer printout as proof that the caution had been administered, since the MG5 recorded that the offence had not been admitted. Mr Millin professed inability to answer the question how that could be if a caution had indeed been given; a caution is only apt where the offence is admitted. Fearing a successful submission of no case to answer, through inability to prove the caution, Mr Millin sought an adjournment to make further enquiries of the police.

26. The legally qualified chairman, Mr Pettigrew, raised the issue of Ms Burrows' letter of 18 July and noted that it raised the issue of "whether Ms Burrows would like to be here". That did not prompt any comment or observation. Mr Hamlet said he did not oppose the adjournment application. There is then a gap in the transcript but it is clear that the adjournment was granted, without opposition.

27. Diaries were then consulted without reference to Ms Burrows' availability. There is no evidence of any further indication about whether she might attend. The hearing was fixed for 16 and 17 September 2015. On 23 July, the GPhC wrote to Ms Burrows informing her of the hearing dates. After that, further enquiries were made about the supposed caution.

28. By 2 September, Ms Sharpe, Ms Burrows' solicitor, had listened to a tape recording of Ms Burrows' interview with the police and maintained in email correspondence with Mr Millin that day that it was "clear to me she got a warning not a caution". I infer that Ms Burrows might well have been of the view, on advice, that she did not have a case to answer. Ms Sharpe asked Mr Millin for the custody record.

29. However, having seen the custody record (albeit with some "sensitive" information redacted out), Ms Sharpe conceded on 14 September in emails that Ms Burrows had been cautioned, and informed Mr Millin and the GPhC that no witness needed to be called on the point and that the hearing estimate could be reduced to one day. She informed that Mr Hamlet would attend and Mr Burrows would accept the allegations but "won't be present". Nor was Ms Sharpe, for reasons of economy.

30. On 16 September 2015 at the resumed hearing, Mr Millin produced a further skeleton argument. In it, he did not specify what sanction he sought, but his tone had hardened. He referred to cases in which removal from the register had flowed from a finding of dishonesty. Mr Hamlet, despite the admission that the caution had been administered and not declared within seven days, submitted in a written skeleton argument that the caution was misconceived.

31. Mr Hamlet's submission was that Ms Burrows' fitness to practice was not impaired because, although cautioned, she was not guilty of the fraud to which she had ostensibly confessed. She had not admitted to intending to cause anyone loss or make a financial gain for herself. She had lacked the necessary *mens rea*, he argued. As such, he submitted, "the offer and acceptance of this caution was fatally flawed". He accepted that it should nonetheless have been declared, and had not been; this, he described as "a technical failure".

32. That was a bold strategy given the absence of Ms Burrows on a pre-booked holiday. She could not therefore be questioned. She had been legally represented when she signed the caution, had previously said in interview that "it wasn't her intention to

make financial gain but [she] understands her actions did and admits both offences"; and when she signed the caution, the form included the statement that "on two separate occasions false receipt had been presented in order to obtain goods from Debenhams to the value of £75 … ."

33. Mr Hamlet did also put forward some brief mitigation, but the tone of his skeleton argument was more defiant than contrite, did not include any apology, and contended that it was not properly open to the Committee to find misconduct and impairment of Ms Burrows' fitness to practise. At the hearing, after going through the documents, Mr Millin submitted that "there has been no remorse or apology about the underlying incident" and that the conduct was deplorable.

34. He disputed Mr Hamlet's challenge to the correctness of the caution, noting that Ms Burrows had been legally represented when she signed it, and had not applied to have it annulled. Mr Hamlet, for his part, referred to the absence of any witness from the police service, even though Ms Sharpe had indicated that no witness need be called to prove the caution.

35. He described the police's position as "tacit acceptance" that the caution was deficient. He complained that the custody record had been selectively redacted and that the police had "got the wrong end of the stick about other things", which made the redactions suspicious. He reiterated that the caution was "defective" because what Ms Burrows had admitted to did not amount to the offence for which she was cautioned.

36. He explained that Ms Burrows was "abroad" under a "long-standing arrangement", made before the date of the reconvened hearing had been set. He said this should not be interpreted as disrespect to the Committee and he hoped it would not be taken as such. He concluded by producing two short written character references, one of them signed.

37. In response, Mr Millin commented that had Ms Burrows not accepted the caution, she would probably have been charged with the offences of fraud. He commented on the absence of any written statement from Ms Burrows, and her non-attendance. Mr Hamlet said that amounted to suggesting "that she is under some form of obligation to assist the Council in producing a case against her" and that it was not for Ms Burrows to "plug the gaps" in the Council's investigation.

38. Mrs Alderwick, a member of the Committee, noted the assertion from Mr Hamlet that Ms Burrows "would have wished to have been here". She asked if any attempt to change the hearing date had been made, which would have enabled her to attend. Mr Hamlet answered no, and said he had had some difficulty in obtaining instructions. At the hearing before me, he explained that he had never met or spoken to Ms Burrows, and that all his contact had been with Ms Sharpe.

39. The Committee deliberated and returned to give its determination. The chairman analysed the facts and stated that Ms Burrows' consent to the caution had been validly given, to avoid prosecution and probable conviction; and that the suggestion that she did not intend to make a financial gain from the enterprise was untenable given that she admitted she knew she would gain financially from it.

40. The chairman recited, uncontroversially, the relevant legal principles and provisions. He noted that Ms Burrows had not attended and had not asked for a hearing date on which she could have attended. He referred to her otherwise unblemished record and to the two testimonial letters, but noted that there was no indication the writers were aware of the allegations that had been made against Ms Burrows.

41. The Committee decided that the conduct for which Ms Burrows had been cautioned was dishonest and that this breached fundamental standards of conduct, brought the profession into disrepute, and meant her integrity could not be relied upon. The Committee would not have found her fitness to practise impaired by the failure to declare alone, but it was impaired "in relation to the caution and the dishonest behaviour that lies behind that caution".

42. The Committee went on to consider sanction. After further lengthy citation of case law, Mr Millin suggested that "a period of suspension is likely to be sufficient to maintain public confidence in the profession and would also send a message to the public ….", but he recognised that the Committee would also be considering removal from the register.

43. Mr Hamlet described the return of the two dresses as "an isolated event in an otherwise unblemished career"; there had been no repetition and there was no risk of any, and no harm to the safety of patients. In all the circumstances the caution was itself sufficient to mark the misconduct; suspension would be disproportionate, erasure even more so, he said. The letter of 18 July 2015 from Ms Burrows (mentioned above) was then referred to as evidence of the hardship suspension would cause.

44. The Committee then deliberated again, returning 83 minutes later. The chairman gave the determination on sanction. He set out correctly, and uncontentiously in this appeal, the usual principles on the basis of which the sanction is decided upon. He noted there were aggravating features: two offences not one; premeditation; and lack of insight arising from Ms Burrows' statement that the incident involved "the wrong receipt". He noted the mitigating features: a prior clean record; no danger to patients; and loss of employment in the event of suspension or removal.

45. On the issue of insight, the chairman referred to the changes in Ms Burrows' position. At first, she had accepted she had received a caution; then, she had not accepted that; finally, she had accepted that she had received one but not that it was properly administered. She had persisted in denying dishonesty and had "failed to engage in a process of acceptance or expression of regret or seeking to improve matters".

46. The chairman concluded:

> The lack of insight or indeed any expression of remorse is a very concerning factor here and it gives us no prospect that a period of suspension is likely to lead to a complete rehabilitation and provide the necessary reassurance that the public interest can be protected and preserved in due course. We consider that, without

> the foundation of some degree of insight at this stage, it is not appropriate to impose a period of suspension but rather that the proportionate and reasonable sanction to impose is that of removal from the Register.

47. It is against that finding that Ms Burrows appeals. At first, the appeal was wrongly brought in the Chancery Division, but it was transferred to this court. There are now many such appeals against decisions of regulatory tribunals exercising disciplinary functions within various professions. The field has become overburdened with citation of authorities, as I have observed lately in another case. In this case, I was treated to 30 authorities including 24 cases. Yet no issue of law divided the parties. It is no longer necessary to cite authority for the well known propositions applying in this case.

48. Those propositions are: (i) dishonesty may well lead to removal from the register because it is very serious and threatens public confidence in the profession; (ii) lack of insight makes removal more likely; (iii) an appeal is only allowed where the decision below is wrong, or unjust because of a serious procedural or other irregularity; (iv) appropriate deference is due to the tribunal below in view of its special expertise, especially in cases regarding professional practise (which this is not); (v) the court can correct material errors but its judgment on application of principles to the facts is a secondary one; and (vi) as regards sanction, the court should not conduct a resentencing exercise, substituting its view for the tribunal's.

49. Mr Hamlet submitted that this was a case in which the wrongdoing did not arise out of the practice of the pharmacy profession and that accordingly a lesser degree of deference to the tribunal's judgment was appropriate than would be the case if the case involved unsound clinical judgment or a threat to the safety of patients. He reminded me that the court should only afford the amount of deference which is warranted by the circumstances.

50. I agree with that submission as far as it goes, but it does not mean that because this case involved the criminal law and no live evidence was heard, the Committee's judgment should be shown less than considerable respect. It remains a matter for the tribunal's primary judgment to determine what preservation of public confidence in the relevant profession requires, even in a case not involving the practice of that profession.

51. Ms Burrows' first ground of appeal was that the Committee was wrong and unreasonable in its approach to and assessment of insight. She submitted, through Mr Hamlet, that insufficient credit was given for her cooperation with the police, the absence of a prosecution and conviction, her apology and her formal admissions. Mr Hamlet said Ms Burrows' uncertainty about the status of the caution was not the same as denying that it had been given. He submitted that the Committee erred by assuming, wrongly, that Ms Burrows had known all along she had received a caution.

52. The Committee should have treated her as having been genuinely unsure of the status of the warning she had been given, and whether it was a formal caution and not just a warning, which would not have to be reported. Mr Hamlet said the confusing and contradictory evidence emanating from the police supported this.

Indeed, it was accepted that non-reporting of the caution was not dishonest; she was unaware of the obligation to report it as well as unaware whether it was a caution at all. The Committee had unfairly equated a bona fide legal argument with a lack of insight.

53. The main difficulty with those arguments is that, as both the Committee and Mr Hamer (for the GPhC in this appeal) pointed out, Ms Burrows did not attend to answer questions about her state of mind. It is unclear why she chose not to attend. The fact that a pre-booked holiday clashed with the hearing date does not explain why Ms Burrows did not ask for a hearing date which did not clash, on which she could attend and answer questions.

54. No reason for this was given at the hearing in September 2015. It was not suggested that her medical problem stood in the way of her attending. No doubt she found the process stressful and preferred to leave the talking to her lawyers, but that carried with it the high risk that she would lose the prospect of a benign interpretation of her conduct and a lenient sanction, having deprived the Committee, by her absence, of the opportunity to test the level of her insight.

55. I accept that the case was delicate, because it was clearly incumbent on her new solicitors to test the validity of the caution. If it had turned out to be a nullity, Ms Burrows would have had no case to answer. Her solicitors would have failed in their duty had they not tested the validity of the caution by asking for the documentary evidence relevant to its validity. Ms Sharpe was asserting right up to 14 September (i.e. until she saw the custody record) that there was no valid caution.

56. The difficulty Ms Burrows placed herself in was that her challenge to the validity of the caution was not accompanied by any expression of remorse or contrition about the switching of the labels on the two dresses, which was obviously serious dishonesty whether or not the caution was valid. To suggest otherwise was unrealistic. Ms Burrows did not at any stage plainly and openly acknowledge that switching the labels on the dresses was a seriously wrong thing to do. She sought to downplay her wrongdoing by denying, unrealistically, any intention to gain financially or cause loss.

57. Furthermore, at the hearing she persisted, through Mr Hamlet, in denying the sting of the wrongdoing that had led to the caution even after she had withdrawn her contention that the it was invalid. That was perilous because it meant foregoing the opportunity to express contrition and show insight into the wrongdoing, pinning slender hopes instead on persuading the tribunal to accept the unrealistic proposition that switching the labels on the dresses was not dishonest. She made things more difficult for herself still, as I have said, by not attending the hearing.

58. In a case of obvious dishonesty, not attending the hearing amounts virtually to courting removal. We are getting a disturbingly high number of cases in which appeals are brought against removals from the statutory registers, imposed at hearings the appellant failed to attend. Given the high number of unrepresented parties in disciplinary proceedings of this kind (of which this case is not one), I think it would be a good idea for the disciplinary bodies to forewarn the defendant

not just that a hearing may proceed in his or her absence, but also that the consequences of non-attendance are likely to be severely prejudicial.

59. The second ground of appeal is that the sanction was too severe. Suspension would have been enough. I agree that the sanction was severe; more so than the sanction of suspension suggested by the Council, through Mr Millin. The Committee might have stayed its hand, even in a plain case of dishonesty such as this. Our legal system does encourage a second chance for wrongdoers, for example by drawing back from a custodial sentence where a person is of good character, or suspending the sentence, even where the custody threshold is crossed.

60. The Committee could have shown more mercy than it did. Another committee might well have accepted the suggestion of the Council that suspension was enough. Ms Burrows has paid dearly for her moments of folly, sacrificing her professional standing and career for paltry financial gain. It is natural to feel sympathy for her, up to a point.

61. But I find myself unable to say that the Committee was wrong to make the decision that it made. Cases of dishonesty are always liable to lead to removal. The fact that removal is not inevitable in such a case does not mean it is necessarily too harsh a penalty for a first disciplinary offence. The primary judgment on that issue is that of the tribunal.

62. On a fair reading of the Committee's determination on sanction, I do not agree with Mr Hamlet's suggestion that the Committee proceeded on the wrong basis that removal is inevitable for an offence of dishonesty in the absence of exceptional circumstances. The Committee was not so directed and would have been prepared to stay its hand if there had been real evidence of insight into the wrongdoing, without the need for exceptional circumstances. I have no doubt that the Committee would have carefully considered Ms Burrows' oral evidence, if she had given any.

63. In this case, the Committee carefully considered the aggravating and mitigating features of Ms Burrows' conduct. They weighed them in the balance, as they were bound to do. The weight to be given to each feature of the case was, primarily, a matter for them and is only secondarily a matter for this court. I do not accept that the weight they placed on the aggravating features was so great that it can be said they were wrong to come down on the side of removal rather than suspension.

64. The third and final ground of appeal is that the Committee's chairman, Mr Pettegrew who is legally qualified, should have floated with the parties the proposed content of any advice on the law he proposed to give the lay members, and heard the parties' representations on the correctness of the advice before giving it in private. Mr Hamlet sought to draw an analogy with the position in the General Medical Council, where an express rule (though not applying to GPhC proceedings) makes provision to that effect.

65. The issue on which, Mr Hamlet submitted, provisional advice should have been disclosed and discussed, was the chairman's statement that Ms Burrows "cannot say that she did not intend to have that financial benefit unless there are circumstances

which would act so as to vitiate her capacity to form the necessary intent". Mr Hamlet said that was a ruling on a point of law, on which the chairman should have entertained submissions before finalising it with the lay members.

66. I am satisfied that there is no merit in this argument. The only issue it raises is whether the proceedings were procedurally fair. It is plain that they were. There was no legal assessor; there was no need for one as the chairman was legally qualified. There were two able advocates before the Committee. They were more than capable of addressing arguments about the quality of the consent indicated by Ms Burrows' signature on the caution sheet, and the consequences of her decision to sign it.

67. The chairman was not, in my judgment, giving a ruling on a point of law. He was expressing the view of the Committee, uncontradicted by the absent Ms Burrows, that her acceptance of having committed the two offences should be taken at face value, because there was no reason (e.g. incapacity, duress, undue influence or some other factor vitiating consent) not to take it at face value. There was nothing procedurally unfair about the process leading to that part of the Committee's determination.

68. For those reasons, this appeal must fail. Mr Hamlet asked me to direct a detailed assessment of the costs he accepts his client must pay to the Council in respect of its costs. I do not agree. I am in a position to assess costs summarily and I propose to do so. I have the Council's updated schedule of costs. I think the costs claimed are too high for a one day case raising no new point of law or principle.

69. I make the following further observations. The Council claims separately for the skeleton argument (£3,100 plus VAT, including amending the skeleton argument twice) and brief fee (£7,000 plus VAT). I allow the latter but disallow the former. The task of drafting the skeleton argument is, conventionally, included in the brief fee. A brief fee of £7,000 plus VAT including the preparation of the skeleton argument is reasonable.

70. I allow the following elements for counsel's fees and expenses: £250 for advising by email; £1,100 for advising in conference; £7,000 for the brief (including skeleton); and £350 for travel and hotel expenses; with VAT to be added to each of the above. The resulting figure is: £8,700 plus £1,740 VAT. Solicitors' costs are claimed in the sum of £578. I allow that sum. The total is therefore £11,018. I summarily assess the respondent's costs in that sum. The parties are asked to draw up a draft order for my approval.