**[2014] UKUT 0348 (TCC)**

**Tribunal ref: FS/2012/0019**

***PROHIBITION — finding in High Court litigation that applicant had knowingly tendered false evidence — whether that finding could be undermined — no — production to the Authority by applicant of redacted and partial copy of High Court judgment to discredit another while concealing criticism of himself — whether applicant fit and proper — no — prohibition upheld***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**STEPHEN ROBERT ALLEN** **Applicant**

**- and -**

**THE FINANCIAL CONDUCT AUTHORITY** **The Authority**

**Tribunal: Judge Colin Bishopp**
**Mr Maurice Bates**
**Mr John Woodman**

**Sitting in public in London on 3, 4, 5 and 6 February 2014**

**The applicant appeared in person**

**Mr Sharif Shivji, counsel, appeared for the Authority**

## DECISION

### Introduction

1. This decision relates to the reference by the applicant, Mr Stephen Allen, of a decision notice, dated 25 July 2012, issued by the Regulatory Decisions Committee ("the RDC") of the Financial Services Authority which, by virtue of s 1A of the Financial Services and Markets Act 2000 ("FSMA") is now known as the Financial Conduct Authority. We shall refer to it, both before and after the change of name, as "the Authority". By that decision notice, the RDC determined to prohibit Mr Allen from carrying on any regulated activity, on the grounds that he was not a fit and proper person.

2. Before we come to the detail of the reference we need to set out some of the background, in order that what follows can be understood, and to deal with some preliminary matters.

3. The reference is unusual in that, although the Authority has throughout maintained that Mr Allen is not fit and proper, it has fundamentally changed the basis on which it advances that case. The most important element of its original position, reflected in the decision notice, was that Mr Allen, an insurance broker specialising in professional indemnity risks, had secretly added a fee to the premiums charged to a client, a firm of solicitors then known as Segens. Mr Allen denied (and still denies) that he has done anything improper; his case was and is that Segens knew of the fee, and consented to its being charged. It was also said that Mr Allen had diverted money due to an authorised insurance broker, R J Langman Insurance Brokers Ltd ("Langmans"), for which he worked at the time as a consultant, to his own benefit, and had diverted a rebate due from Langmans to Segens, also for his own benefit. Mr Allen has consistently denied those allegations as well.

4. The decision notice was based substantially, though not entirely, on the evidence of Mr Martin Webster who, although not a solicitor or barrister, was the head of Segens' litigation department and, it seems, responsible for securing the firm's professional indemnity cover. After Mr Allen had referred the decision notice to the tribunal, he produced a redacted single page extracted from the judgment of HH Judge Raynor QC, sitting as a High Court judge, delivered on 16 December 2011 in an action between Mr Allen as claimant and Mr Michael Seaman and MS plc (trading as Miles Smith Insurance Brokers) ("MS") as defendants. We shall refer to the judgment, whose neutral citation is [2012] EWHC 3526 (Ch) but which is unreported, as "the Seaman judgment".

5. Mr Webster was a witness in the trial of the action, but his evidence was almost entirely rejected by the judge, in clear terms—so much so that on any view Mr Webster must be regarded as discredited. The plain purpose of Mr Allen's sending the redacted page to the Authority was, it says, to demonstrate that Mr Webster was an unreliable witness, and that a case against him based on Mr Webster's evidence could not realistically succeed.

6. The Authority asked for a complete, unredacted, copy of the judgment but Mr Allen did not supply one, arguing that it was irrelevant to the issues in his reference. The Authority did not accept that assertion, and managed to obtain from the transcribers a complete copy of the judgment, which had been delivered

*ex tempore* and which, apparently for that reason, has not been made available, albeit summaries have appeared in the legal press. The complete judgment shows that not only Mr Webster but Mr Allen too was disbelieved by the judge, who concluded that Mr Allen had knowingly advanced an untrue case, had produced at least one forged document and had originally colluded with Mr Webster to advance that untrue case. It is not clear to us why he did so, but it is plain that Mr Webster later changed his mind and gave evidence for the defendants. We shall say more about this litigation later.

7. Once it had obtained a complete copy of the Seaman judgment the Authority recognised that it could no longer rely on Mr Webster, and it decided to abandon its case that Mr Allen had, in effect, overcharged Segens and had diverted money due to others to himself—in other words, it no longer placed any reliance on the facts said to support its original position. Instead, it took the view that Mr Allen's having knowingly advanced an untrue case before the High Court, in the process submitting a forged document, and his (as it saw it) attempt to mislead the Authority by producing a very partial extract from the judgment, designed to undermine Mr Webster's credibility, while concealing the equally, if not more, damning remarks made about Mr Allen himself by the judge, were themselves reasons for concluding that Mr Allen was not fit and proper to carry on regulated activities. It accordingly sought and secured permission from the tribunal to amend the statement of case it had already served, in order that it could rely instead on Judge Raynor's conclusions. Mr Allen opposed the application, but he has not appealed against the decision permitting the amendment.

8. We therefore start from the, we think unprecedented, position that we are required to consider the Authority's argument that Mr Allen should be prohibited from carrying on any regulated activity, based as it is not merely on evidence which was not before the RDC but also on claimed facts which were not foreshadowed by either the warning notice or the decision notice. However, as Judge Sinfield concluded when he gave permission to amend the statement of case, the subject matter of the reference is whether or not Mr Allen is fit and proper in the general sense, and not merely and specifically in relation to a particular transaction or set of transactions. Pragmatically, there is merit in not requiring the Authority to re-start the process by issuing a further warning notice, and in not subjecting Mr Allen to the expense and delay of prolonged proceedings.

9. Mr Allen's case before us, in very short summary, is that there is material, much of which he obtained from the Authority in late disclosure, which was not before Judge Raynor and which, had it been before him, would have made a material difference to his conclusions. That material, he says, shows that he did not advance a false case, and that the supposed forged document was, in reality, authentic. He accepts, now, that he should have provided a complete transcript of the Seaman judgment, but maintains that his failure to do so was no worse than a misguided mistake. We will, of course, deal with these contentions in greater detail later.

10. During the course of the hearing we were shown some results of polygraph tests arranged by Mr Allen and to which he had subjected himself with a view, as he made plain, to demonstrating that he was truthful. Some of the questions asked

of him during the testing related to matters in issue in his High Court action, and others to matters which are in issue in this reference. On the second day of the hearing Mr Allen (who represented himself before us) asked whether we would take any heed of the results, and we told him that, as they stood, they were of no evidential value. The reports had been prepared by a person who did not explain what were his qualifications to undertake the tests, his experience, the nature of the equipment, the conditions under which the tests had been undertaken, the extent to which reliance could be placed on the results and various similar matters. There was also the question, to which we come shortly, of the admissibility of test results of this kind. We left the matter on the basis that Mr Allen would find out whether the person who undertook the tests was able and willing to attend the hearing (since, if he was not, the matter was academic and there was nothing to be gained by spending time on it) and that we would revisit Mr Allen's application that the test results should be admitted if he was.

11. On the following day Mr Allen told us he had ascertained that the person concerned was able to attend on the scheduled last day of the hearing, and he made an application to us for permission to call him as a witness. His reason, in essence, was that as the question in the reference was whether he was fit and proper to carry on controlled functions, and the underlying basis of the Authority's case that he was not was that he had been untruthful to the High Court, he should be allowed to introduce evidence which would, he said, undermine that case by showing that he is a truthful person, and in particular that he has been truthful in answering questions directly relevant to the High Court action and to the reference.

12. Mr Sharif Shivji, counsel appearing for the Authority, opposed the application on the ground that it was not the policy or practice of the English courts or the tribunal to admit such evidence, for the very good reason that it is the function of the court or tribunal itself and not of some outside agency, however expert, to determine where the truth lies. There is very little authority on the subject, but he was able to show us two reported cases. The first was the decision of Tucker J in *Fennell v Jerome Property Maintenance Ltd*, which appears to be reported only very briefly in The Times of 26 November 1986, and which relates, not to polygraph evidence, but to answers given by a subject to whom a substance—it appears, what is known colloquially as a truth drug—had been administered. Tucker J refused to admit the evidence, taking the view that its admission would usurp the function of the trial judge. The other was a decision of the Canadian Supreme Court in *R v Béland & Phillips* [1987] 2 SCR 398 in which it decided that polygraph evidence should not be admitted in a criminal trial, on the ground that the issue of credibility is a matter within the competence of judges and juries and not one on which expert evidence is required.

13. We refused the applications for admission of the test results and for the oral evidence of the person who undertook the tests to be heard for two reasons, one practical and the other, of much greater importance, of principle.

14. The practical obstacle was that although the tester could have attended the hearing on the last scheduled day, it would have been impossible to deal with his evidence fairly had he done so. There had been no direction at an earlier stage for any expert evidence, and the Authority had had no opportunity of considering

whether it needed a report of its own. Cross-examination, without adequate preparation, would have been unsatisfactory, and it would have been extremely difficult for us to determine what, if any, weight to attach to the evidence in those circumstances. The alternative, of a delay while the Authority obtained a report of its own and a further hearing was arranged would be unattractive even if it were appropriate.

15. The more compelling reason for declining Mr Allen's request is that we agree with Mr Shivji on the principle that there is no place in a court or tribunal for such evidence, and for the reasons he offered. The almost complete absence of authority on the point is, we think attributable to the fact that it is obvious, irrespective of the reliability or otherwise of polygraph testing, that it is for the court or tribunal to hear and read the evidence placed before it and to make up its mind what the relevant facts are from that evidence, and nothing else. That has been the practice for very many years, and it is so well-established that, in our view, it would require an Act of Parliament to change it. The two authorities we have mentioned are wholly consistent with that view.

**The facts**

16. Many of the facts set out below are taken from the findings made in the Seaman judgment, though supplemented by the evidence we heard of (in the order they gave evidence) Mr Jasminder Jandu, a solicitor advocate employed by the Authority, Mr John Freudenthal, a chartered accountant who worked part time for Fabien Risk Services Ltd ("FRS"), a company to which we refer again below, and Mr Allen. As Mr Allen represented himself, his evidence and submissions were to some extent, and inevitably, intertwined, but we have endeavoured to segregate them in what follows.

17. It is common ground that Mr Allen has many years of experience in placing professional indemnity risks. The Seaman judgment sets out details of Mr Allen's several moves from one broking firm to another between late 1997 and about 2005. We do not, we think, need to relate in what follows the detail of those moves, on which little turns for the purposes of this decision, save to the limited extent it is necessary to do so for better understanding our decision. We do, however, need to mention for completeness that FRS collapsed in 2005, despite the improper use of clients' money in an attempt to support it. Two of the directors were found to have been party to the misuse of the clients' money, and were prohibited. The Authority issued a decision notice to the effect that Mr Allen, who was also a director, should be prohibited too, for knowing that, or being reckless as to whether, clients' money was being misused. The Financial Services and Markets Tribunal, the predecessor of this tribunal, found that he did not know that clients' money was being misused, and was not reckless about the matter, but that he had failed in his duties as a director and should be prohibited from performing any management or control functions. Mr Allen remains subject to that prohibition.

18. Of central importance in this reference is the Seaman judgment and the action brought by Mr Allen against Mr Seaman and MS which led to it. The action was founded on Mr Allen's claim relating to a portfolio of clients which, he said, he had built up and in which he had the beneficial interest. He claimed that he had taken the portfolio with him from one firm to the next. One move was to a

firm which did not have the facilities which were necessary if he was to service the portfolio, and Mr Allen claimed that Mr Seaman and MS had agreed to "warehouse" the portfolio for him, meaning preserve and service it while he was temporarily unable to do so himself, in exchange for a share of the commissions earned. Mr Allen and Mr Seaman had known each other for some years, often moving together from one firm to another, although their paths diverged when Mr Seaman moved to MS. Rather than honour the agreement, Mr Allen said, Mr Seaman and MS exploited the portfolio for their own advantage and did not pay any part of the commissions to him. He maintained that they were obliged to account to him for a substantial sum.

19. It was, therefore, necessary for Mr Allen to demonstrate two things if he was to succeed in the claim: that he had the beneficial interest in the portfolio, and that Mr Seaman and MS had agreed to warehouse it.

20. His case on the former point was based, in part, on an employment contract made, or purportedly made, between FRS and Mr Seaman on 1 August 2002, shortly after Mr Seaman became an employee of FRS; Mr Allen was already an employee of FRS at that time, and would soon become a director. Clauses in the agreement were consistent, if not more, with Mr Allen's case that the benefit of the portfolio lay with him. Mr Seaman denied that he had ever signed such a document. After setting out the evidence, to some of which we shall return, the judge recorded his conclusion that the document had been forged and said this (at [73]):

> "I am satisfied that the first defendant [Mr Seaman] is telling me the truth when he states that he never saw the document before it was produced in the course of this litigation. The claimant [Mr Allen] has produced the document and I am satisfied that it is more probable than not that he is responsible for the forgery. Either he forged the signature or caused it to be forged. If I am right and the document was forged, there is no other plausible culprit."

21. In reaching that conclusion it is clear from what he said next that the judge took into account the evidence he had heard from Mr Webster who, in addition to his position at Segens, had a connection with FRS. At [74] he said:

> "In this connection, it is pertinent to note that when in 2004 Mr Webster, the company secretary and non-executive director of FRS, was tasked with preparing new employment contracts for the employees of FRS, he does not recall ever seeing the disputed contract which he says was never given to him. The terms and conditions of employment, which the first defendant signed in November 2004, made no mention of the claimant or his portfolio, although it did contain restrictive covenants referring to clients of FRS."

22. The warehousing agreement was made, according to Mr Allen, at the Novotel hotel in London EC3 on or about 7 October 2005. He claimed that he and Mr Seaman, the latter with authority to commit MS, had met there and had agreed on the terms on which MS would warehouse his portfolio. The agreement was not documented, but Mr Allen produced a witness statement (although it was marked as a draft) supposedly made by Mr Webster who claimed to have witnessed the meeting and who supported Mr Allen's version of events, an email written by Mr James Packham, formerly the managing director of MS, to Mr Allen in which he referred to a lunch in December 2005 when Mr Seaman "admitted that he had walked off with your business", and a letter prepared by Mr Allen and signed by a

colleague, Miss Deborah Schofield, in which she expressed surprise that MS and Mr Seaman had not honoured their agreement (about the terms of which she was rather vague) with Mr Allen.

23. Mr Webster denied having made the witness statement, and indeed he made a later statement supporting the defendants' case. Nevertheless, the judge concluded, from handwriting evidence (among other things), that he had made (by signing) the first statement, even though it was marked as a draft, that his evidence was "extraordinary" and, at [179], "I have hesitated before treating anything that he has stated in these proceedings as reliable." He added at [180] that "I do not believe he witnessed the discussions alleged by the claimant to have taken place. I do not believe he witnessed a handshake …".

24. The judgment records that Mr Packham said in his evidence that the contents of his email were untrue, that he had provided it in order to help a friend, that he had thought better of it, and that he had gone to the defendants' solicitors to tell them what was the true position. It also records part of Miss Schofield's evidence in which, as the judge said, she maintained she had signed the letter only to help a colleague, in the belief that the letter would not be used in court proceedings, and that she was very angry that it had been so used. Although he did not say so in terms, it is apparent from the judgment that the judge accepted both explanations. He went on to conclude that Mr Allen had put forward the statement, the email and the letter knowing that all of them were untrue and, at [192] he said:

> "I have concluded that the claimant's account of [the October 2005] agreement is simply untrue, that he has colluded with Mr Webster in presenting a false case as to what happened at the Novotel, and that as regards Mr Packham and Miss Schofield, as I've said, he submitted evidence which he knew to be false in support of his case."

25. As we have said, the Authority's original case against Mr Allen was based on Mr Webster's evidence to it, and Mr Allen produced a single redacted page of the Seaman judgment in order to undermine that evidence. That page (a photocopy of a page of the judgment on which passages had been obscured by thick black lines, and which starts and ends mid-sentence) was as follows; what remained after redaction is in a bold typeface, while what was redacted is in italics.

> "*… authority to enter into such an arrangement on behalf of Miles Smith. I would have been extremely surprised if Michael Seaman had any authority to enter into the sort of arrangement which Mr Allen claims in any event."*
>
> *172. He refers later in the paragraph to his email of 2nd December, supporting his recollection that he did not ask Michael Seaman if he had the necessary authority to enter into such an arrangement.*
>
> 173. **Mr Webster gave evidence before me, and he confirmed on oath the statements made in the witness statement given on behalf of the defendants, although when the handwriting expert evidence of Dr Giles was put to him, he said that he was surprised by it because as far as he recalled, he had never signed the agreement** [this appears to be a mistake for "statement"]**, but as I have said already he plainly had.**

*174. He said—and I won't quote verbatim from the extensive transcript, but the references are T3, pages 35 to 44—that those present in the Novotel had not been interested in what the claimant and the first defendant were discussing, and that he told them to go to the other side of the bar, that there then was a discussion. He said that what he had alleged in paragraph 10 of his witness statement, namely that the agreement he'd witnessed was that Stephen Allen would allow Michael Seaman to warehouse his risks, was not correct. He said he did not witness any agreement at all. That for him that evening was one among many and what was going on was of no interest to him.*

*175. He said that he didn't remember any discussion about the allegedly excluded clients, that the reference to Valpac* [one of the clients] *was information that the claimant had told him, and he didn't believe it was discussed that evening, and that the commission split in respect of Valpac was not something he had witnessed being discussed. He said he didn't recall in fact any handshake, despite what was stated in the draft witness statement. He recalled the claimant looking unhappy as if he didn't want to be there at all.*

*176. He said again that he did not make any request that the first defendant confirm his authority, and that that did not happen. He said that he did a witness statement, although as I say, he said he hadn't signed it, to "try and help a friend when he was told there was a possibility to negotiate a settlement and that some further evidence to boost the case would assist."*

177. **As I mentioned already, he thought he'd never be prepared** [required?] **to sign it or give evidence, and he doesn't recall signing it** *and that he had stipulated to the claimant on many occasions that under no circumstances would he be prepared to swear on the Bible that what was in the draft statement was true.*

**178. The evidence of Mr Webster is extraordinary. He said more than once that he was not proud of what he had done and clearly any settlement induced by knowingly false statements would have been voidable and procured dishonestly.**

179. **I have hesitated before treating anything he has stated in these proceedings as reliable.** *But having regard in particular to his email of 2nd November 2007, I have concluded that Mr Webster, on the balance of probabilities, spoke in his draft signed …*"

26. As we have indicated, Mr Allen's case in his action against Mr Seaman and MS that he owned the beneficial interest in the portfolio was based not only on his own evidence but also on the proposition that it was confirmed by the clauses on which he relied in Mr Seaman's 2002 contract of employment. Mr Freudenthal's evidence was directed to the existence or otherwise of that contract. He did not say he had seen the contract—it was not his function to deal with such matters—but he was aware that it was the policy of FRS to put employment contracts in place promptly, and that Mr Seaman had been nervous about joining FRS without the security of a contract. It was, he said, unlikely that either party would not have insisted on an employment contract soon after Mr Seaman joined FRS. He added that he had always found Mr Allen, whom he had known for more than ten years, to be honest and of integrity.

27. Mr Allen gave evidence about the 2002 employment contract to much the same effect as Mr Freudenthal, and made copious written submissions about the evidence available to Judge Raynor on the subject, and about the inconsistencies and improbabilities which, he said, could be identified in that evidence. He similarly gave extensive evidence, and made lengthy submissions, about the claimed warehousing agreement, and what he argued were inconsistencies in the evidence before the judge about that agreement. Mr Jandu's evidence in chief was limited to a formal narration of the Authority's change of approach, as we have described it above, and the production of the relevant documents, but Mr Allen's cross-examination of him was also designed to demonstrate inconsistencies in the evidence available to Judge Raynor relating to the existence of the employment contract and of the warehousing agreement. It consisted, however, almost entirely of questions which Mr Jandu could not properly answer as they related to matters not within his own knowledge.

28. We will deal with our conclusions about the evidence at a later stage.

**The law**

29. The Authority's power to make a prohibition order is derived from s 56 of FSMA which, so far as material to this case, and as it was in force when the decision notice was issued, read as follows:

> "(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to—
>
> (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities …."

30. The section has been amended extensively by the Financial Services Act 2012, with effect from 1 April 2013, but the amendments cater for the changes in the regulatory structure which occurred on that date, and the substance of the provisions, so far as they are relevant to this case, is unchanged. For that reason we do not think it necessary to set out the provisions as they now are.

31. The decision notice stated that the Authority intended to invoke sub-ss (2) and (3)(a) by prohibiting Mr Allen from performing any function, and that the prohibition should relate to all regulated activities. Mr Allen did not argue that, depending on our findings, we might impose a lesser prohibition; his argument was that his conduct warranted no prohibition at all.

**The Authority's case**

32. The Authority's case, as it is now put, is an essentially simple one which can be shortly stated. It is that a person who has been found by a court of competent jurisdiction, as plainly the High Court is, to have advanced what he knew to be a false case, supported by a forged document and other materials which, to his knowledge, contained false information, and to have given untrue

evidence himself is for that very reason not fit and proper to undertake regulated activities. Even if we were persuaded that that there was some compelling reason for us to conclude that the judge was wrong—and nothing less would do, particularly when the Seaman judgment had not been appealed—the fact that Mr Allen produced a redacted and therefore misleading extract from the judgment, designed as we have said to discredit Mr Webster while concealing the findings made about his own conduct is, alone, sufficient to demonstrate that he is not a fit and proper person.

33. Mr Shivji referred us to extracts from the Authority's Handbook, setting out various matters which the Authority will take into account when considering whether or not a person is fit and proper for the purposes of s 56 of FSMA. The more important are, first, FIT 2.1.3G(2), which brings into consideration

> "whether the person has been the subject of any adverse finding or any settlement in civil proceedings, particularly in connection with investment or other financial business, misconduct, fraud or the formation or management of any body corporate."

34. The second relevant passage, FIT 2.1.3G(11), indicates that the Authority will also take into account

> "whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards."

35. Mr Shivji acknowledged that those were matters to be taken into account, and were not factors which necessarily and invariably pointed to the conclusion that such a person was not fit and proper, but they were, he said, relevant and in this case of considerable significance. The criticisms of Mr Allen made in the Seaman judgment were severe, fully reasoned and based on several factors rather than on one isolated piece of evidence. It was also an inescapable conclusion that the provision of a redacted copy of a single page of the judgment was not, as Mr Allen had claimed, a misguided mistake. It was the only partial and redacted document he had supplied; and it was plain that his purpose in providing it in that manner was to discredit Mr Webster while preventing the Authority from finding out that he too had been strongly criticised. Even if there might be any doubt about the motive for producing the redacted page, that doubt could not survive Mr Allen's refusal to produce a complete copy when asked.

**Mr Allen's case**

36. As we have said, Mr Allen maintains that the judge was wrong, and that the adverse remarks made about him, not only in the passages redacted from the page he provided but elsewhere in the Seaman judgment, have no foundation. His first, and perhaps most important, contention is that the judge's conclusion about the 2002 employment contract between FRS and Mr Seaman was quite wrong and that, having incorrectly concluded that there was no such contract, the judge's remaining findings proceeded from a false starting point. If it was correct that the portfolio was his, it made perfect sense that he would ask Mr Seaman, with whom

he was on good terms at the time, to warehouse it for him when he was temporarily unable to service it himself.

37. We spent a considerable part of the hearing in examining the evidence before the judge, including transcripts of the oral evidence of several witnesses. For reasons we explain below, we see little purpose in our providing a detailed analysis of that evidence, and we intend no discourtesy to Mr Allen, or to the tenacity of his arguments, in adopting that course. It is, we think, sufficient to record at this point that we accept that there were conflicts in the evidence, and a number of inconsistencies.

38. If one accepts Mr Allen's primary argument that Judge Raynor's findings, that he had given dishonest evidence and had induced others to act improperly, or worse, were wrong, he continued, it follows not only that his claim against Mr Seaman and MS should have succeeded, but—and more importantly for this reference—that the Authority was advancing a case which in reality was without foundation. It would be an unjustified and unfair course to prohibit him completely in those circumstances; he did not argue in the context of this reference that the earlier partial prohibition should be revoked or varied.

**Conclusions**

39. Mr Allen is, as we have said, a litigant representing himself and, since he is not a lawyer experienced in the presentation of a case, we have examined what he said, and the substantial volume of evidence he produced, with great care.

40. We mentioned above our acceptance that Mr Allen had been able to identify various inconsistencies and conflicts in the evidence before Judge Raynor, although we detected nothing in the material which emerged later, in the course of the Authority's investigation or in the course of this reference, which added anything of significance. Indeed, we agree with Mr Shivji that, when properly analysed, all of the material which came to light during the course of the Authority's enquiries, and was disclosed then or in the context of this reference, is inconsequential. The primary difficulty for Mr Allen is that most, if not all, of the inconsistencies and conflicts on which he relied were addressed by the judge, and resolved. We did not, in fact, detect any issue of present relevance which was not before the judge, nor did we detect any material, whether in the evidence available then or in what has emerged since, which casts material doubt on any of his conclusions.

41. It is precisely the function of any judge faced with a conflict of evidence to resolve that conflict, and also to take into account inconsistencies. Experience shows that even the most reliable of witnesses may sometimes be guilty of errors of recollection, and that they may give internally conflicting evidence, yet do so honestly. It is equally the case that two witnesses, both doing their best to give honest evidence, may give different accounts of the same event. And it is, as one might expect, not always easy to determine which of two witnesses is telling the truth when it is clear that only one of them can be doing so.

42. It is, of course, possible that a different judge, hearing and seeing the same evidence as was before Judge Raynor, would reach a different conclusion but, as Mr Shivji correctly pointed out, in the absence of a successful appeal against the Seaman judgment, the judge's findings in that case are binding on Mr Allen as

against Mr Seaman and MS, and we too cannot simply disregard them. We have to pay considerable heed to the fact that Judge Raynor heard much more comprehensive evidence than we have been able to hear, and that he was in consequence in a better position than are we to judge the truth of the dispute between Mr Allen and the defendants in that case.

43. We accept that if there were some evidence, of undoubted reliability, which showed that Judge Raynor must have been wrong in one material finding or another it might be open to us (depending on the nature of the evidence and the conclusions to which it led) to reach the view that the criticism of Mr Allen was unfounded, to the extent that we could also conclude that the Seaman judgment is an insufficient basis for a determination that Mr Allen is not fit and proper; but nothing before us is of that character. At best, it added to the conflicts and inconsistencies addressed by the judge; but in our view it did so only to a limited, indeed trivial, extent. There was nothing which might be regarded as a compelling indication that there was a fundamental error in the Seaman judgment.

44. We should record, before moving on, that we found Mr Freudenthal to be a straightforward witness, whose evidence we accept. Unfortunately for Mr Allen—and we intend no discourtesy to Mr Freudenthal in saying this—it is of very little value. As we have said, his evidence suggested that it was unlikely that Mr Seaman would not have insisted on an employment contract in 2002, or that FRS would not have offered one. The evidence before the judge shows that Mr Seaman's contemporaneous illness was offered as a possible explanation of an oversight. However, even if it were open to us to reject that explanation and conclude there was in fact an agreement in 2002, it does not necessarily follow that it was the one bearing that date which was produced to the judge. Mr Allen still has to overcome the obstacle that Mr Seaman denied that he had signed the agreement which was produced, and that the judge accepted that evidence, finding that he had not signed it and that the document was forged. In addition, there was nothing before us which could reasonably be regarded as evidence which might, still less must, undermine the judge's findings about the claimed warehousing agreement. Indeed, the evidence we saw suggests that the judge's conclusions in that respect were plainly right.

45. In addition, even if we had accepted that there was any merit in Mr Allen's attack on the Seaman judgment, we would be bound to agree with Mr Shivji that the production of a redacted page from the judgment in the manner we have described amounts to an attempt to mislead the Authority. Mr Allen's actions were certainly misguided, but we cannot accept his claim that they were the product of a mistake. They were, as we are satisfied, a calculated attempt to mislead a regulator.

46. It follows, in our view, that both of paragraphs (2) and (11) of FIT 2.1.3G, which we have set out above, are engaged. Those paragraphs are not, of course, of statutory force, but are a statement of matters the Authority takes into account. In our view they are both very much matters which are relevant to a determination of fitness and propriety within the meaning of s 56(1) of FSMA, as it was in force at the time, once due weight is given to such factors as the gravity of, and the time which has elapsed since, the events complained of. Here, both the findings against Mr Allen in the Seaman judgment and his attempt to mislead are serious and

recent enough in our view, even if taken individually, to warrant prohibition; together they allow, realistically, of no other outcome.

47. Mr Allen's challenges to the Seaman judgment are not sufficient to displace, or even call into question, the findings in it that he knowingly advanced and gave untrue evidence, including a forged document, findings which demonstrate that he cannot be fit and proper to conduct activities which should be conducted only by the scrupulously honest. His attempt to divert the Authority by discrediting Mr Webster and concealing his own wrongdoing is, we are satisfied, an indication of his inability to understand the need for complete candour in his dealings with a regulator and that attempt, too, shows that he is not a fit and proper person.

48. We add, to eliminate any doubt, that we have taken no account of the fact that Mr Allen is already partially prohibited. The reasons for that prohibition are of a quite different character.

49. Our conclusion is that Mr Allen is not a fit and proper person to perform any function in relation to a regulated activity and that he should be prohibited from doing so. We direct the Authority accordingly.

**Colin Bishopp**
**Upper Tribunal Judge**

**Release date: 6 August 2014**