

PROHIBITION ORDER - whether Applicant fit and proper to perform functions in relation to all regulated activities carried on by authorised persons generally – no in respect of all currently regulated activities – Financial Services and Markets Act 2000 s 56

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

CHRISTOPHER REGINALD COLIN HENTON

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondents

**Tribunal: DR A N BRICE (Chairman)
MR C A CHAPMAN
MR N W DOUCH**

Sitting in public in London on 24 and 25 September 2007

The Applicant in person

Dan Enraght-Moony, of the Financial Services Authority, for the Authority

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FINAL DECISION

The reference

1. On 18 October 2006 the Financial Services Authority (the Authority) issued a Decision Notice stating that they had decided to make an order prohibiting Mr Christopher Reginald Colin Henton (the Applicant) from performing any function in relation to any regulated activity carried on by an authorised or exempt person or exempt professional firm. The Decision Notice was issued because it appeared to the Authority that the Applicant was not a fit and proper person to perform any such function. The Applicant referred that Decision Notice to the Tribunal.

2. On 20 April 2007 the Tribunal heard a preliminary issue in this reference. That issue was whether the Authority were entitled to rely upon the findings of the High Court in *Sphere Drake Insurance Limited and Another v Euro International Limited and Others* [2003] EWHC 1636 (Comm) where findings had been made about the honesty of the Applicant. On 14 May 2007 the Preliminary Decision of the Tribunal was released. The Tribunal concluded that the Authority was entitled to put before the Tribunal the findings of the High Court in *Sphere Drake* as evidence of the Applicant's lack of fitness and propriety; however, the Tribunal stated that it would also consider any other relevant evidence, and any other relevant argument, which either party wished to put before it and would then reach its own decision as to whether the Applicant was a fit and proper person.

The legislation

3. The Decision Notice was given under the provisions of section 56 of the Financial Services and Markets Act 2000 (the 2000 Act) the relevant parts of which provide:

“(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 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;
(b) authorised persons generally or any person within a specified class of authorised person.

(4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence”

4. Section 157 of the 2000 Act provides that the Authority may give guidance consisting of such information and advice as it considers appropriate with respect to a number of matters. The Authority has published guidance in the FSA Handbook with the relevant provisions being denoted by the letter G. Section FIT 1.3.1G of the

Handbook states that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person to perform a particular controlled function. The most important consideration will be that person's honesty, integrity and reputation; competence and capability; and financial soundness. FIT 2.1.1G states that, in determining a person's honesty, integrity and reputation the Authority will have regard to a number of matters including whether the person has been the subject of any adverse finding in civil proceedings, particularly in connection with financial business, misconduct or fraud.

10 **The issue**

5. The issue we had to determine was whether the Applicant was a fit and proper person to perform functions in relation to all regulated activities carried on by authorised persons generally.

15 **The evidence**

6. A joint bundle of documents was produced at the hearing. Oral evidence was given by the Applicant on his own behalf.

The facts

20 7. From the evidence before us we find the following facts.

The Applicant

8. The Applicant was born in 1965. He left school at eighteen after taking his A level examinations. He then joined Alexander Howden, insurance brokers, where he worked in the tax department and later in the accounts department.

1986 – Syndicate 103

9. When he was twenty-one the Applicant joined Lloyd's Syndicate 103 where he was an underwriting assistant to a deputy underwriter who later became an underwriter. Syndicate 103 had been formed in 1948 and was classified as an aviation syndicate; it also wrote personal accident insurance. The deputy underwriter started writing a London Market Reinsurance account for the syndicate and much of the work came from a firm of brokers where Mr Jeffrey Ronald Butler and Mr Nicholas Brown worked.

10. By the time that he was twenty-five the Applicant had been appointed deputy underwriter at Syndicate 103. Mr Brown and Mr Butler had left their previous firm and gone to Stirling Cooke where they set up the firms of Stirling Cooke Brown Reinsurance Brokers Limited and Stirling Cooke Brown Insurance Brokers Limited, both called SCB. SCB developed the reinsurance of United States workers' compensation business and placed it into various entities. Syndicate 103 was a supporter of that business.

11. While the Applicant was with Syndicate 103 he met Mr John Hubert Whitcombe. Mr Whitcombe was a Name at Lloyd's and was an underwriter in his own syndicate. For about a year the Applicant and Mr Whitcombe shared a box at Lloyd's and got to know each other well. Mr Whitcombe was more senior than the

Applicant who thought that he was about fifty-four years of age in 1996 when the Applicant was thirty-one years old.

Mid-1990s – City Run-Off

5 12. In the mid-1990s Syndicate 103 went into run-off and the Applicant then worked for a firm called City Run-Off. In about 1996 Mr Whitcombe approached the Applicant and asked the Applicant if he would like to join him. The Applicant decided to leave City Run-Off and to join Mr Whitcombe. Later Mr Whitcombe formed a company called Euro International Underwriting Limited (EIU) for whom
10 the Applicant worked as an underwriter. In November 1996 the Applicant assisted Mr Whitcombe in preparing a business plan to present to Sphere Drake Insurance Limited (Sphere Drake). The business plan was intended to describe the type of business which could be written by EIU on behalf of Sphere Drake. The intention was that the Applicant, through EIU and on behalf of Sphere Drake, would write business which
15 was the reinsurance of workers' compensation business and that the business would be offered by SCB.

13. In January 1997 Mr Victor Broad, a director of Sphere Drake, granted a binding authority to Mr Whitcombe. The binding authority was later transferred to
20 EIU. The business accepted on behalf of Sphere Drake under the binding authority was written by the Applicant. The Applicant became a director of EIU in February 1997. The work done by the Applicant through EIU in 1997 and 1998 later formed part of the claim brought against him and others by Sphere Drake.

25 *Sphere Drake*

14. The judgment in *Sphere Drake* was given on 8 July 2003 after a trial which had begun in February 2002. Sphere Drake claimed damages against EIU, Mr Whitcombe, the Applicant, SCB, Mr Brown and Mr Butler. The Applicant appeared in person (with some very limited legal assistance). Part I of the judgment of Thomas
30 J is long and comprehensive and runs to 1873 paragraphs with an Appendix of 32 paragraphs.

15. In summarising the relevant parts of the judgment we first give an overview. We then describe in a little more detail the four main findings of Thomas J relied upon by the Authority, namely the findings concerning the initial business plan, the
35 business written by the Applicant, the underwriting reports submitted to Sphere Drake, and the stop loss reinsurances. We then summarise the main conclusions of Thomas J.

40 *Overview - introduction*

16. Paragraphs 1 to 34 of the judgment summarise its contents and state that the defendants in the action were involved in the operation of a reinsurance market which traded in losses generated by United States Workers' Compensation (WC) business. The overall sum claimed in the action was in excess of \$250m.

Overview – the nature of the business

17. The nature of the reinsurance business carried on was summarised at paragraph 7 of the judgment which stated that in the 1980s a small group of

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of workers' compensation insurance business in the United States. One of the ways in

which this operated was that the greater part (90%) of a standard workers' compensation policy would be reinsured after a certain part had been carved out; the part carved out was reinsured separately. The 90% part was called "WC carveout".

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Paragraph 7 continued:

"(v) Some of those that provided reinsurance of WC carveout did so at a premium which was far less than what they knew they would have to pay out by way of claims; they were therefore deliberately writing reinsurance under which they knew and intended would make a gross loss; this was wholly different from conventional reinsurance and was not done for ordinary competitive market reasons such as for writing loss leading business.

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(vi) They did so only on the basis that they had outwards reinsurance by way of retrocession at a price which enabled them (1) to pay a small portion of each loss by way of retention, (2) to pay the premiums for their own outwards reinsurance by way of retrocession and (3) to make a small profit. They were therefore writing this business on the basis that they would make a "turn" and not assessing the risk and the premium in the manner of conventional reinsurance; some called it "arbitrage" or "net underwriting". It would more accurately be described as deliberately accepting business known to produce losses in excess of the premium charged on the backs of reinsurers who would be expected to pay the losses for even less premium.

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(vii) Those that provided the retrocession received substantially less premium than the underlying reinsurers but had to pay the greater part of the losses; they therefore made an even greater gross loss, but were prepared to do so on the basis that they in turn had a retrocession from which they could therefore make a turn. Those that provided that retrocession had reinsurance themselves by way of further retrocession and so on. The reinsurer at each tier was in effect passing the bulk of the losses on to the reinsurer at the next tier for progressively less premium (the total premium at each successive tier was often 25% of that on the tier above); they were trading in losses. For example, a series of contracts that produced £50m of the £70m loss on one programme had been reinsured for a gross premium of £148,392; the loss ratios on these contracts were between 20,000% and 30,000%.

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(viii) It was those that acted in this way that formed, with those who accepted the business, the reinsurance market that traded in losses with which this trial was concerned.

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(ix) The brokers who arranged the reinsurances earned brokerage at the rate of 10%-15% on each trade; sometimes it was more. This further progressively reduced the amount of premium that was available to pay the losses and enriched the participating brokers by “churning” on each successive trade.

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(x) Between these reinsurers and retrocessionaires in this small part of the insurance market there arose a spiral which entailed the losses being passed round between participants. Spirals in the catastrophe market had caused disastrous losses to Names at Lloyd’s as a result of catastrophes in 1988-90. In the catastrophe market, there had been at least the prospect of profit in some years with those who might end up with the liabilities, as catastrophes did not occur each year. In the market that reinsured WC carveout losses, there were heavy and certain losses on an enormous scale which had to be paid year in year out.

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(xi) The scale of the WC losses took about three or so years to manifest themselves and the participants in the spiral market then suffered serious cash flow and other problems.

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(xii) It was plainly a market that was unsustainable and would end, as it has, in disaster, with the massive losses produced year in year out by WC business landing on some of those who participated in this market, resulting in litigation on an extensive scale.

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(xiii) The market was, in my view, rightly characterised ... as “pass the parcel” or “Russian roulette by proxy”.

Overview – the duty of disclosure

18. At paragraphs 8 and 9 of his judgment Thomas J summarised the duty of disclosure. He stated that there was obviously a duty to disclose to any reinsurer the fact that the business to be reinsured with him was being written deliberately on the basis that the business would make a gross loss, with a loss ratio in some cases of many hundreds of per cent (or more than 1,000 %); the reinsurer would be expected to pay for those losses but receive a premium that was far less than the premium that had been received by the reinsured. There also had to be specific disclosure of any business that had a spiral content. It was also essential that any person committing his capital, for example as a company giving authority to an underwriting agent, was told of the nature of the business as it was so fundamentally different from conventional insurance and carried very high risks. Thomas J continued at paragraph 10 of his judgment:

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“10 The market which traded in losses in this way was one in which no rational and honest person would participate (either by committing his capital or by writing a line on the reinsurance of the business) if he had understood the market and proper disclosure had been made.”

Overview – the formation of SCB

19. At paragraphs 12 to 15 of his judgment Thomas J described the formation of SCB and stated that the individuals who were primarily involved were Mr Brown and Mr Butler. SCB became the leading brokers in the market that traded in losses. From
5 1993 SCB deliberately constructed tight spirals which had the effect of passing losses from those who wrote lower layers of reinsurance to those who wrote higher layers and rated those higher layers on the basis that they would only be reinsuring catastrophe type losses and thus would attract lower rates. They thus protected those who were prepared to provide the lower layer reinsurances.

Overview – the involvement of Sphere Drake

20. At paragraph 16 Thomas J related that Sphere Drake became involved in the business as a result of the grant in January 1997 of a binding authority to Mr Whitcombe by a Mr Victor Broad, a director of Sphere Drake. The binding authority
15 was subsequently transferred to a company formed by Mr Whitcombe, namely EIU. The business accepted under the binding authority was written by the Applicant who was an underwriter employed by EIU, and a director of EIU after 12 February 1997. Very high commission was payable under the binder.

21. Prior to the grant of the binding authority SCB had discussions with the Applicant and made it clear that they would offer gross loss making business to the company which became EIU. However, Thomas J found that when Sphere Drake granted the binding authority to EIU the nature of the business to be written was fraudulently misrepresented to Sphere Drake.

22. Sphere Drake claimed that the acceptance of this business by EIU under the binder was dishonest because they had not authorised it and knew nothing about it. They also claimed that SCB knew that the acceptance of the business was dishonest. EIU and SCB denied dishonesty and contended that Sphere Drake had known what was happening and claimed that they did nothing different from others in the market. The Applicant produced to us a copy of the closing summary put to the judge on behalf of EIU, Mr Whitcombe and himself. This was a long and comprehensive document of 797 paragraphs.

The four main findings relied upon by the Authority

23. We now describe in a little more detail the four main findings of Thomas J relied on by the Authority, namely, the initial business plan, the business written under the binding authority, the underwriting reports submitted to Sphere Drake, and the stop loss reinsurances. Our references to numbered paragraphs are to those
40 paragraphs in the judgment of Thomas J.

November 1996 - the initial business plan

24. In November 1996 the Applicant assisted Mr Whitcombe with the preparation of a second draft of a business plan. The business plan was sent to Sphere Drake on
45 26 November 1996 and led to the grant of the binding authority by Mr Broad of Sphere Drake to EIU in January 1997. The business to be written was described in the business plan as "a low to medium risk account specialising in personal accident and

related classes”. (paragraph 607). The business was also described as “ a highly desirable product line” and “highly profitable and professionally conducted ... substantial underwriting profits are possible” (paragraph 611).

5 25. Thomas J found that Mr Broad of Sphere Drake was never told and never
understood that gross loss making business was to be written and that Mr Broad never
authorised the writing of an account of gross loss making business “to be written on
the backs of reinsurers ” (paragraph 721). Thomas J had no doubt at all that for an
10 agent to write such an account without making it very clear that that was the type of
account to be written was dishonest (paragraph 725). The judge found that there was a
common understanding between SCB, Mr Whitcombe and the Applicant that SCB
would offer their book of WC carveout business and that the Applicant would write it;
15 there were meetings between SCB and EIU before the binder was signed during
which the judge was sure that that had been agreed. He found that the Applicant
clearly knew, at the time that the business plan was submitted and before the binder
was granted, that the intention was that he would write business that was gross loss
making on a large scale as that was what he would be offered by SCB (paragraph
727). The business plan was deliberately drafted to conceal the true intent to write
gross loss making business (paragraph 728).

20 26. Thomas J concluded (at paragraph 737) that he was sure that Mr Whitcombe
and the Applicant deceived Mr Broad of Sphere Drake into giving them a binder
which they intended to use for a purpose that was never authorised.

25 *The business written*

27. After February 1997, and during the approximately eighteen months when the
binder operated, the Applicant accepted a total of 119 contracts of reinsurance under
the binder, 112 of which were placed with the Applicant by SCB. These 112 contracts
were grouped together as 35 programmes of reinsurance. Five were written in early
30 1997, one in October 1997, twelve on Christmas Eve 1997, five on New Year’s Eve
1997 and the rest between January and July 1998. The premiums amounted to about
\$25M and the losses amounted to about \$250M.

28. Thomas J found that many of the programmes were written by the Applicant
35 in the knowledge that they would make a gross loss. The business written by the
Applicant funnelled losses into Sphere Drake (paragraph 838). The judge said that he
was sure that the Applicant would have appreciated that he was making Sphere Drake
“a funnel for losses”. Confirmation of some programmes in the knowledge that
reinsurance had not been obtained for the lowest layer was dishonest conduct towards
40 Sphere Drake (paragraph 858(b)). Looked at overall, the Applicant’s acceptance of
the programmes was not that of an inexperienced person doing his incompetent best
or of someone acting negligently; it was dishonest (paragraph 864). Although SCB
had instigated the dishonesty the Applicant was influenced to go along with SCB’s
plan by the very substantial fee that EIU earned (paragraph 1247(iii)).

45 29. At paragraphs 1535 to 1538 Thomas J discussed what he called EIU’s
subservience to SCB. SCB ruthlessly exploited the opportunity offered through the

binder in order to further their own interests. Mr Brown's ruthless conduct gave the Applicant little alternative but to acquiesce and act dishonestly in putting the interests of SCB over those of Sphere Drake. The Applicant acted dishonestly in accepting the programmes and also acted in collusion with SCB; he had no regard for the interests of Sphere Drake and wrote the programmes in order to earn commission.

The underwriting reports

30. It was the responsibility of EIU to submit underwriting reports to Sphere Drake to inform them of the business written on their behalf.

31. The first underwriting report was submitted on 17 November 1997; the second on 11 February 1998 and the third in May 1998. They were prepared by the Applicant and Mr Whitcombe. Thomas J concluded, at paragraph 1107, that the first was a document designed and carefully crafted to deceive anyone who read it who did not know what EIU had actually done. It was dishonest not to make it clear that the major programmes written were gross loss making business written on the backs of reinsurers. The figures were designed to mislead and it was dishonest not to have made significant provision for the inevitable and substantial losses that must have been incurred and not reported. It was dishonest to say that a profit was anticipated without stating that it was dependent on reinsurance which was not yet in place. Thomas J also concluded, at paragraph 1302, that the second underwriting report was designed to mislead and that it was dishonest to describe gross loss making business as good quality business and dishonest not to state that the bulk of the business was WC carveout. Finally Thomas J concluded, at paragraph 1360, that the third report was also designed to deceive.

The stop loss reinsurances

32. On 29 May 1998 Mr Whitcombe sent to Sphere Drake details of the aggregate horizontal stop loss reinsurances and set out four layers for 1997 and four for 1998 but only one had been placed. The Applicant's evidence in the trial was that he thought that the other reinsurances for 1997 and 1998 would be or had been placed but there was no independent evidence of this. Thomas J concluded that he was sure that the Applicant and Mr Whitcombe knew that the stop loss reinsurances had not been placed and that their statement that it had been was known by them to be untrue (paragraph 1363).

The conclusions of the judge

33. The issues were identified in paragraphs 39 to 110 of the judgment and three are relevant to the Applicant. These were: whether EIU, Mr Whitcombe and the Applicant had acted in dishonest breach of the fiduciary duties they owed to Sphere Drake; whether there had been dishonest assistance in breach of the fiduciary duties, and whether there had been fraudulent misrepresentation. At paragraph 107 Thomas J stated that he had adopted the criminal standard of proof in respect of the allegations involving dishonesty.

34. The judge summarised his overall conclusions at paragraphs 1861 to 1866. He found that Mr Brown was the driving force in the dishonest enterprise and acted with

“singular dishonesty”. He also found that Mr Butler had acted dishonestly. He partly accepted that EIU had been a dupe and, to a certain extent, was a victim, but also added (at paragraph 1861(iii)) that the Applicant “was intelligent and acute enough to know what he was doing and that it was dishonest to acquiesce as he did.”. He also found that the Applicant had given dishonest and untruthful evidence in relation to many matters (paragraph 1254).

35. At paragraph 1862 Thomas J summarised his findings of fact and the following sub-paragraphs are relevant to the Applicant:

“(v) I am sure that SD [Sphere Drake] were never told that the business Mr Henton intended to write was to be accepted in the knowledge that it would create gross losses that would be passed on to reinsurers. They were therefore dishonestly brought into this market to provide capacity without being told what they were actually being asked to write; if they had been told of the true nature of the market they would not have entered it. No rational person told of what was intended would have written such business, particularly given the scale and volume presented by SCB to Mr Henton.

(vi) When EIU obtained the binding authority from SD EIU agreed to write the programmes offered to them without SCB having to place reinsurance for them; EIU, having misled SD as to the nature of the business to be written, were content that the losses should be dumped on SD or on their reinsurers whom they knew must similarly have been unaware of the true nature of the business to be written.

(vii) Mr Henton accepted in his evidence that he knew exactly what he was doing when he accepted the programmes; it was not a case of naivety or incompetence on his part. He was an intelligent man with an acute trader’s instinct. When the circumstances surrounding the entirety of the business accepted by EIU in the 35 programmes placed are looked at as a whole (in the sense of the scale of the gross losses being assumed, the lines being written, the brokerage being allowed and the nature of the reinsurance cover obtained) I am sure that no person acting honestly, however imprudent, would have ever accepted those programmes. ...

(ix) Both SCB and EIU were content that SD remain the dump for the losses until the end of 1997. For their own purposes, SCB procured reinsurance that re-created a spiral and that EIU were to write gross loss making business that they had been unable to place in 1997 and that they were to continue to write such business in 1998. SCB and EIU were both fully aware that SD had no knowledge this was being done and that what was being done was wholly contrary to their interests and dishonest.

(x) I am sure that all the Defendants acted in collusion. ...

5 (xi) Mr Henton (and through him EIU), Mr Brown and Mr Butler (and through them SCB) all knew that writing gross loss making business on the back of reinsurance could only be achieved through a scheme involving either the deception of capacity (as for example in the case of SD) or of reinsurers who would ultimately have to pay the losses. They each fully understood that this was dishonest. ...

10 (xiii) Throughout I have endeavoured to test the credibility of each witness whose credibility was in issue against the objective facts, the contemporary documents, and the overall probabilities. I have had the advantage of seeing each of the main witnesses undergo long and searching cross-examinations that have also afforded me the opportunity to test their credibility. I am sure that .. Mr Henton ... were witnesses who had given untruthful evidence in the respects which I have set out.”

15 36 At paragraphs 1863 and 1964 Thomas J summarised his findings as:

20 “1863 I therefore find that the claim for dishonest breach of fiduciary duty succeeds against ...Mr Henton (from February 1998) ... and the claim for dishonest assistance succeeds against ... Mr Henton (for matters before February 1998)

25 1864 I also find that the claim for fraudulent misrepresentation succeeds against ... Mr Henton”

30 37. At paragraph 32 Thomas J concluded that in very many respects EIU acted extensively in dishonest breach of their duties. They were brought into the business which SCB wanted reinsured and were ruthlessly exploited by SCB; they were in a sense a victim of SCB. However, the Applicant acted dishonestly in accepting most of the programmes. Mr Whitcombe also acted dishonestly but to a much lesser degree than the others.

The application for leave to appeal against the judgment in Sphere Drake

35 38. On 14 October 2003 Thomas LJ (sitting as a Judge of the Commercial Court) heard an application from the Applicant for leave to appeal against the judgment given on 8 July 2003. The Applicant appeared in person. There were three grounds of appeal. The first was that the court had failed to take account of a number of relevant matters in reaching the findings made. In paragraphs 4 and 5 of his judgment on the application Thomas LJ said:

40 “4. ... In considering that ground I must first bear in mind that there are no issues of law, as set out in the very lengthy judgment. In the ultimate analysis the issues of law were largely agreed and on those on which I reached decisions they, in my view, are really not material to any possible appeal.

45 5. In reaching findings of fact, because of the gravity of the allegations, I applied the very high criminal standard of proof. I have very carefully

5 considered whether there would be a realistic prospect of success in overturning the findings of fact which I have made. The findings of fact are set out extensively in the very lengthy judgment. The findings of dishonesty are made in relation to numerous matters. Sitting as I do and reflecting on the matter some three months after I have given judgment, I cannot see that there is any realistic prospect of successfully appealing the judgment on issues of fact.”

10 39. The third ground of appeal was an alleged breach of human rights and Thomas LJ dealt with this ground at paragraphs 9 to 11 of his judgment on the application in the following way:

15 “9 The third ground put forward is an alleged breach of human rights as a result of “inequality of arms”. At paragraphs 37 and 38 of Part I of my judgment I set out the position in respect of EIU, Mr Whitcombe and Mr Henton; the fact that they had virtually no legal representation at the trial; the fact that I had taken that into account in considering the findings I had to make. I, of course, had no power to grant legal aid, though I made observations at the outset of the trial in relation to its nature and complexity. I have little doubt that these were referred to the Legal Services Commission by those assisting ... Mr Henton, if not by ... Mr Henton themselves. I also understand from Mr Hirst [Leading Counsel for the claimants] that (in accordance with what is to be expected of those who appear in court where individuals are representing themselves in person) he drew to the attention of ... Mr Henton a decision where a challenge had been made to a ruling of the Legal Services Commission on legal aid.

30 10. It seems to me that if a challenge was to have been made to the position on legal aid, that should have been made at the outset. Of course, I would have considered adjourning the trial. Indeed, I did adjourn the trial for several days in February of last year whilst attempts were made to obtain funding from another source.

35 11. I cannot see that at the conclusion of the trial it can be right to reopen this question. The judgment in this case has important implications for a very large number of people and a large number of contracts. Furthermore, the costs of Sphere Drake alone have been in excess of £6million. It seems to me that at this stage there can be no real prospect of success on an appeal based on a breach of human rights.”

40 40. Thomas LJ refused permission to appeal. The Applicant did not apply to the Court of Appeal for permission to appeal.

The Applicant’s work since the judgment

45 41. After the hearing in *Sphere Drake*, the Applicant returned to City Run-Off (then Capita) and worked in the audit department. When the judgment in *Sphere Drake* was released he had some time at home. Towards the end of 2003 he and his

brother set up an estate agency and the Applicant has remained there. EIU was dissolved in September 2004.

5 On 14 April 2004 the matter was referred to the Authority by Lloyd's of London. At that time the Authority did not regulate general insurance business. As from 14 January 2005 general insurance business has been regulated by the Authority.

A summary of the arguments

10 42. For the Authority Mr Enraght-Moony argued that a prohibition order was protective and not punitive. Section 56 set out the statutory test which was whether it appeared to the Authority that a person was fit and proper to perform functions in relation to a regulated activities carried on by authorised persons. FIT 1.3.1G stated that honesty, integrity and reputation were among the most important considerations in assessing fitness and propriety and FIT 2.1.1G stated that in determining honesty, integrity and reputation the Authority would have regard to adverse findings in civil
15 proceedings. The Authority relied upon the findings in *Sphere Drake* and argued that those findings demonstrated serious and sustained deliberately dishonest conduct by the Applicant and therefore lack of fitness and propriety.

20 43. The Applicant did not accept the judge's findings of dishonesty and put forward a number of arguments which fell into three main groups. The first group of arguments concerned the procedure at the *Sphere Drake* trial and these arguments centred round the theme that the Applicant had been at a disadvantage because he did not have legal representation. The second group of arguments concerned the findings
25 of the judge and included the arguments that the Applicant was only following standard market practice and that he did not agree with the judge's comments about the November business plan; he thought that Sphere Drake had reinsurance and he had relied upon Mr Whitcombe who was an experienced underwriter. The third group was more general and included arguments that the Authority should not look at
30 matters which had occurred before the 2000 Act was enacted and that the prohibition order should not be so wide.

Reasons for decision

35 44. We have found it convenient to consider the arguments of the parties by reference to the following questions:

- (1) Was the Applicant at a disadvantage at the trial?
- (2) Was the Applicant following standard market practice?
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- (3) What were the facts about the November business plan?
- (4) Can the Authority rely upon events which occurred before 2000?; and

(5) Should the prohibition order be less wide than it is?

Some general observations

5 45. Before turning to consider these questions separately we make some general observations. We have to say that we found the Applicant to be an honest witness before us. We formed the view that since the events described in *Sphere Drake* the Applicant had become older and wiser and had learnt a very hard lesson. We have, however, approached the Applicant's criticisms of the judgment with some caution. Thomas J conducted a hearing of more than a year whereas the hearing before us
10 lasted less than two days. Also, although the Applicant made it clear that he disagreed with some of the conclusions of Thomas J and the views of the Authority he did not bring forward any new oral evidence (apart from his own oral evidence) to support his arguments.

15 46. In favour of the Applicant we have also borne in mind that the judgment in *Sphere Drake* was the judgment of a civil court on the subject of a commercial claim. It resolved a dispute between private parties. It was not a criminal or a regulatory matter. Nevertheless, the judge did apply the criminal standard of proof when deciding issues of dishonesty.

20 47. There are two areas where we formed views which were different from those of the judge. The first concerns the relationship between the Applicant and Mr Whitcombe. The judge concluded that Mr Whitcombe was less at fault than the Applicant. On the evidence before us we formed the view that the Applicant looked
25 up to, and relied upon, Mr Whitcombe who was many years senior to the Applicant. Mr Whitcombe had been a Name at Lloyd's and was the dominant individual in EIU. However, we bear in mind that the judge saw all the witnesses and great quantities of documents which we did not see, and that the trial lasted for over a year, whereas the Applicant was the only witness at the hearing before us which lasted less than two
30 days. Also, the Applicant was given every opportunity to call other oral evidence before us and did not do so. We did not see Mr Whitcombe give evidence and, if we had done, might well have reached different views.

35 48. The other area where we formed views different from the judge concerned the ability of the Applicant. The judge thought that the Applicant had an acute trader's mind. We formed the view that he may have known about the technicalities of insurance and reinsurance but had a less well developed judgment about the appropriate standards of behaviour.

40 49. With those general comments in mind we turn to consider the questions arising from the arguments of the parties.

(1) Was the Applicant at a disadvantage at the trial?

45 50. The Applicant argued that his lack of legal representation in *Sphere Drake* seriously hindered his ability to defend himself. The documents amounted to 120 storage boxes each containing several lever arch files. He had been cross-examined for about twenty-five days and then had to cross-examine the witnesses for SCB. He

argued that, with access to legal assistance, more evidence could have been adduced at the trial to support his case. Also, he argued that his human rights had been infringed because he had lacked legal aid and that in turn had given rise to the prohibition order which prevented him from working in all regulated activities. He further argued that there had been inequality of arms because the claimants in *Sphere Drake* had been legally represented. Also the judge had interrupted his questioning of Sphere Drake's expert witness; and the complexity of the legal issues also meant that he was at a disadvantage.

51. The Authority acknowledged that the Applicant had been at a disadvantage but argued that all the matters mentioned had been taken into account fully by the judge.

52. We accept that the Applicant's lack of legal representation at the trial must have caused problems for him. The trial was very lengthy and the documents must have been voluminous. However, the judge was aware of the difficulties of the Applicant's lack of legal representation and endeavoured to make the appropriate allowances. Also, the judge applied the criminal standard of proof in his decisions about dishonesty. The judge also considered the human rights arguments when dealing with the application for leave to appeal.

(2) *Was the Applicant following standard market practice?*

53. The Applicant argued that the business he had written for Sphere Drake was in accordance with market practice at the time; it was similar to that which he had seen written when he was with Syndicate 103 and was similar to that commonly practised by underwriters in other market sectors. He relied upon the underwriting reports and reinsurance results for Mr Jackson, Sphere Drake's expert witness and produced certain documents from the trial in support. He also relied upon a letter dated 15 April 2005 written by Mr Brown to the Authority. The Applicant argued that normal market practice did not amount to full disclosure, and was something less, and he repeated that at the time he was doing what he had seen others do although things had changed since then. He accepted that he could have done things differently and that perhaps he had been naïve but he did not think that he was dishonest. He had believed what he had been told and perhaps he should have been more diligent in making sure the answers to his questions were correct. He had relied upon Mr Whitcombe as the senior person in EIU.

54. The Authority argued that Thomas J had considered the arguments of the Applicant that he was following standard market practice and had concluded that the type of business written by the Applicant for Sphere Drake could have been written on the basis of full disclosure but that there had not been full disclosure by the Applicant. The judge had found that the Applicant as an individual had acted dishonestly.

55. Having heard the Applicant give evidence we formed the view that he genuinely believed that he was following standard market practice as he knew it. We are also of the view that he believed that standard market practice did not always

amount to the full disclosure required by Thomas J. We also formed the view that, at the relevant time, the Applicant was comparatively young, lacked maturity of judgment and was not very experienced and for that reason followed what others had done and did not make the independent and mature judgments that should have been made.

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(3) *What were the facts about the November business plan?*

56. The Applicant argued that the November 1996 business plan had been accepted by Mr Broad and in the plan the WC carveout business had been included as occupational accident business and was described according to his experience of similar business at the time the plan was written; the risks that were written turned out to be far worse than he had expected; all the risks offered the possibility of gross profit and it was his intention to produce a net profit. The plan mentioned the need for reinsurance and a proposed reinsurance programme was shown. He had been told that Sphere Drake had reinsurance to cover the business written. At the time of the business plan Mr Whitcombe was the underwriter and he, the Applicant, was the deputy. It was Mr Whitcombe who attended meetings with Mr Broad and the Applicant said that he relied upon what he was told by Mr Whitcombe. Mr Whitcombe was a very experienced underwriter and the Applicant had full reason to expect him to understand what was being written.

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57. We accept the evidence of the Applicant that the risks turned out to be far worse than he expected. We also accept that he thought that Sphere Drake had reinsurance in place and only found out later in 1997 that they did not have it. We also accept that the Applicant relied upon Mr Whitcombe who was very much more experienced than the Applicant. Nevertheless, even taking all these matters into account, the fact remains that very serious findings of dishonesty were made against the Applicant.

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(4) *Can the Authority rely upon events which occurred before 2000?*

58. The Applicant argued that the events which were the subject of the claim in Sphere Drake occurred nearly ten years previously and before the passing of the 2000 Act and the Authority should not look at matters which occurred before it was established. The Authority argued that they also relied upon the fact that Thomas J had found in 2002 that the Applicant had given untruthful evidence but they also relied upon the findings of serious and sustained dishonest conduct which, they argued, was unacceptable whenever it occurred.

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59. We agree with the Authority that, when deciding whether to impose a prohibition order, they are not restricted to considering events occurring after the passing of the 2000 Act.

(5) *Should the prohibition order be less wide than it is?*

60. The Applicant argued that the prohibition order should be in relation to a specified regulated activity and he confirmed that it was not his intention to seek employment in any insurance related regulated activity. The Authority argued that a full prohibition was appropriate given the serious nature of the Applicant's conduct

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the subject of the trial and the giving of dishonest evidence at the trial. A lack of honesty and integrity indicated that a full prohibition was appropriate.

5 61. In considering this argument we first remind ourselves of the statutory context of section 56. Section 2(1) of the 2000 Act provides that, in discharging its general functions, the Authority must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives. The regulatory objectives are set out in section 2(2) and include market confidence, the protection of consumers and the reduction of financial crime. As a Tribunal we also must act in a way which is
10 compatible with the statutory objectives.

15 62. On the other hand we are of the view that we should balance the need to comply with the statutory objectives with the liberty of the Applicant to earn his living to the extent that that does not interfere with the statutory objectives

20 63. We accept all the findings of the Applicant's dishonesty made by Thomas J but have formed the view that there were some mitigating factors. In our view, the Applicant was disadvantaged by not having legal representation at the trial. We think that the Applicant believed that he was following standard market practice. At the time of the events in *Sphere Drake* the Applicant was comparatively young and inexperienced and perhaps relied too much upon Mr Whitcombe who was more experienced. We also bear in mind the time that has passed since the events in *Sphere Drake* (1996 to 1998) and the findings of dishonest evidence (2002) and the hearing before us in 2007 when we formed the view that the Applicant has since become older
25 and wiser and has learnt a very hard lesson.

30 64. Even taking account of all these mitigating factors we have concluded that some prohibition order is required in order to promote market confidence, the protection of consumers and the reduction of financial crime. Certainly we are of the view that the Applicant should be prohibited from performing any functions which are currently regulated.

35 65. However, we are conscious of the fact that a general prohibition would cover activities that are not regulated by the Authority at present, but which might become so in future. A prohibition order covering all possible future regulated activities moves from being protective to becoming punitive and would, in our view, be disproportionate in this case. It is possible to envisage circumstances where the Applicant's present unregulated activity as an estate agent could become imperilled by a wide ranging prohibition order. For this reason we are of the view that the
40 prohibition order should be restricted to activities which are currently regulated. If in future further activities become regulated it will still be open to the Authority to prohibit the Applicant from performing any function in relation to such a regulated activity but the Applicant would then have a further right of appeal to the Tribunal.

Decision

66. Our decision is that the Applicant is not a fit and proper person to perform functions in relation to currently regulated activities carried on by authorised persons. This is a unanimous decision.

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67. Section 133 (5) of the 2000 Act provides that, on determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

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68. WE DIRECT that the matter be remitted to the Authority and that the Authority should issue a Final Notice making an order prohibiting the Applicant from performing any function in relation to an activity which at the date of this Decision is a regulated activity carried on by an authorised or exempt person or exempt professional firm.

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DR A N BRICE

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CHAIRMAN

RELEASE DATE:

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FIN/2006/0017
09.11.07

**This decision was released to the parties on 15 November 2007
This version has been corrected under Rule 28(3)**

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DR A N BRICE

CHAIRMAN

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RELEASE DATE:

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FIN/2006/0017
11.12.07