

APPROVED PERSON - withdrawal of approval – whether person to whom the approval was given was fit and proper to perform the function to which the approval related – no - FSMA 2000 s 63

AUTHORISED PERSON - cancellation of permission – whether resources of authorised person adequate in relation to regulated activities – no – whether authorised person fit and proper – FSMA 2000 s 45 and Sch 5 paras 4 and 5

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

NORMAN MCINTOSH

First Applicant

LA MORTGAGE SERVICES LIMITED

Second Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondents

**Tribunal: DR A N BRICE
MR I B ABRAMS
MR K R PALMER**

Sitting in London on 6 and 7 November 2007

Mr Gareth Fatchett, with Mr Kuldip Singh Lall of Messrs Shakespeare Putsman, Solicitors, for the Appellant

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

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DECISION

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The references

1. Mr Norman McIntosh (Mr McIntosh) referred to the Tribunal a Decision Notice given by the Financial Services Authority (the Authority) on 26 April 2007. The Decision Notice stated that, pursuant to section 63 of the Financial Services and Markets Act 2000 (the 2000 Act), the Authority had decided to withdraw the approval granted to Mr McIntosh because it considered that he was not a fit and proper person, in terms of his honesty, integrity and reputation and his competence and capability, to perform the functions to which his approval related.

2. LA Mortgage Services Limited (the Company) referred to the Tribunal a Decision Notice given by the Authority on 26 April 2007. The Decision Notice stated that, pursuant to section 45 of the 2000 Act, the Authority proposed to cancel the permission granted to the Company to carry on regulated activities. The reason was that, as Mr McIntosh was the only person approved by the Authority to perform controlled functions in relation to the regulated activities carried on by the Company, the withdrawal of approval from Mr McIntosh meant that there would be no-one at the Company to carry out controlled functions. That meant that the Company would not have adequate human resources and would not be able to satisfy the Authority that it was a fit and proper person having regard to all the circumstances including its connection with Mr McIntosh and the need to ensure that its affairs were conducted soundly and prudently.

The legislation

3. The relevant legislation is found in the 2000 Act. The scheme of the legislation is that only firms which are authorised persons can carry on regulated activities. Authorised persons include persons who have a permission under Part IV of the Act. The Act also provides that certain functions specified by the Authority are controlled functions and only approved persons may carry out controlled functions for authorised firms.

The legislation relating to the Company – authorised person

4. Part IV (sections 40 to 53) of the 2000 Act contains the provisions about permission to carry on regulated activities. Section 40 provides that a person can apply for permission to carry on one or more regulated activities. Section 41 provides that, in giving or varying a permission, the Authority must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to the regulated activities for which he has permission. Section 45 provides that the Authority may cancel a Part IV permission if it appears that an authorised person is failing, or is likely to fail, the threshold conditions.

5. The threshold conditions are set out in Schedule 6 and paragraphs 4 and 5 are relevant to the reference of the Company. Paragraph 4 provides that the resources of the person concerned must be adequate in relation to the regulated activities he carries on. Paragraph 5 provides that the person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances including (a) his connection with any person; (b) the nature of the regulated activity he carries on; and (c) the need to ensure that his affairs are conducted soundly and prudently.

The legislation relating to Mr McIntosh – approved person

6. Part V of the 2000 Act (sections 56 to 71) contains the provisions about the performance of regulated activities. Section 59 provides that an authorised person must ensure that no person performs a controlled function unless the Authority approves such performance by that person. Section 63 provides that the Authority may withdraw an approval given under section 59 if it considers that the person in respect of whom the approval was given is not a fit and proper person to perform the function to which the approval relates.

The issue

7. It was agreed by the parties that the issue for determination in the reference was whether Mr McIntosh was a fit and proper person to perform controlled functions and whether his approval should be withdrawn.

The evidence

8. A bundle of documents was produced. Oral evidence was given by Mr McIntosh on behalf of himself and the Company. Oral evidence on behalf of the Applicants was also given by Ms Jacqueline Nedd, Solicitor, of Messrs Kellie & Co, Solicitors of London. Oral evidence on behalf of the Authority was given by Mr Andrew Roland Honey who is currently Head of the Insurance Department in the Small Firms Division of the Authority and who was, at the relevant time, a manager in the Authorisation Department of the Authority's High Street Firms Division.

The facts

9. From the evidence before us we find the following facts.

1993 - Leonard Alexander

10. Mr McIntosh started his career in financial services by joining Canada Life and selling life policies and pensions direct to the public; he also did some mortgage work. After four years he joined a new firm as a mortgage adviser. He then formed a business association with a Mr Turnbull who advised on company pensions. At the same time he established a business called Leonard Alexander and Mr Turnbull referred clients to him.

11. On 30 September 1993 the firm of Leonard Alexander (the Member) was admitted to membership of the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) and was authorised to arrange investment transactions and to give investment advice but not to handle clients' money or assets. The Member was a sole trader whose only registered individual was Mr McIntosh. Authorised firms were required to demonstrate a continuing level of solvency so that they were able to meet their liabilities as they fell due.

12. Commissions earned from life offices in respect of pension policies sold by the Member were paid to the Member and, if they related to work referred by Mr Turnbull, were then passed by Mr McIntosh to Mr Turnbull. It is not unusual for there to be a requirement for the repayment of some part of initial commissions to the insurer if the policy-holder terminates the policy early. This is sometimes referred to as "claw back". Some of the premiums on policies sold to clients referred by Mr Turnbull were not paid and the insurance companies sought from the Member the claw back of the initial commissions. At the time the Member had an overdraft and

was short of funds but, as the initial commissions had been paid to Mr Turnbull, Mr McIntosh looked to Mr Turnbull to repay them to the life offices.

August 1995 – suspension of membership of FIMBRA

5 13. In July 1995 FIMBRA received information that two County Court judgments had been entered against the Member. The first was entered on 5 June 1995 and was for £4,008.69 in favour of the Provident Mutual Life Assurance Association (Provident). The second was entered on 14 June 1995 and was for £4,215.56 in favour of General Accident Life Assurance Limited (General Accident).

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14. On 8 August 1995 FIMBRA sent a warning to the Member saying that, if it failed within seven days to satisfy FIMBRA that its powers of intervention should not be exercised, then FIMBRA might prohibit the Member from conducting investment business. Mr McIntosh then visited Provident and General Accident and, relying upon
15 assurances given to him by Mr Turnbull, gave each a post-dated cheque for the amount due.

15. On 10 August 1995 Mr McIntosh wrote to FIMBRA to say that he had visited Provident and General Accident and had obtained evidence that they had been paid
20 the amounts due to them. The letter enclosed copies of two receipts, each dated 9 August 1995. The first was given by Provident and stated that the sum of £3,967.46 had been received from the Member. The second was given by General Accident and stated that the sum of £4,308.79 had been received from the Member.

25 16. On receipt of Mr McIntosh's letter of 10 August 1995, FIMBRA took the view that the Member had, in effect, warranted that the two County Court judgments had been satisfied and that the Member was able to meet its liabilities as they fell due. As a consequence of the letter of 10 August no intervention action was taken by FIMBRA.

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17. However, Mr Turnbull did not put the Member in funds and disappeared. Mr McIntosh knew that the post-dated cheques would not be met when they were presented and so he instructed his bank not to pay them.

35 18. On 16 August 1995 FIMBRA received a letter from General Accident which stated that the cheque for £4,308.79 had been returned by their bankers as it had been stopped with an order not to pay. On 17 August FIMBRA received a similar letter from Provident. Accordingly, on 17 August 1995 FIMBRA directed the Member not to conduct or solicit any investment business because it appeared that it had failed to
40 maintain sufficient financial resources to ensure that it was able to meet its liabilities as they fell due. Mr McIntosh confirmed receipt of the direction on 29 August 1995.

19. On 21 August 1995 FIMBRA published a Press Notice stating that it had suspended the investment business of Mr McIntosh trading as the Member and that
45 the firm had been ordered to cease conducting and soliciting investment business as it appeared that the Member had failed at all times to maintain sufficient financial resources in respect of its business to ensure that it was able to meet its liabilities as they fell due. Thereafter Mr McIntosh wrote to all his clients informing them of the suspension and saying that he anticipated that it would be lifted in a very short time.

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September 1995 – termination of membership of FIMBRA

20. On 28 September 1995 the Disciplinary Committee of FIMBRA decided that the Member should be charged with (1) a failure to deal with FIMBRA in an open and co-operative manner and keep it promptly informed of anything concerning the firm which might reasonably be expected to be disclosed and (2) a failure to maintain at all times sufficient financial resources to ensure that liabilities could be met as they fell due. With regard to the first charge it was submitted that the Member had misled FIMBRA into believing that the County Court judgments had been satisfied and, in effect, had perpetrated a deception upon FIMBRA and sought to avoid the issue of the direction threatened in FIMBRA's letter of 8 August 1995.

21. A copy of the charge was sent to Mr McIntosh who was informed that the date of the determination would be 7 December 1995. He was required to reply by 25 October 1995 and to return a copy of the charges saying that he denied or admitted them. He did reply on 22 November 1995; he deleted the word "denied" and left in the word "admitted". Thus he admitted both charges. He also stated that he would attend in person to address the Committee in mitigation.

22. The date of the hearing was changed to 4 January 1996. Mr McIntosh was informed and confirmed that he had received the notification. However, Mr McIntosh did not attend the hearing. The matter was heard in his absence and the membership of the Member was terminated and the Member was ordered to pay costs.

23. FIMBRA sent the Member a Formal Notice on 5 January 1996. On 2 February 1996 FIMBRA published a Press Release stating that the membership of the Member had been terminated. The Press Release stated that the Member had admitted the two charges of (1) a failure to maintain at all times sufficient financial resources to ensure that liabilities could be met as they fell due; and (2) a failure to deal with FIMBRA in an open and co-operative manner and keep it promptly informed of anything concerning the firm which might reasonably be expected to be disclosed.

1998 – 2001 Bankruptcy

24. On 29 January 1998 Mr McIntosh was declared bankrupt. He was discharged on 29 January 2001.

2004 – the application to the Authority for approval

25. After the termination by FIMBRA of the membership of Leonard Alexander Mr McIntosh established a mortgage-broking business which at the time was not required to be regulated. However, in 2004 authorisation was required and in April 2004 the Company applied to the Authority for permission to be authorised for mortgage and/or general insurance regulation. It also applied for the approval of Mr McIntosh to carry out controlled functions at the Company. On behalf of the Company Mr McIntosh completed an Approved Persons and Individual Controllers Form (APICF) which asked a number of questions.

26. Question 33a asked if the individual (Mr McIntosh) had ever been the subject of any bankruptcy proceedings and whether the proceedings were related to financial services. Mr McIntosh answered both questions with "Yes". At the end of the form he provided some supplementary information relating to question 33 and stated that he had been made bankrupt on 29 January 1998 and discharged on 29 January 2001. He added "Business partnership failed as an IFA. Commission claw-back the cause. No client money involved."

27 Question 37b of the application form asked:

5 “37b Has the individual ever ... been refused, restricted in, or had suspended, the right to carry on any trade, business or profession for which specific licence, authorisation, registration, membership or other permission is required?”

10 28. Mr McIntosh answered this question with “No”. Question 38 of the application form asked:

15 “38 In respect of activities regulated by the FSA or any other regulatory body has the individual, or any ... unincorporated association of which the individual is or has been a controller ... ever

(a) been refused, had revoked, restricted or terminated any licence, authorisation, registration, notification, membership or other permission granted by any such body?

20 (b) been criticised, censured, disciplined, suspended, expelled, fined or been the subject of any disciplinary or intervention action by any such body?

25 29. A note to question 38 stated that “regulatory body” referred to, among other things, the self-regulatory organisations including FIMBRA. Mr McIntosh answered question 38 (a) with “No” and question 38(b) with “No”.

30 30. At the end of the Form appeared the words: “Knowingly or recklessly giving the FSA information which is false or misleading in a material particular is a criminal offence. It should not be assumed that information is known to the FSA merely because it is in the public domain or has previously been disclosed to the FSA, or another regulatory body. If there is any doubt about the relevance of information, it should be included.”

35 *June 2004 - The correspondence with the Authority*

40 31. On 4 June 2004 the Authority wrote to Mr McIntosh about the Company’s application for a Part IV permission to be authorised for mortgage and/or general insurance business. The letter asked for details of his bankruptcy and also stated that the Authority were aware of the termination of the membership of the Member by FIMBRA and asked for full details about it and the reason why it had not been disclosed.

45 32. Mr McIntosh replied on 23 June 2004. As far as the bankruptcy was concerned he said that he had acted with a business associate who advised on company pensions. Some of the premiums had not been paid by the policy holders and the insurance companies had sought to claw back the initial commissions paid to the Member. He had sent post-dated cheques to the insurance companies but these could not be met so he had cancelled them. The insurance companies took him to court and one year later he was declared bankrupt for approximately £100,000.
50 Turning to the termination by FIMBRA he said that he never received any official

documentation to say that his licence had been revoked but he “assumed that FIMBRA would have no choice as my membership would in time lapse”.

33. The Authority formed the view that this answer constituted a valid reason for the non-disclosure of the FIMBRA termination. The Company’s application for the approval of Mr McIntosh was granted. The unchallenged evidence of Mr Honey was that, at the time of the authorisation, the Authority was not aware of the full facts surrounding the suspension and termination by FIMBRA of the Member’s membership; if the Authority had been so aware then the authorisation applied for by the Company would not have been granted.

December 2004 – the Land Transfer document

34. At the beginning of September 2004 Mr McIntosh was introduced to a Mr Godfrey Brown and Mrs Yvonne Brown and was told that they wished to raise money in order to re-furbish their property. The existing mortgage was to be repaid and replaced with a new, larger mortgage as a result of which Mr and Mrs Brown would receive about £99,000. Mr McIntosh assisted Mr and Mrs Brown in completing an application form for the new mortgage. The form asked about the ownership of the property. Mr McIntosh was told that the property was owned by Mr Godfrey Brown and a relative, a Mr Noel Brown. Mr McIntosh recommended the firm of Messrs Kellie & Co, Solicitors. He had, over the years, introduced a number of clients to Ms Nedd of that firm

35. In December 2004 Ms Nedd of Messrs Kellie & Co was instructed by the lender and also by Mr and Mrs Brown. Ms Nedd is a solicitor of fourteen years’ standing and a partner of the firm of Messrs Kellie & Co which has one other partner. She specialises in residential conveyancing. Both Mr and Mrs Brown attended her offices in December 2004 to give instructions and at that time they both signed the new mortgage deed and Ms Nedd witnessed their signatures. Ms Nedd was informed that Mr Godfrey Brown had been divorced from his first wife some time previously and at that time the property had been transferred into the joint names of Mr Godfrey Brown and his cousin Mr Noel Brown. This had been done because Mr Noel Brown was much younger than Mr Godfrey Brown and his name on the title had then facilitated a new mortgage so that Mr Godfrey Brown’s first wife could be paid her share of the property. Ms Nedd was informed that Mr Noel Brown did not have an interest in the property.

36. At no time did Ms Nedd act for Mr Noel Brown. In December 2004 she prepared a Land Registry Transfer document (Form TR1) transferring the title to the property from Mr Godfrey Brown and Mr Noel Brown to Mr Godfrey Brown and Mrs Yvonne Brown for no consideration. She sent the form to Mr Godfrey Brown, Mr Noel Brown and Mrs Brown at the address of the property. She asked that Mr Godfrey Brown and Mr Noel Brown should each sign the Land Transfer Form in the presence of a witness who was also required to sign; in the letter she advised Mr Noel Brown to seek independent legal advice if he needed to do so.

37. The re-mortgage was completed in December 2004. Mr and Mrs Brown received the amount of the loan and Mr McIntosh received his commission.

38. Early in 2005 Ms Nedd realised that she had not received the signed Land Registry Transfer document and she asked Mr and Mrs Brown to return it to her.

They did not do so and so she later asked Mr McIntosh if he would make enquiries about it. She then discovered that Mr Noel Brown was in the United States of America and she tried, unsuccessfully, to contact him there.

5 39. Some time between December 2004 and March 2005 Mr McIntosh received
the Land Registry Transfer document in his post without a covering letter. He noticed
that it had been signed by both Mr Godfrey Brown and Mr Noel Brown but that
neither signature had been witnessed. Mr McIntosh then telephoned Ms Nedd. There
was some dispute about what happened next and we consider the conflicting evidence
10 later. It was not disputed that Mr McIntosh then signed his name as a witness to both
signatures. In evidence before us he accepted that he knew that he “needed to be
present when the signatures were actually made transposed onto the paper”. He then
returned the Form to Ms Nedd. Ms Nedd received the form in March 2005 without
any covering letter. She immediately submitted it to the Land Registry. However, the
15 registration did not proceed because the Land Registry had been informed that the
transfer was disputed.

40. Ms Nedd then asked Mr McIntosh if he could telephone Mr Noel Brown in the
United States to assist in the verification of his signature. Mr McIntosh did speak to
20 Mr Noel Brown and asked him to send his passport details so that his signature could
be verified. During the telephone conversation Mr Noel Brown became heated and
made it clear that he did not wish to transfer his interest in the property to Ms Yvonne
Brown. Mr McIntosh was left with the impression that Mr Noel Brown would not be
sending copies of his passport either to Mr McIntosh or to anyone else.

25 *The enquiries of the lender’s solicitors*

41. In August 2005 the lender’s solicitors wrote to Mr McIntosh and told him that
it appeared that Mr Noel Brown had not consented to the transfer and that his
signature on the Land Registry Transfer document had been forged. The letter asked
30 for information about the way in which the signatures had been witnessed. Mr
McIntosh replied on 26 September 2005 in the following way:

“The Transfer was sent to our offices and I witnessed the signatures and sent
the transfer to the Solicitors Messrs Kellie & Co.

35 “In the course of obtaining the mortgage from the [lender] I had already
obtained proof of ID from Mr Godfrey Browne. I telephoned Mr Noel Browne
who lives in America and spoke to him in person to obtain a copy of his
passport, to date I am still waiting.”

40 42. The lender’s solicitors then asked Mr McIntosh to prepare a full statement of
the circumstances surrounding the loan and his witnessing of the signatures. Mr
McIntosh prepared and signed such a statement on 26 October 2005. The statement
said that Mr McIntosh had witnessed the Land Registry Transfer document but did
45 not state that he had not seen the signatories sign it.

43. At no stage did Mr McIntosh contact the lender, the Land Registry, the police
or the Authority to report the doubt about Mr Noel Brown’s signature.

50 *The investigation by the Authority*

44. On 15 June 2006 the Authority appointed investigators under the provisions of section 168 of the 2000 Act to investigate matters concerning Mr McIntosh and the Company. Both Mr McIntosh and the Company were informed and each was sent a Memorandum of Appointment which described the reasons for the appointment. The
5 Memorandum of Appointment sent to Mr McIntosh referred to the signature of the Land Registry Transfer document, to the failure to bring the matter to the attention of the lender, and to the failure to disclose in his application to the Authority that he had been the subject of disciplinary action. On 12 September 2006 Mr McIntosh was interviewed by the investigators. The interview began at 10.22 am and concluded at
10 1.55 pm. Following the interview the Authority made further enquiries.

45. As a result of their enquiries the Authority formed the view that Mr McIntosh had purported to witness a signature despite not being present when the signatory signed the document. The Authority were also of the view that Mr McIntosh had failed to be candid
15 and truthful with the Authority about the suspension and termination of his membership of FIMBRA. It followed that, in the view of the Authority, Mr McIntosh was not a fit and proper person to perform controlled functions and so it proposed to withdraw its approval from Mr McIntosh. As Mr McIntosh was the only person approved to perform controlled functions for the Company the withdrawal of Mr McIntosh's approval meant that there
20 was no one with the Company who was approved to carry out controlled functions. Accordingly, the Authority was of the view that the Company would not have adequate human resources in relation to the regulated activities it carried on and was not a fit and proper person having regard to its connection with Mr McIntosh and the need to ensure that its affairs were conducted soundly and prudently.
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46. On 27 February 2007 the Authority sent Mr McIntosh a Warning Notice and on 22 March 2007 Mr McIntosh sent written representations to the Authority. These stated:

30 "My suspension from FIMBRA was due purely to financial resources and not in any way due to misconduct. At the time of my application to the FSA and the correspondence during the application process I did explain fully the situation leading to my suspension with FIMBRA and as a result was given authorisation."
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The arguments

47. For the Applicant Mr Fatchett first argued that the FIMBRA matters were not relevant to Mr McIntosh's approval by the Authority because they were concluded by another regulatory body and they had already been dealt with. McIntosh had already
40 received a sanction from FIMBRA for the events of 1995 and should now be given the benefit of the doubt. Next, Mr Fatchett admitted that errors had been made on the APICF application form. However, he argued that Mr McIntosh had referred in the form to his bankruptcy and the commission claw back which related to the FIMBRA matters. Also, in his letter of 23 June 2004 to the Authority Mr McIntosh had set out
45 the position after which the Authority had granted his authorisation. Thirdly, with regard to the Land Registry Transfer document Mr Fatchett argued that Mr McIntosh was not a lawyer and did not have experience in witnessing documents. When he received the document he had asked Ms Nedd what to do. He accepted that there was no excuse for Mr McIntosh signing a document which clearly required him to be
50 present at the same time as the signatories but in mitigation it could be said that he had trusted Ms Nedd and had telephoned Mr Noel Brown in an attempt to resolve the

matter. Finally, Mr Fatchett made the point that the compelled interview had considered matters going back as far as 1995 and that Mr McIntosh had not been represented nor had he had the benefit of having the relevant documents before him.

5 48. For the Authority Mr Moony argued that Mr McIntosh lacked honesty and integrity in eight respects. First, by admitting the two charges made by FIMBRA in November 1995 he had in effect admitted perpetrating a deception on FIMBRA. Secondly, in his application to the Authority in April 2004 he had failed to disclose either his suspension by FIMBRA or the termination of membership. Thirdly, in his
10 letter to the Authority of June 2004 he had omitted to state that he knew he had been suspended. Fourthly, he had purported to witness the Land Registry Transfer document which stated that the two signatories had signed in his presence when that had not been the case and, when he had been told that Mr Noel Brown's signature had been forged, he had failed to take appropriate action and had not notified the lender or
15 the Land Registry. Fifthly, Mr McIntosh's letter of 26 September 2005 to the lender's solicitors failed to make it clear that he had not been present when the signatories had signed the Land Registry Transfer document; the letter claimed that Mr McIntosh was waiting for Mr Noel Brown's passport when that had been refused and did not explain that Mr Noel Brown had made it clear that he did not wish to transfer his
20 interest in the property to Mrs Yvonne Brown. Sixthly, the statement of 26 October 2005 had not made it clear that Mr McIntosh had not seen the signatories sign. Seventhly, some statements made by Mr McIntosh during the compelled interview were untrue and contradictory. And, finally, some of Mr McIntosh's written representations to the Authority after receipt of the Warning Notice were dishonest.

25 49. Mr Moony cited *Eversure v Financial Services Authority* (April 2006) Tribunal Decision No. O32 at paragraph 58 for the principle that the Authority was entitled to expect full and frank disclosure from those who complete forms of application for approval. He cited *Virenda Rai Agarwala v The Financial Services
30 Authority* Tribunal Decision No. 052 at paragraphs 44 and 45 for the principle that the lack of accuracy in replying to application forms, for whatever reason, is a serious matter. He referred to *PS Mortgages Ltd and Stanley Olutola v The Financial Services Authority* Tribunal Decision No. 042 at paragraphs 15 and 16 where the Tribunal did not accept that an Applicant could have forgotten about a serious finding
35 of professional misconduct which had occurred three years previously.

50. Mr Fatchett for the Applicant distinguished these authorities on the ground that they all related to recent matters which were not disclosed whereas he argued that in these references the undisclosed matters went back to 1995.

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Reasons for decision

51. In considering the arguments of the parties we remind ourselves that the issue for determination in these references is whether Mr McIntosh was a fit and proper person to perform controlled functions. We consider this issue by reference first to the
45 findings of FIMBRA; then to the completion of the APICF form; and finally to the witnessing of the signatures on the Land Registry Transfer document.

52. First, however, we consider what weight we should give to the statements made by Mr McIntosh at the compelled interview. We accept that it was a long
50 interview as it lasted for three and a half hours. We also accept that Mr McIntosh was not accompanied by any legal representative, and that he was speaking from memory

without the benefit of documents. For these reasons we have preferred to base our decision on the documentary and oral evidence before us and we have not relied upon the transcript of the interview in any way.

5 53. Beginning, then, with the findings of FIMBRA we are of the view that these are
of a serious nature. The finding of a failure to maintain sufficient financial resources is,
perhaps, less serious because it could be argued that, after the passage of time, such a
10 problem could be cured and might be unlikely to recur. However, the finding of a failure
to deal with FIMBRA in an open and co-operative manner, and to keep it promptly
informed of anything which might reasonably be expected to be disclosed, is a more
serious finding as it goes to honesty and integrity. At this stage we record that FIMBRA
did not find that Mr McIntosh had perpetrated a deception on FIMBRA; that was one of
the arguments put to the Disciplinary Committee but not one of its findings.

15 54. Having heard the evidence of Mr McIntosh we formed the view that he had done
his best to obtain funds from Mr Turnbull to enable him to pay Provident and General
Accident but had been unsuccessful. What he should have done was to keep FIMBRA
informed of his unsuccessful attempts to obtain payment and of the fact that the cheques
20 would not be met. But this he did not do. We formed the view that Mr McIntosh was
reluctant to face up to reality when it became uncomfortable and that led to his failure to
keep FIMBRA fully informed. A failure to be open and honest with a regulator is a
serious failure. We accept that these matters go back to 1995 but a similar course of
behaviour occurred in 2004 in the completion of the APICF form to which we now turn.

25 55. In considering the completion of the APICF Form we have been most assisted
by the Decision in *Eversure* which is a Decision of a Tribunal chaired by the
President. At paragraph 58 the Tribunal stated that the Authority was entitled to
expect full and frank disclosure from those who complete forms of application for
approval; the Authority was entitled to expect anyone who performs or intends to
30 perform controlled functions to adhere to high standards of competence and
capability. When it comes to filling in the application form for approval applicants
must be taken to understand the express and unambiguous language; the forms call for
full and frank disclosures and the inclusion of any material information if the
applicant has any doubt about it.

35 56. We received no satisfactory explanation as to why Mr McIntosh failed to disclose
his suspension by FIMBRA in reply to Questions 37b and 38. As far as his termination
was concerned, Mr McIntosh gave evidence that he did not receive notification of the
termination nor did he see the press release saying that his membership had been
40 terminated. He also gave evidence that the lease of his office premises had been
terminated and he had been given a few days to leave the building. We find that, in
view of the fact that Mr McIntosh left the office premises at short notice, he probably
did not receive the notice of termination from FIMBRA. However, we also find that
he knew that he had been suspended; he knew the date on which the Disciplinary
45 Committee were to meet; and he knew of the charges which he had admitted in
writing. If he had wanted to do so he could have enquired about the result of the
meeting. We conclude that Mr McIntosh most probably knew that his membership
had been terminated and this is consistent with his subsequent actions as he did not
thereafter arrange investment transactions or give investment advice. In the light of
50 this finding we are of the view that Mr McIntosh should have given full and frank
disclosure of his suspension, of the charges of the Disciplinary Committee, of the fact

that he had admitted the charges, and of the fact that he had not attended the meeting of the Disciplinary Committee. His failure to do this was a serious failure of honesty and integrity.

5 57. Turning to the witnessing of the signatures on the Land Registry Transfer
document, we first consider the conflicting evidence about what was said during the
telephone conversation between Mr McIntosh and Ms Nedd after Mr McIntosh had
received the signed document in his post. At one stage Mr McIntosh claimed that Ms
Nedd had advised him to witness the signatures and return the Form to her. Ms Nedd
10 gave evidence that Mr McIntosh had merely asked how he should get the Form to her
and that there was no conversation about Mr McIntosh signing or witnessing the
document. In oral evidence before us Mr McIntosh said that he told Ms Nedd that he
had received the document which had been signed but not witnessed and Ms Nedd
had told him to “sort it out and just send it on”; it was his understanding that “sorting
15 out” meant witnessing the signatures.

58. In considering this conflict of evidence we bear in mind that Mr McIntosh’s
oral evidence before us was less certain than his original claim. We found Ms Nedd to
be a credible witness and accept her evidence. Accordingly we find that Ms Nedd did
20 not advise Mr McIntosh to witness the signatures in the absence of the signatories.

59. We therefore conclude that Mr McIntosh decided himself to witness the
signatures on the Land Registry transfer document without being in the presence of the
signatories when they signed it. That is a serious failing not only of honesty and integrity
25 but also of competence.

60. In the light of these findings we have to conclude that Mr McIntosh is not a fit
and proper person to perform controlled functions. The failure to be open and honest
with FIMBRA, the deliberate omissions from the APICF form, and the witnessing of the
30 signatures on the Land Registry Transfer document in the absence of the signatories, all
point to a lack of honesty and integrity. We could not condone such behaviour and are of
the view that the withdrawal of approval was justified.

61. We have had the advantage of both seeing Mr McIntosh giving evidence before
35 us and of considering the evidence in this reference at some length. In relation to the
matters that we have had to consider we are of the view that it would not be appropriate
for Mr McIntosh to be barred forever from approval and he should not be discouraged
from re-applying for approval at some future stage.

40 **Decision**

62. Our Decision on the issue for determination is that Mr McIntosh is not a fit and
proper person to perform controlled functions.

63. This is a unanimous decision .

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64. 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. We therefore
now remit these matters to the Authority.

DR NUALA BRICE

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CHAIRMAN

RELEASE DATE:

10 FIN/2007/0004
FIN/2007/0009
07.01.08