PERFORMANCE OF REGULATED ACTIVITIES – application for approval – non- disclosure of the fact that the Applicant resigned from previous employment during the course of disciplinary proceedings - whether Applicant fit and proper to perform controlled function CF30– no – FS&MA 2000 s.61(1)

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

PHILIP GRAHAM LLOYD

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal : DR A N BRICE (Chairman)
MRS C E FARQUHARSON
MRS J M NEILL

Sitting in London on 27 and 28 April 2009

Gary Cooke Counsel, instructed by Shakespeare Putsman LLP Solicitors, for the Applicant

Peter Wright, Solicitor-Advocate of the Financial Services Authority, for the Respondent

DECISION

The reference

1. On 3 September 2008 Mr Philip Graham Lloyd (the Applicant) referred to the Tribunal a Decision Notice issued by the Financial Services Authority (the Authority) on 30 July 2008. The Decision Notice was issued to MWM Investments Limited and to the Applicant and stated that the Authority had decided to refuse the application for the approval of the Applicant to perform controlled function CF30 because the Authority was not satisfied that the Applicant was a fit and proper person to perform that controlled function..

The legislation

2. Section 59(1) of the Financial Services and Markets Act 2000 (the 2000 Act) provides:

> **"(1) An authorised person (A) must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates."**

3. The controlled function relevant in this reference is CF30 – customer function. Section 60(1) of the 2000 Act provides that an application for the Authority's approval under section 59 may be made by the authorised person concerned and must contain such information as the Authority may reasonably require. In this reference MWM Investments Limited is an authorised person who carries on regulated activities and who applied to the Authority under section 60 for the approval of the Applicant to perform controlled function CF30 as a self-employed independent, financial adviser. The relevant parts of section 61 provide:

> **"61(1) The Authority may grant an application made under section 60 only if it is satisfied that the person in respect of whom the application is made ("the candidate") is a fit and proper person to perform the function to which the application relates.**
>
> **(2) In deciding that question, the Authority may have regard (among other things) to whether the candidate ….**
>
> **(a) has obtained a qualification;**
>
> **(b) has undergone, or is undergoing, training; or**
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> **(c) possesses a level of competence,**
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> **required by general rules in relation to persons performing functions of the kind to which the application relates."**

The issue

4. What we had to decide was whether the Applicant was a fit and proper person within the meaning of section 61(1) of the 2000 Act to perform controlled function CF30 with MWM Investments Limited.

The evidence

5. Two bundles of documents were produced. Oral evidence was given by the Applicant on his own behalf. Oral evidence was also given on behalf of the Applicant by Mr David Parkinson, the Managing Director of MWM Investments Limited. Oral evidence was given on behalf of the Authority by:

> *Mr Mark Anthony John Brown* of Lloyds TSB; Mr Brown was the Applicant's sales manager from 2004 to 1 January 2007;
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> *Mr Andrew John Franks,* a case officer in the Consumer Contact Centre of the Authority; and
>
> *Mr Guy Richard Moreton* of Lloyds TSB; from 1 January 2007 Mr Moreton was a risk consultant at Lloyds TSB and he took part in the investigations into the conduct of the Applicant and was present at the interview of the Applicant in April 2007.

6. Witness statements containing evidence on behalf of the Authority and signed by the following witnesses, all of Lloyds TSB, were not objected to by the Applicant and so were admitted in evidence at the hearing as the unchallenged evidence of those witnesses:

> *Ms Carol Anne Burton* whose role it was to monitor the conduct of the investment advisers employed by Lloyds TSB and to co-ordinate arrangements for investigations including dealing with customers, providing references and notifying the Authority;
>
> *Mr Mark Andrew Frier* who from 1 January 2007 was the combined sales manager and risk manager of the Applicant;
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> *Mr Matthew Philip Osborne* who was the hearing manager at the Applicant's disciplinary hearings on 7 August 2007 and 20 September 2007; and
>
> *Mr Charles Arthur Wells* who, at the relevant time, worked in human resources and provided support to Mr Osborne in dealing with the disciplinary issues relating to the Applicant.

The facts

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

The Applicant

8. The Applicant was born on 5 March 1966. From 1988 until 1996 he was employed by Alliance Insurance Brokers as a branch manager in a general insurance office and then for two years he worked for a small firm of insurance brokers. Between 1998 and 2002 he worked for JCB Insurance. He was first approved by the Authority in 2002 when he joined the Co-operative Insurance Society where he worked from home and visited customers in their homes. While with the Society he obtained Financial Planning Certificate 1 in July 2002; Financial Planning Certificate 2 in December 2002 and Financial Planning Certificate 3 in July 2003.

9. The Applicant remained with the Co-operative Insurance Society until July 2004 when he joined Lloyds TSB (the Bank) to give financial advice to customers. He was approved by the Authority to carry out the controlled function of investment adviser (CF21) for the Bank. While at the Bank he only sold investment products issued by the Bank and by Scottish Widows, a related firm.

The Applicant's terms of employment with the Bank

10. When he joined the Bank the Applicant was introduced to Mr Brown, who was his sales manager. He was also assigned a regulated induction coach (Ms Jeannie Birds). At the beginning of his time with the Bank the Applicant had to complete a three-week induction training programme which included nine computer-based tests. Thereafter he undertook a two-week sales course. Then his regulated induction coach watched as he interviewed customers and guided him through his first few weeks, which he spent at the branch of the coach. By November 2004 the Applicant was able to advise on his own and was placed in his own branch of the Bank.

11. The Applicant also had a risk manager (Ms Tracy Cooper) one of whose functions was to monitor the Applicant so that he could achieve the status of a competent adviser. To do this the risk manager was required to observe one interview each month for ten months and to comment on the Applicant's interviewing technique. Areas which required improvement were recorded on a record of coaching.

12. Each investment adviser was also given written guidance on the selling of investments. When a customer of the Bank sought advice about investments the adviser was required to interview the customer and to record relevant details on a document called a factfind. If a customer wanted to purchase an investment then a copy of the factfind was sent to Scottish Widows or the relevant department of the Bank. The adviser was also required to send to each customer a letter containing recommendations with the reasons why the recommended investments were suitable for the customer. This was referred to as the suitability letter.

The points system

13. While working at the Bank the Applicant was paid a salary and a bonus. Both the level of salary and the amount of the bonus were determined by reference to a points system The salary bands started at level B and went up to level G. At each salary level there was a minimum number of points which an adviser was expected to achieve. So. for example, at level B an adviser would need to earn a minimum of 13,000 points; at level C 18,000 points; at level D 24,000 points; at level E 32,000 points; and at level F 39,000 points. Every time an adviser sold an investment product to a customer he was awarded a number of points. If the total amount of points he was awarded in a quarter equalled the minimum for his salary level he earned a bonus of 15% of his salary and an extra bonus of 1% of salary for each additional 1% of points earned. If, after nine months, the total amount of points earned by an adviser was that for a higher salary level, the adviser could be promoted to that higher salary level.

14. However, a condition of the award of a bonus or of a higher salary level was that the adviser should not exceed a score of more than 75 risk points. Each month the Bank's computer would calculate the risk points for each adviser based on the data relating to the performance rates and other key performance indicators of the type of business placed by each adviser. For example, if more than a minimum number of

customers cancelled products during a cooling-off period the adviser would be given a number of risk points. If in any month the total risk score exceeded 75 then, irrespective of any points awarded to the adviser on the sale of products, the adviser would not be awarded a bonus and would not be promoted to a new salary level. We saw the risk points awarded to the Applicant in each of the twelve months ending in November 2005. The number of risk points ranged from 22 in January 2005 to 77 in June 2005. In May 2005 it was 75 but in all the other months it was less than 75. Where an adviser had a high risk score he would be observed by his risk manager in order to find out why the problems were occurring.

15. Thus the way in which the points system operated was to reward each adviser for the number of investment products sold so long as his risk score remained within certain parameters.

2004 – 2006 – the Applicant's work for the Bank

16 On a record of coaching begun on 8 December 2004 Ms Cooper recorded that the Applicant had not documented the cancellation of a personal equity plan with Scottish Widows and had not sent the customer a terms of business letter. It was also noted that the Applicant had also recorded other incorrect information in the factfind document for that customer, none of which, however, affected the advice given. The Applicant agreed to ensure that the cancellation question was put to customers and that they fully understood the questions about their investments. Further reviews took place on 26 January 2005 and 4 March 2005 and the record of coaching recorded that the required development had taken place. In January 2006 the matter was closed.

17. In about September 2005 the Applicant was given a list of 100 customers of the Bank who had not been contacted for five years and was asked to contact them to see if they wished to make further investments. In an interim review conducted on 21 December 2005 Mr Brown recorded that the sales performance of the Applicant had been truly excellent.

18. Ms Cooper left the Bank before she had completed the programme of monitoring of the Applicant. Mr Peter Harper was appointed the Applicant's risk manager in February 2006. Within three months thereafter the Applicant achieved competent adviser status. On 1 January 2007 Mr Frier took over the combined roles of sales manager and risk manager of the Applicant. On 9 March 2007 Mr Frier observed a customer over the age of 75 being interviewed by the Applicant when the Applicant did not complete the documentation applicable to a customer over the age of 75.

September 2006 – the investigations into replacement selling

19. In September 2006, when Mr Harper was the Applicant's risk manager, the Bank began a review of cases of apparent replacement selling. Special rules applied to replacement selling which was defined as the unnecessary cancellation of an existing investment with the funds being invested in another investment designed to achieve the same or similar objectives. The disadvantages were that the customer might have to bear both the charges associated with the cancelled investment and the charges for the new investment. There could also be the loss of a tax advantage if, for example, a personal equity plan or an individual savings account were cancelled and replaced by a non-tax free investment.

20 The Bank's written guidance made it clear to advisers that the practice of replacement selling was unacceptable as it invariably resulted in customers being disadvantaged. Advisers were told that investigations into replacement selling could lead to disciplinary action and that the Bank could identify all new investment sales that matched encashments for the same customer. Advisers were required, without exception, to disclose in the suitability letter any cancellation of an existing investment with a full explanation of the financial consequences. The Bank used to contact customers at random and ask questions about the way in which investment advice had been given. If the Bank's procedures had not been followed the matter was referred to the adviser's risk manager.

21. The review which began in September 2006 covered the period from October 2004 to June 2006. Twenty advisers were identified where more than 10% of their sales involved the cancellation of an existing investment and the Applicant was one of these advisers. Twenty-four of the Applicant's customers had cancelled and replaced a Scottish Widows product. A sample of eight of these was extracted covering sales between 1 October 2004 and 30 June 2006. .

22 In November 2006 Mr Harper telephoned each of these eight customers and asked them a number of questions. The customers appeared satisfied with their new investments. In some cases the customers said that the decision to cancel and re-invest was their decision; in some cases they said that it was not. One customer stated that the Applicant had given the impression that the customer's existing personal equity plan and individual savings account had matured and in that case the customer had cashed them and purchased a new investment. All eight customers had relied upon the advice of the Applicant. Mr Harper then reviewed the documentation relating to these customers and noted that the factfind documents had not mentioned that an existing investment was to be cancelled. The factfind document for one customer stated that the source of the funds for his new investment was a matured endowment policy whereas the customer had no recollection of the matured endowment. It also appeared that all the customers had not been sent the correct suitability letters mentioning the financial consequences of cancellation.

23. Mr Harper also had concerns about the sales by the Applicant of critical illness policies because Mr Harper had identified thirty-three sales which not disclose any medical problems and that proportion was extremely unusual. If an adviser did not accurately record the medical facts told to him by a customer the policy might be processed more quickly but there would be a risk of the policy not being honoured because of non-disclosure.

2007 – the investigations into incorrect signatures and information

24 When Mr Frier replaced Mr Harper as the Applicant's risk manager in January 2007 he continued the investigations commenced by Mr Harper. He was provided with a sample of ten customers and he asked them to confirm that the medical information recorded about them was accurate. They all confirmed that it was but one customer reported that the signature on the documentation was not hers. Mr Frier was then supplied with details of another ten cases of the Applicant's that had failed the Bank's verification process because of problems including missing signatures or missing information. In such cases the practice was to return the documents to the

adviser so that he could contact the customer to correct the error and re-sign the proposal form. Mr Frier wrote to these ten customers on 16 April 2007 and sent them copies of their factfinds and other documents. He asked them to confirm that the information on the factfind documents was correct and that the signatures on their documents were theirs. Three replied that the signatures were not theirs and a number said that there was incorrect information in the factfind documents. For example, one customer who had two children aged 13 and 10 was recorded as having no children; the occupation of the same customer was recorded as shop assistant when she was a delivery driver; and the same customer was recorded as having £19,500 in various accounts whereas she said that she only had one account which was a current account with the Bank.

25. In the light of these findings Mr Frier, together with Mr Moreton, decided to interview the Applicant in order to ask the Applicant about the results of the enquiries into replacement selling and doubtful signatures. The interview was arranged for 25 April 2007 but the day before the interview Mr Frier and Mr Moreton received information from a customer who was referred to at the hearing before us as customer G.

The case of customer G

26. Customer G had purchased a mortgage protection plan on which she was paying premiums. She had been asked to verify the information in the factfind document prepared by the Applicant and had replied that the information recorded was incorrect in a number of respects and that the signature was not hers. The factfind document recorded that she had a mortgage with a monthly payment of £159; an amount outstanding of £66,200; and a term of 20 years starting on 1 December 2006 with a remaining term of 19 years eleven months. However, the customer said that she did not have any mortgage. The factfind document also recorded that the customer had a savings account at the Bank, which she did not have (nor did she have such an account elsewhere); and that she had no dependants when in fact she was a single mother and the reason for her taking out the policy was to provide a lump sum for her child if she predeceased her child. Customer G also said that she had not received any suitability letter from the Applicant setting out the reasons for taking out the policy.

25 April 2007 - the interview

27. The interview took place on 25 April 2007 attended by Mr Frier and Mr Moreton for the Bank and the Applicant. The Applicant was told that it was not a disciplinary meeting although the information gathered at the meeting could be used towards a disciplinary hearing if that were considered appropriate. Mr Moreton asked the Applicant about the investment products sold by the Bank and the Applicant demonstrated that he had sound financial knowledge of the products and of their advantages, disadvantages and relative merits.

28. During the interview the Applicant was taken through some examples of transactions where cancellations had not been documented and where the suitability letters made it appear that the new products had been purchased with money available for investment when in fact the money was pre-invested money. Some of those customers had told the Bank that they had cancelled and re-invested on advice from the Applicant to do so. The Applicant said that he did not document the cancellation of a product if it was an investment with Scottish Widows to be replaced by another

investment with Scottish Widows. Mr Moreton did not regard this explanation as adequate as the written guidance emphasised that all cancellations had to be documented.

29. During the interview Mr Moreton also took the Applicant through a number of examples in which customers had said that the signatures on the documents were not theirs. The Applicant denied that he had forged the signatures but was unable to offer any explanation. Mr Moreton also mentioned the case of customer G. The Applicant accepted that he had recorded incorrect information but explained that the customer had wished to purchase a policy which would provide a lump sum on death. The Bank only offered life policies that paid an income but a critical illness policy could be sold that paid a lump sum. That Bank had an internal rule that a critical illness policy could only be sold if the potential customer had a mortgage and so he had sold the customer a critical illness policy even though the customer did not have a mortgage.

27 April 2007 – the suspension

30. Mr Frier took notes of the interview which were signed by the Applicant, Mr Frier and Mr Moreton. Immediately after the interview Mr Moreton and Mr Frier had a discussion and formed the view that the issue of the incorrect signatures was a serious matter which could be gross misconduct. It was therefore agreed that the Applicant should be suspended pending further investigation and with the possibility of disciplinary proceedings.

31. On 27 April 2007 Mr Frier wrote to the Applicant to confirm that he had been suspended from his duties with immediate effect under the Bank's disciplinary procedure. The letter contained the following paragraph:

> "You are advised that the Bank is required to notify the Financial Services Authority about your suspension and will also be advised of the outcome in due course. You should also be aware that any outcome of a disciplinary hearing could affect your fitness and propriety as prescribed by the FSA."

32. The Bank also informed the Authority that the Applicant had been suspended and that an investigation had been opened.

August 2007 – the first disciplinary hearing

33. On 22 June 2007 the Applicant was invited to attend a disciplinary hearing to be held on 7 August 2007 to consider allegations of gross misconduct relating to replacement selling and acts of dishonesty. Details of eight instances of replacement selling, and of four instances of dishonesty, were provided. In each of the four instances of dishonesty there was an allegation of the forgery of a signature and in two of those four instances there was also an allegation of the falsification of information on the factfind document. One of those instances was that of customer G.

34. The hearing on 7 August 2007 was conducted by Mr Osborne and the Applicant was supported by his union representative. The hearing lasted five hours. Mr Wells told the Applicant that the purpose of the hearing was to consider whether disciplinary action should be taken in accordance with the Bank's procedures. Details of each allegation of replacement selling and of each allegation of dishonesty were considered. The hearing was adjourned without any decision being made so that Mr Osborne could consider the documents and the representations and make further

enquiries. At the end of the hearing the Applicant's union representative asked to be supplied with copies of the signatures held by the Bank of the four customers who had claimed that the signatures on the documents prepared by the Applicant were incorrect. A note of the hearing was prepared and sent to the Applicant on 14 August 2007.

35. After the hearing Mr Osborne asked Mr Wells to obtain sample signatures from the customers who had claimed that the signatures on their documents were incorrect. Mr Osborne spoke to some of the customers about the alleged forged signatures but then he shredded his notes for confidentiality reasons. However, he recalled that one customer told him that she had met the Applicant only once which indicated that the Applicant had not gone back to the customer when the documentation had been returned to him. None of the customers that Mr Osborne spoke to were able to confirm that their signatures were correct.

36. On 23 August 2007 Mr Osborne wrote to the Applicant to say that, since the meeting on 7 August, he had made some further enquiries into the issues discussed and had decided to reconvene the hearing in order for the Applicant to have the opportunity to respond to the evidence that had been obtained. He stated that there would be a reconvened hearing on 20 September 2007. With the letter was sent a copy of the evidence which had been obtained and a copy was also sent to the Applicant's union.

37. Mr Osborne also asked Mr Wells to obtain sample signatures for all the customers concerned from the Signatures Mandate Department of the Bank. On 14 September 2007 Mr Wells asked the Signatures Mandate Department for sample signatures for the customers involved in the alleged signature forgeries. When the Signatures Mandate Department replied Mr Wells forwarded a copy of the evidence to the Applicant. Mr Osborne reviewed these sample signatures against those appearing on the documents that had failed the verification process and thought that they were different in a number of ways.

September 2007 – the reconvened disciplinary hearing

38. The reconvened hearing started at 10.30 am on 20 September 2007. The Applicant was asked if he was aware of the potential outcomes of the hearing, which were detailed in the disciplinary policy which had been sent to him, and whether he understood the nature and the format of the hearing and he replied that he did. Mr Osborne presented evidence to the Applicant relating to the alleged forged signatures and the Applicant was unable to provide any adequate explanation of why the customers had said that the signatures were not theirs. The Applicant's representative read a statement during which he expressed surprise that the Bank could not provide a copy signature from customer G. After reading the statement the representative asked whether, if the Applicant were to tender his resignation immediately, the Bank would give a less harsh reference to a future employer. There was an adjournment of the hearing from 10.55 to 11.00 am when Mr Osborne stated that he could not stop the Applicant from resigning and he would get the standard bank reference which would state that he had resigned pending disciplinary action; it would also state the alleged offence and that no further action had been taken. There was a further adjournment from 11.25 to 11.50 am after which the Applicant said that he had decided to resign and handed in his resignation.

39. We accept the evidence of Mr Wells that the phrase "no further action" meant that the Applicant had not been dismissed by the Bank but neither had the Bank concluded that there was no case to answer. If an offence was considered to be very serious, and if the disciplinary process was very far advanced, then on occasion the Bank would not let an employee resign. However, in the case of the Applicant the proceedings were not sufficiently advanced to refuse a resignation as no final decision had been reached on what outcome was considered appropriate.

40. On 25 September 2007 the Bank informed the Authority that the Applicant had ceased to perform controlled function 21 and that the Applicant had resigned during a disciplinary hearing.

The continuing investigations and the payment of compensation

41. After the Applicant had resigned the Bank continued with its investigations into the conduct of the Applicant concerning replacement selling, incorrect signatures, and failure to record correct information so that the Bank could ascertain whether any customers had suffered loss as a result of the Applicant's conduct. None of the customers who had queried their signatures stated that they had suffered a loss. All the other customers who had been advised by the Applicant between 9 November 2004 and 25 April 2007 were reviewed. Compensation amounting to a total of £27,762.19 was paid to 38 customers who had been advised by the Applicant to cash an existing product and where the customer had not been informed about the charges or where the customer documentation was inaccurate or incomplete. The detailed reasons why this compensation was paid to the customers were not considered at the hearing before us.

November 2007 - investigations into advice to elderly clients

42 In November 2007 a customer told the Bank that he was concerned that, although his policy document stated that he was 71 years old, in fact he was 81. The Bank had specific rules about the sale of investments to customers who were over the age of 75. There were some limitations on the investments they could hold. Also, they had to be given the option of being accompanied by a friend or relative at the interview with the adviser. Finally, a senior member of the staff of the Bank had to be present at the interview to confirm that the customer understood the investments he had agreed to buy.

43. The customer who complained had been interviewed by the Applicant. He had not been accompanied at the interview by a relative or friend and a senior member of staff had not been present at the interview. The Bank became concerned that other elderly customers might not have received the necessary protection afforded by the Bank's rules. Ms Burton used the list of the Applicant's business to identify all customers recorded by the Applicant as having a date of birth between 1926 and 1939. There were ninety such customers. Ms Burton checked the dates of birth recorded by the Applicant in these ninety cases against the bank's existing records of those customers. She found that in six cases the Applicant had recorded the dates of birth as exactly ten years later than they were and had not followed the rules and procedures for elderly clients.

2007- the application to the Authority for approval

44. Meanwhile, on 16 October 2007 the Applicant telephoned the Authority and spoke to Mr Franks who worked in the Customer Contact Centre. There was a conflict of evidence about the contents of this telephone call which we consider later within the context of the reasons for our Decision.

45. At some time before 16 October 2007 the Applicant approached MWM Investments Limited (MWM) with a view to working with MWM as a self-employed independent financial adviser. If approval were granted the role intended for the Applicant at MWM would require the Applicant to meet individual and corporate clients, to gather information, to identify areas requiring advice, to research a solution, to present this to the client and then to complete the arrangements. No sales targets would be set by MWM and MWM would not pay a salary. The Applicant would be remunerated by fees paid by his clients and from commissions on investment products he sold.

46. On 16 November 2007 MWM sent to the Authority a short application seeking approval for the Applicant to perform controlled function CF30. The short from application was signed by both the Applicant and MWM. The guidance published with the form indicated that the short form application might be used where a candidate had ceased to perform a controlled function for one firm and required approval to perform a controlled function for another firm. However, it was made clear that it was not appropriate to use the short form where there had been any changes in the way in which the candidate would answer questions relating to his fitness and propriety since the last time he was approved; in such circumstances the long form had to be completed.

47. On 16 January 2008 the Authority asked MWM to submit the long form application. On 22 January 2008 MWM did submit the long form application which included the following questions

> "5.09 Is the candidate, or has the candidate **ever** been, the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity? …
>
> 5.10 Has the candidate **ever** …
> (b) been refused, restricted 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?"

48. The Notes to the form stated that question 5.09 covered internal investigations by an authorised firm. The Applicant answered "No" to both questions. In a letter sent to Mr Parkinson on 23 January 2008 the Authority indicated that it was aware that the Applicant had been suspended by the Bank and that he had later resigned during disciplinary proceedings and asked for an explanation of the failure to disclose this information and for details of the circumstances leading up to the Applicant's suspension and resignation. The Applicant wrote to the Authority on 14 February 2008 and stated that none of the allegations had been decided against him and that he had been informed by the Bank that no further action would be taken.

49. We saw a reference provided by the Bank to MWM on 8 February 2008 which gave details of the Bank's investigation into replacement selling by the Applicant and

the claims by four customers that the signatures on documentation were not theirs. Details were also given of the disciplinary hearings on 7 August 2007 and 20 September 2007 and it was stated that, during the latter hearing, the Applicant had resigned and therefore the investigation was not fully concluded. It was also stated that the investigation had continued after the Applicant's resignation and 38 customers who had apparently cancelled investments had been paid compensation totalling £27,762.19.

The arguments

50. For the Authority Mr Wright referred to the criteria contained in the guidance given by the Authority, and published in the Handbook as FIT, and argued that the Applicant failed the test of honesty, integrity and reputation and also failed the test of competence and capability. Mr Wright relied primarily on the fact that, in the application for approval, the Applicant had failed to disclose the disciplinary proceedings taken against him by the Bank and had given no satisfactory explanation for that failure. However, Mr Wright also relied upon the facts surrounding the replacement selling, the incorrect signatures, the incorrect information given in the case of customer G and other cases and the treatment of elderly clients by the Applicant in support of his argument that the Applicant was not fit and proper. Mr Wright cited *Eversure Financial Service and Frederick George Young v Financial Services Authority* (2006) Tribunal Decision No 32 at paragraphs 55, 58 and 59 for the principle that the Authority were entitled to expect full and frank disclosure and high standards of competence and capability in candidates who sought approval to perform controlled functions.

51. For the Applicant Mr Cooke argued that the Applicant met all the requirements of section 61(2) of the 2000 Act and it had been recorded by Mr Brown in 2005 that his sales performance had been excellent. At the interview in April 2007 he had demonstrated a sound financial knowledge of the products sold by the Bank and of their advantages, disadvantages and relative merits. The Applicant had been present at the interviews with the customers who had sold one investment and bought another and was best able to assess their needs. Some had said that their personal equity plans had performed poorly and a change to a guaranteed investment bond may well have been in their best interests. There had been no expert or forensic examination of the allegedly incorrect signatures and no decision on this matter had been reached by the Bank. The Applicant had accepted that he had made errors in the case of customer G but had received no personal advantage and had given the customer what she wanted. There was no evidence that the elderly clients had not been properly advised or were unhappy with the products they were sold.

52. Turning to the non-disclosure of the disciplinary proceedings to the Authority, Mr Cooke distinguished *Eversure* on the facts and argued that the Applicant was not dishonest but had hoped to put a gloss on what had happened and was fundamentally a fit and proper person. Mr Cooke cited *Rajiv Khungar and Khungar Home Loans Limited v The Financial Services Authority* (2005) Tribunal Decision No. 16 at paragraph 11 and *Theophilus Folagrade Sonaike trading as FT Insurance Services v The Financial Services Authority* (2005) Tribunal Decision No. 24 as examples of cases where an unsuccessful applicant had committed offences of proven dishonesty and argued that there was a distinction to be drawn between the level of wrongdoing required in deciding whether a person was fit and proper.

Reasons for decision

53. In considering our decision we first identify the legal principles by reference to the legislation, the published guidance and the authorities. We then apply those principles to the facts and evidence before us.

The legal principles

54 We start with the 2000 Act and first note that section 61(1) provides that an application for approval of a candidate to perform a controlled function may *only* be granted if the Authority is satisfied that the candidate is a fit and proper person. This indicates that if the Authority is not satisfied then approval must not be granted. Thus the burden of proving fitness and propriety rests on the Applicant. Sections 2 and 133 of the 2000 Act are also relevant. Section 2(1) 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. Section 2(2) sets out the regulatory objectives which include the protection of consumers.

55. Section 133(3) provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference, whether or not it was available to the Authority. That means that it is open to an Applicant to bring fresh evidence before us in support of his case. Section 133(5) provides that, on determining a reference, the Tribunal must remit the matter to the Authority with such direction (if any) as the Tribunal considers appropriate for giving effect to its determination. These provisions indicate that the Tribunal is not restricted to deciding whether the Authority was in fact satisfied, or whether it was reasonable for the Authority not to be satisfied, but to reach its own conclusions on the evidence before it. However, like the Authority, the Tribunal is bound by the provisions of sections 59 to 61 and by section 2 of the 2000 Act. That means that we should only direct the Authority to grant the application for approval if, bearing in mind the protection of consumers, we are satisfied on the evidence before us that the Applicant is a fit and proper person to perform the customer function of self-employed independent financial adviser with MWM. If we are not satisfied then we must not make such a direction.

56. The Authority has published guidance in its Handbook where it describes the criteria it will consider when assessing the fitness and propriety of a candidate for a controlled function. FIT 1.2.4 refers to section 61(2) and FIT 1.3.1 states:

> "FIT 1.3.1 The FSA 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 considerations will by the person's
>
> (1) honesty, integrity and reputation;
> (2) competence and capability; and
> (3) financial soundness."

57. In this reference the Authority did not question the financial soundness of the Applicant but were not satisfied about his honesty, integrity and reputation or about his competence and capability.

58 FIT 2.1 gives more extensive guidance on the matters to be considered in determining a person's honesty, integrity and reputation and FIT 2.1.1 emphasises that the Authority treats each candidate's application on a case-by-case basis and will have regard to all relevant matters including, but not limited to, the matters set out in

FIT 2.1.3. FIT 2.1.3 mentions thirteen separate matters of which numbers (4), (6), (11) and (13) were referred to at the hearing. These matters are:

> "FIT 2.1.3 The matters … to which the FSA will have regard include, but are not limited to:
>
> > (4) whether the person is or has been the subject of any proceedings of a disciplinary …nature or has been notified of any potential proceedings or of any investigation which might lead to those proceedings.
> >
> > (6) whether the person has been the subject of any justified complaint relating to regulated activities;
> >
> > (11) whether the person has been dismissed, or asked to resign and resigned, from employment or from a position of trust, fiduciary appointment or similar;
> >
> > (13) 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."

59. FIT 2.2 gives more extensive guidance on the matters to be considered in determining a person's competence and capability and the relevant parts of FIT 2.2.1 provide:

> "FIT 2.2.1 In determining a person's competence and capability the FSA will have regard to all relevant matters including but not limited to …
>
> > (2) whether the person has demonstrated by experience and training that the person is suitable, or will be suitable if approved, to perform the controlled function."

60 In *Eversure* (2006) the Tribunal found that the failure by an applicant to ensure that the information submitted to the Authority in his application form was accurate and complete meant that he failed to show that he had the honesty, integrity, competence and capability to carry out the controlled function to which the application related. At paragraph 58 of the Decision the President of the Tribunal stated:

> "The Authority cannot carry out its statutory approval responsibility without having the information to assess the candidate's integrity and willing to be open and honest with it. If it fails to insist on absolute disclosure, it will not be fulfilling its public function. In this regard the Authority is entitled to expect anyone who performs or intends to perform controlled functions to adhere to high standards of competence and capability. When it comes to filling in the application form for approval, and thereby seeking access to the advantages and responsibilities of approval, the applicants must be taken to understand the express and unambiguous language of the application form in question. Understandably the Authority … places a great deal of importance on an open and co-operative relationship with firms Because small firms do not have regular contact with supervisory staff at the Authority, it is important that

> the Authority can rely on them to bring to its attention voluntarily any matters relating to their ability to comply with relevant rules and requirements."

61 In *Khungar* (2005) an applicant had criminal convictions, had been sentenced to two years of imprisonment for deception, had conducted activities while bankrupt, and had incurred losses. The applicant applied to the Authority for authorisation and did not answer the questions in the application form correctly. In the Decision the President of the Tribunal said, at paragraph 36, that the applicant's answers were misleading and that he had not been frank with the Authority and that feature itself demonstrated a lack of integrity. Having regard to the other matters, and the applicant's failure to disclose them, the Tribunal was not satisfied that the applicant satisfied the fit and proper test.

62. A similar conclusion was reached in *Sonaike* where an applicant had recent convictions of offences of dishonesty and had also failed to disclose the facts of the arrest and convictions in an annual questionnaire. The Tribunal considered all the facts and dismissed the references.

63. From those authorities we derive the principles that, in deciding whether we are satisfied that the Applicant is a fit and proper person, we should consider all the facts but that the failure by an applicant to submit accurate and complete information in an application form sent to the Authority indicates that he has failed to show the required degree of honesty, integrity, competence and capability.

The application of the legal principles to the facts

64. We now turn to apply the legal principles to facts of this reference and we have found it convenient to consider the evidence under five headings, namely, the replacement selling, the incorrect signatures, the recording of incorrect information, the ages of the elderly customers and the non-disclosure of the disciplinary proceedings to the Authority.

(1) The replacement selling

65. The relevant facts are that in 2006 the Applicant was one of twenty advisers identified by the Bank where the cancellation of an existing investment occurred in more than 10% of their sales. Twenty-four of the customers advised by the Applicant had cancelled and replaced a Scottish Widows product. A sample of eight of these were telephoned and it appeared that, contrary to the written guidance of the Bank, the factfind documents had not mentioned the cancellations and not all the customers had been sent a suitability letter mentioning the financial consequences of cancellation. After the Applicant had resigned the Bank continued its investigations and paid compensation of £27,762.19 to 38 customers who had been advised by the Applicant to cash an existing product and where the customer had not been informed about the charges or where the documentation was inaccurate or incomplete.

66. The Applicant gave evidence before us that shortly after March 2005 he had been told by Mr Brown that he need not record the cancellation of a Scottish Widows investment if it was replaced by another Scottish Widows investment. The Applicant told us that as Scottish Widows would receive notice both of the cancellation and the proposal for the new investment they could "tally the two things together". Mr Brown

gave evidence that he had not given the Applicant any such advice and that it was not part of his responsibility as sales manager to do so.

67. As it is the Applicant who asserts that this conversation took place the burden of proving that it did rests on the Applicant. We found Mr Brown to be a truthful witness. Mr Brown was the Applicant's sales manager and not his risk manager. The recording of the cancellation of a product by a customer at the same time as the purchase of another product was a matter within the responsibility of the risk manager and not the sales manager and we note that a similar matter had been raised with the Applicant by his risk manager as early as 8 December 2004 within the context of the cancellation of a personal equity plan with Scottish Widows. Further, the Bank's written guidance made it clear that advisers were required, without exception, to disclose to the customer in the suitability letter any cancellation of an existing investment with a full explanation of the financial consequences which could include charges on both the cancelled investment and the new investment and tax consequences in appropriate cases. It seems to us that these financial consequences would also apply in the case of the replacement selling of Scottish Widows products and so there would be no reason why the guidance should not apply in those cases.

68. On the evidence before us we consider it unlikely that the alleged conversation with Mr Brown took place and we are not satisfied that it did.

69. We have found that the eight customers who were approached by the Bank during the investigations into replacement selling appeared satisfied by their new investments and that some said that the decisions to cancel and re-invest were their decisions. However, all eight had relied upon the advice of the Applicant and the fact remains that the recording of information in the factfind documents and the suitability letters was inadequate.

70. The Bank's requirements that advisers should record on factfind documents when one investment was sold in order to purchase another, and were required to inform the customer of the disadvantages, were both requirements for the benefit of the customer. We are of the view that the facts and evidence surrounding the replacement selling by the Applicant raise doubts about both his honesty and integrity and his competence and capability. They could also prejudice the interests of consumers.

(2) The incorrect signatures

71. The relevant facts are that in early 2007 one customer advised by the Applicant informed the Bank that the signature on her documentation was not hers. A sample was then identified of ten other cases where the documentation prepared by the Applicant had been incomplete and had been returned to the Applicant to obtain missing information or signatures. Enquiries were made of these ten customers and three replied that the signatures were not theirs. Also, customer G stated that the signature on her documents was not hers. We make this in total to be five cases but only four of them (including that of Customer G) were the subject of the Bank's disciplinary proceedings.

72. In evidence before us the Applicant denied signing the relevant forms for customer G and denied forging any signatures. He suggested that the customers who

alleged that the signatures on their documents were incorrect could have seen this as a way to obtain compensation. He also stated that at the disciplinary hearing the Bank had not proved that the signatures were forgeries and had not supplied him with copies of the specimen signatures they held.

73. We note that at the end of the first disciplinary hearing on 7 August 2007 the Applicant's union representative asked to be supplied with copies of the signatures of these customers as held by the Bank. The customers were asked to supply sample signatures; Mr Osborne spoke to some of them (we were not told how many) and none of those to whom he spoke were able to confirm that the signatures were correct. Mr Osborne sent this evidence to the Applicant on 23 August 2007 and said that the disciplinary hearing would be reconvened to give the Applicant an opportunity to respond to the evidence. On 14 September Mr Wells asked the Bank's Signatures Mandate Department for sample signatures and sent copies of the evidence he received to the Applicant. We did not see a copy of that evidence. The unchallenged evidence of Mr Osborne was that some evidence was obtained and was put to the Applicant at the beginning of the reconvened hearing. So we conclude that there was some evidence although we were not shown it during the hearing before us.

74. At the reconvened disciplinary hearing the Applicant's representative expressed surprise that the Bank could not provide a copy signature from customer G which indicates that copies of the signatures of the other three customers could have been supplied. Further, the evidence about the signatures was considered at the reconvened hearing because Mr Osborne presented it to the Applicant after which the Applicant resigned. We accept the unchallenged evidence of Mr Osborne that, if he had not been permitted to accept the Applicant's resignation, he would have dismissed the Applicant for gross misconduct as he considered the forgery issue to be particularly serious.

75. We accept that there had been no expert or forensic examination of the signatures by the Bank but it would have been open to the Applicant to bring such evidence before us.

76. An allegation of forgery is a very serious allegation. Cogent evidence is required to support it and mere suspicion is not enough. The evidence before us is not sufficiently cogent for us to reach a conclusion about this matter. However, we do find that doubts had arisen and that some evidence had been put to the Applicant but that no decision was reached at the disciplinary hearing because of the timing of the Applicant's resignation.

(3) *The recording of incorrect information*

77. The main example of the recording of incorrect information occurred in the case of customer G but we also saw documents prepared by the Applicant for other customers in which information was incorrect. In the case of customer G the documents recorded the amount, the term and the amount of monthly payments of what was a wholly fictitious mortgage. In other documents details such as age, occupation, and number of children were recorded incorrectly.

78. In evidence before us the Applicant stated that customer G had wanted a lump sum policy and, at that time, the life assurance policies written by Scottish Widows

only paid a monthly income on death. The only policy that paid a lump sum was a critical illness policy (also known as a level term insurance policy). The Bank's rule was that this product could only be sold if the customer had a mortgage and so he prepared the forms for that although he knew that the customer did not have a mortgage. He was giving the customer what she wanted. The customer had told him that she could afford premiums of £10 per month which meant that she could take out a critical illness policy for £66,000 and so he had completed the details of the mortgage so as to achieve that figure. The Applicant could not explain why he had recorded that the customer had a savings account when she did not The Applicant also said that he gave the suitability letter, which stated that the customer owned her own home with an outstanding mortgage of £66,200, to the customer at the end of the interview although the customer denied receiving it.

79. Before us the Applicant acknowledged that there had been failings in the way in which he dealt with this matter, and that it was wrong to send a factfind document containing false information to Scottish Widows. He accepted that the submission of false information could result in a claim under an insurance policy being rejected although he said that he thought that that only applied to false medical information. He also accepted that customer G could have obtained a life assurance policy which paid a lump sum on death from another provider and perhaps he should have told the customer that all that he could offer was a policy that paid a monthly income and that for a policy that paid a lump sum she would have to go elsewhere.

80. As far as the other cases of incorrect information recorded in the factfind documents is concerned the Applicant gave evidence that, if a customer was short of time, he (the Applicant) recorded only the information needed for the particular investment that the customer was buying. The computer gave a default answer for each of the other questions and the default answer would then appear on the documents even if incorrect. The Applicant accepted that personal equity plans and individual savings accounts did not mature but told us that many customers thought that they did mature after five years and one of his colleagues used to tell customers that they needed to review these investments every twelve months.

81. Mr Cooke for the Applicant argued that the Applicant received no personal advantage from the case of customer G but the fact remains that the Applicant received points for every product sold and those points affected the level of his salary and bonus. If a customer had been advised to go to another provider the Applicant would not have made a sale and consequently would not have gained any points towards his bonus target.

82. The recording of fictitious information on a proposal for insurance is dishonest and puts the customer at risk of a claim under the policy not being paid. It is also dishonest not to correct a customer's impression that personal equity plans and individual savings accounts mature after five years. The other examples of incorrect information indicate a degree of incompetence. We are of the view that the facts and evidence surrounding the incorrect information recorded by the Applicant bring into question both his honesty and integrity and his competence and capability. They could also lead to prejudice to the interests of consumers.

(4) The ages of elderly customers

83. The relevant facts are that one elderly customer complained in November 2007 that his age had been incorrectly recorded as ten years less that it was after which the Bank identified ninety customers advised by the Applicant who had been born between 1926 and 1939. We calculate that those customers were between the ages of 81 and 68 on 2007. Of this sample of ninety customers the Applicant had recorded six who were over the age of seventy-five as being ten years younger than they were and had not followed the special procedures for elderly customers.

84. It is relevant that these matters were not put to the Applicant by the Bank as the information only emerged after he had resigned. Before us his evidence was that he had not been shown any of the documentation relating to these customers. His explanation for the incorrect dates of birth was that he must have entered the incorrect dates in error but in his view that error would not affect anything else; it was "just an administration matter".

85. In considering this evidence we bear in mind that if the Applicant knew that a customer was, say, 81 years old, and he recorded that age as 71 years in error, he would also have followed the special procedures for elderly clients because he would know that the customer was in fact 81. There was no adequate explanation as to why the special procedures had not been followed in these cases. Also, we do not agree that an incorrect age is only an administrative matter as, for example, in the case of life assurance age can affect the level of premium. However, we bear in mind that the Applicant had not been shown the documentation relating to these cases.

86. In our view the evidence before us about recording of the age of the elderly clients is not sufficient for us to conclude that this matter affects the honesty and integrity of the Applicant. However, it does demonstrate a certain lack of competence and capability.

The non-disclosure to the Authority

87. The relevant facts are: that the Applicant knew that he had been investigated and suspended by the Bank in April 2007; that there had been disciplinary hearings on 7 August 2007 and 20 September 2007 during which he had resigned; that he had spoken to Mr Franks at the Authority in October 2007; that he and MWM submitted the short form of application for approval on 16 November 2007 knowing that it did not apply where there had been changes relating to fitness and propriety; and that they submitted the long form on 22 January 2008 denying that the Applicant had ever been the subject of an investigation into allegations of misconduct and denying that he had been suspended.

88. In evidence before us the Applicant stated that he had not disclosed the information about the disciplinary proceedings in the application forms because he had spoken to Mr Franks of the Authority asking whether the Bank had contacted the Authority about his fitness and propriety and was told that it had not. He therefore thought that the Bank had not advised the Authority about the disciplinary proceedings. That was why the short form had originally been used and why the question in the long form had been answered in the way it had. The evidence of the Applicant was that, when talking to Mr Franks on 16 October 2007, he asked if there was anything on his file that needed to be disclosed to MWM and whether there would be any difficulties in seeking approval and was told there was not. He said that

he was informed that there were no problems and that he was a fit and proper person with no disciplinary action held against him and that any employment issues were with his future employer and not with the Authority. He also said that he thought he had been required to complete the long form because there had been changes in the amount he borrowed since he had sent his previous form in 2004.

89. Mr Franks gave evidence that he took a number of similar calls and did not remember this particular call. He produced his notes of the call which stated that the Applicant asked for clarification of the role of the Authority in respect to references and that Mr Franks had provided him with details of competency and training and the rules in the Handbook. Mr Franks stated that, although theoretically he had access to the Authority's internal records on firms and individuals, he would never access these records when answering a query from a customer; he only ever used information which was in the public domain. In answering the Applicant he could only have accessed the Authority's public register, which contained details of any disciplinary actions by the Authority, but he did not think he expressly explained that when talking to the Applicant. If he had been asked about whether the Applicant would be approved Mr Franks would have replied that it was always possible to apply for approval and that each application was considered on a case-by-case basis. Mr Franks also stated that he would not have been able to inform the Applicant as to whether the Authority had any problems with the Applicant's disciplinary history because it was not within his responsibilities to comment on individual problems or to provide advice.

90. Where the evidence of the Applicant conflicted with the evidence of Mr Franks we preferred that of Mr Franks. We found the evidence of the Applicant to be unsatisfactory as he did not give direct answers to the questions put to him. We found Mr Franks to be a truthful witness. The only written record of the conversation was that made by Mr Franks. Mr Franks' account of the conversation also accords with the information given by the Frequently Asked Questions document published on the Authority's website.

91. However, even if the conversation with Mr Franks had been as alleged by the Applicant it would not in our view have adequately explained the failure to disclose the Bank's investigation and the suspension in the forms of application for approval. Indeed, if it were thought that these matters had not been known by the Authority there was greater reason for them to be disclosed so as to ensure that the Authority would have all relevant information in its possession when deciding whether to grant the approval.

92. In the light of the guidance given by the President of the Tribunal in *Eversure* we conclude that the failure to disclose means that we are not satisfied about the honesty, integrity, competence and capability of the Applicant.

The controlled function to which the application relates

93. Before reaching a final view we have considered the Applicant's fitness and propriety within the context of the controlled function which he would perform at MWM. We accept the evidence of Mr Parkinson that, if the approval were granted, he would ensure that the Applicant was closely supervised and monitored for his first year. However, we also bear in mind that the Applicant would be a self-employed

independent financial adviser giving advice directly to customers, making their investment arrangements, and being remunerated by fees paid by them and by commissions on the investment products sold. In the light of all the evidence we are not satisfied that the Applicant is a fit and proper person to perform the controlled function to which the application relates.

94. We have had the advantage of seeing both the Applicant and Mr Parkinson give evidence before us and of considering their evidence in detail. In relation to the matters which we have considered we are of the view that it would not be appropriate for the Applicant to be barred forever from approval and he should not be discouraged from re-applying for approval at some future stage especially if he were to be monitored and supervised by Mr Parkinson.

Decision

95. We are not satisfied that the Applicant is a fit and proper person to perform the controlled function to which his application relates. The reference is therefore dismissed. We remit this matter to the Authority and direct the Authority to issue a final notice in the form of the Decision Notice.

96. This is a unanimous Decision.

This Decision was originally released to the parties on 4 June 2009. This version is issued under Rule 28(3) and corrects clerical mistakes or errors arising from accidental slips or omissions.

DR NUALA BRICE

CHAIRMAN

RELEASE DATE:

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