

REGULATED ACTIVITIES – Refusal of application – Threshold Condition 5 – Fit and proper person – Mortgage business – Second Applicant had criminal convictions in 1992 for deception in connection with mortgage activities – Second Applicant had been bankrupt in 1991 – Second Applicant had been investigated and warned in 1999 for infringement of regulated activities – Application by First and Second Applicants did not disclose those facts – Whether second Applicant a fit and proper person – No – Threshold Condition 4 – Whether adequate resources – No – Reference dismissed

FINANCIAL SERVICES AND MARKETS TRIBUNAL

RAJIV KHUNGAR

First Applicant

KHUNGAR HOME LOANS LIMITED

Second Applicant

- and -

FINANCIAL SERVICES AUTHORITY

The Authority

**Tribunal: STEPHEN OLIVER QC
PETER LAING FCIB
JO NEILL ACA**

Sitting in London on 4 May 2005

Mr R Khungar and Ms Angela Khungar for the Applicants

Timothy Dutton QC and J Purchas and Nadeem Ahmad, counsel, for the Authority

DECISION

5 1. Following the Authority's issue of a decision notice of 23 September 2004 that it was not satisfied that Khungar Home Loans Limited (KHLL) would satisfy Threshold Conditions 4 and 5, KHLL referred the matter to the tribunal. Following the issue of a second decision notice on the same date that it was not satisfied that Mr R Khungar was a fit and proper person to perform controlled functions CF1 and CF8, Mr Khungar referred the matter to the tribunal.

10 2. KHLL had applied (on 30 March 2004) under section 40 of the Financial Services and Markets Act 2000 ("the Act") for Part IV for permission to perform the regulated activities of advising on regulated mortgage contracts, arranging (bringing about) regulated mortgage contracts, making arrangements with a view to transactions in regulated mortgage contracts, advising customers on non-investment insurance contracts, arranging (bringing about) deals in non-investment insurance contracts and making arrangements with a view to transactions in non-investment insurance contracts.

15 3. Section 49(1) of the Act entitles the Authority, in considering an application for Part IV permission, to have regard to any person appearing to be, or likely to be, in a relevant relationship with the firm.

20 4. Threshold Condition 5 states:

25 "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 any regulated activities that he carries on or seeks to carry on; (c) the need to ensure that his affairs are conducted soundly and prudently."

30 5. By reason of the relationship between KHLL and Mr Khungar, the Authority was not satisfied that it could ensure that KHLL would satisfy Threshold Condition 5. In addition, by reason of the Authority's decision to refuse to approve Mr Khungar to perform the approved functions, the Authority could not be satisfied that KHLL would have adequate resources.

35 6. Pursuant to section 61(1) of the Act, 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 is a fit and proper person to perform the function to which the application relates.

40 7. By the application of 30 March 2004, KHLL had applied under section 60 of the Act for the approval of Mr Khungar to perform the director controlled function (CF1) and the apportionment and oversight controlled function for KHLL (CF8). The Authority was not satisfied that Mr Khungar was a fit and proper person to perform those controlled functions.

45 8. The issue for the tribunal is whether, in the light of the evidence adduced to us, we can be satisfied that Mr Khungar is a fit and proper person to perform the relevant controlled functions and that KHLL satisfies the Threshold Conditions and in particular Condition 5.

50 9. The Authority's function of determining applications made under section 60 is contained in section 61 which provides:

“(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.”

5 The primary objective of the exercise of the Authority's function is the protection of consumers and in this respect the Authority is to have regard to the degrees of risk involved, the experience and expertise that different consumers may have and the needs of consumers for advice and accurate information and the general principle that consumers must take
10 responsibility for their own decisions

10. Mr Khungar presented the case for KHLL and himself. He was assisted by his daughter, Angela Khungar. Mr Khungar gave evidence. Unchallenged evidence was presented by three officers from the Authority namely:

15 Philip Robinson, director of Regulatory Transactions Division of the Authority
Paul Kelly, financial accountant in the Finance Strategy and Risk Division and
Andrew Honey, head of insurance department in the Small Firms Division of
the Authority

20 **The key features taken into account by the Authority**

25 11. In May 1992 Mr Khungar had been convicted on his own plea of guilty of nine counts of procuring the execution of a valuable security by deception. He was sentenced to two years imprisonment. In the great majority of the counts Mr Khungar had been charged jointly with another: in at least one of these he had been acting alone. In all cases the valuable security had been a cheque issued by a mortgage lender. The lender was a different lender, usually a building society, in the case of each count. The form of deception in each case had been to falsely represent to the lender that the borrower had been employed for a
30 certain period at a certain salary.

35 12. Mr Khungar had been declared bankrupt on his own petition and the date of the bankruptcy had been 31 October 1991. Mr Khungar was discharged three years later.

40 13. Not long after finishing his sentence Mr Khungar had started business as Khungar Associates arranging home loans, taking introductions from estate agents and other referees. This business has now become a regulated business, hence the application to the Authority
45 for authorization in 2004.

40 14. In 1999 an inquiry had been conducted by the Financial Services Authority into Mr Khungar's involvement with an Isle of Man based institution. It appears that Mr Khungar had become involved in some unauthorized investment business. This led to the Financial Services Authority issuing him with a warning which he had countersigned. It appears that Mr Khungar, through Khungar Associates, had been providing advice to UK residents about that institution's investment products and that at least three of the clients had taken up policies issued by it. The Financial Services Authority, in a warning letter dated 25 January 2000, warned Mr Khungar, stating that it was their view that his activities constituted
45 breaches of section 3 of the relevant Act.

50 15. We come now to the application for authorization. This was submitted in March 2004. The part where application is made for approval of Mr Khungar for “Approved Person” status states that Mr Khungar is the individual responsible for insurance mediation at

“the firm”. The answer “yes” is given to the question whether there is a “director function.” The application form (HSF2) then asked this question

5 “Has the individual ever been convicted of any offence involving fraud, theft, false accounting or other dishonesty? Or have they been convicted of an offence (whether or not in the United Kingdom) relating to companies …”,

In brackets, immediately following that question and in bold letters are these words:

10 **“(Convictions spent under the Rehabilitation Offenders Act 1974 must be included, as should convictions and injunctive action taken by local Trading Standards Authority.)”**

The answer given to that question is – “No”.

15 Section 29 asks – “Has the individual any convictions for any offences other than those listed in question 28 above, which are not spent?” The answer given is – “No”.

20 16. A later question “... has the individual ever been the subject of any bankruptcy proceedings...? The answer given to that is – “No”.

25 17. A later question asks – “... has the individual ever been found guilty of conducting any unauthorized regulated activities or been investigated for possible conduct of unauthorized regulated activities?” The answer given to that question is – “No”. And when asked for details, no further details are given.

30 18. A further question asks – “Is the individual or has the individual ever been the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity?” The answer given to that is – “No”.

35 19. The form had been completed by Mr Khungar. Mr Kelly of the Authority, who gave evidence, inquired into the form. He wrote to Mr Khungar drawing his attention to the fact that he had failed to mention a criminal conviction for fraud in 1992, failed to mention a previous FSA investigation and had failed to disclose the bankruptcy proceedings in 1991. Mr Khungar’s response had been:

40 “After seeking advice from various sources I was advised that because the conviction is a spent conviction under the Rehabilitation Offenders Act, I answered “no” on the application form.”

45 As to unauthorized investment business (see paragraph 14 above), Mr Khungar’s explanation was:

50 “The unauthorized investment business issue 1999 was a mutual misunderstanding between myself and the Insurance Company involved. The Insurance Company was an off shore based firm and I was advised by them... that I can conduct off shore business despite me telling them that I am not authorized to conduct investment business... as a result, the matter was resolved and no action was taken against me by the FSA.”

20. As regards the question about Mr Khungar’s bankruptcy, his response was:

“I voluntarily put in a petition for bankruptcy in 1991. As it was voluntary i.e. not action based and discharged over 10 years ago I said no on the form.”

He concluded with the words – “I hope these explanations are sufficient”.

5 21. Mr Kelly followed up Mr Khungar’s explanations asking for further details as to the criminal convictions, a brief summary of the case and of his bankruptcy. Mr Khungar’s answer was contained in a 22 June e-mail with a brief summary of the case which the Authority concluded (and we agree with the Authority) was not a true response, given what is now known about the criminal convictions. Mr Khungar said:

10 15 “I was in a business partnership with a family member through marriage. We bought a couple of properties together in 1988. During the well known recession of the late 80’s , interest rates shot up and he quickly wanted to sell these properties to his nephew, but because the property market crashed it did not work out. The building society informed the police who questioned them both, including me because I happened to be a partner and consequently was charged with them.”

20 That explanation does not, we note, square up with the accounts for which Mr Khungar was charged, convicted and sentenced in 1992.

22. Mr Khungar’s response in relation to the bankruptcy was as follows:

25 “Because of the above partnership, the case, the recession and, as a consequence, high debts and lack of cooperation by my then business partner, the business was forced to cease. Creditors were knocking at my home daily and I had no means/savings to pay.”

30 23. Later Mr Khungar wrote to Mr Kelly saying:

35 “The information that I have provided is the fullest I have, as it (the criminal conviction) was twelve years ago and I no longer have any records relating to this. All paperwork has been destroyed due to the long time period of the case. All that I can add further is that the valuable securities were properties, and my involvement was that of a partner. Unfortunately, I was involved because I happened to be a joint partner, and paid the consequences of this.”

40 24. Again, the Authority observed, and we agree, this does not tally up with the offences for which Mr Khungar had been convicted and which took place over a period of many months.

45 25. Finally it is relevant to mention Mr Khungar’s explanation of his own role with KHLL. This is described as follows:

50 “Usha Khungar (Mr Khungar’s wife) is a director of the company and is in charge of administration and participation in decision making. The company is a private limited company and so she is registered as the other director. My role is that of company director and managing the company overall.”

The Authority's refusal of the Application

26. The Authority issued the Decision Notice on 23 September 2004. This followed a
5 Warning Notice of 19 August which explained the Authority's intention to refuse both
applications by reference to the criminal convictions, the non-disclosures and the answers
that Mr Khungar actually gave to the inquiries made by Mr Kelly (summarized above).

Mr Khungar's further explanations and the reaction to the Authority

10 27. In a letter of 9 September 2004 Mr Khungar says under the heading, "previous
convictions" –

15 "A Brief summary of the case has already been given by me in my previous
letter dated 21st June 2004. At the material time I was totally inexperienced to
the business line and had to bank upon the other partner for his guidance in all
matters. I was misguided, for which I paid an extreme penalty, and now the
proposal to deny me authorization would amount to double jeopardy.

20 As regards the allegations regarding its non-disclosure, I wish to explain as
below.

- 25 1. After seeking advice from various sources, I was advised that because the
conviction is a spent conviction under the Rehabilitation of Offenders Act, I
answered "no" on the application form.
- 30 2. I was under a bona fide belief that the application for authorization was in
respect of the company, Messrs Khungar Home Loans Limited, and I had to
answer with reference to the activities of the present company since its
inception."

35 The Authority did not accept either of those contentions and explanations. They did not
accept that advice had been given and took into account the fact that the question requiring
disclosure of the previous offences had made it clear that the Rehabilitation of Offenders Act
did not apply. The Authority also took into account the fact that the questions had been clear
enough to indicate that they related to the individual and not to Khungar Home Loans
Limited and further that it was the individual's bankruptcy that needed to be revealed. Mr
Khungar had said of the bankruptcy:

40 "The filing of the petition of voluntary bankruptcy in the year 1991 was
consequential to the proceedings relating to the above conviction. Since the
business was closed down, I was left with no means to pay the creditors who
were daily knocking on my door."

45 28. Regarding the non-authorized investment business in respect of which the warning
notice had been issued, Mr Khungar said that he had explained that it had arisen on account
of a mutual understanding between himself and the insurance company that, being an
offshore firm, he believed that he could conduct offshore business. Mr Khungar, as already
50 noted, had gone on to mention that the matter had already been resolved with no action been
taken against him. The response of the Authority had been that this did not excuse Mr
Khungar, nor indeed did it explain why he had failed to disclose the investigation and the
warning on his application form.

29. When Mr Khungar was asked to disclose the source of the advice which he said he had received, he said:

5 “Various sources are telephone calls made to the Law Society and Probation Office, who provided general advice.”

10 30. Mr Khungar did not identify any individuals. The Authority itself made enquiries of the Law Society and the response received was that the Law Society could not trace having received a call from Mr Khungar requesting advice on whether he was obliged to disclose his spent convictions. On the basis of that enquiry, the Authority was not satisfied that the answer given by Mr Khungar in respect of the previous convictions namely that he had taken advise from the Law Society, was correct.

15 **Summary of the position of the Authority**

20 31. Essentially the Authority's concern has been that Mr Khungar was not straightforward in his dealings with it. That in turn indicates that he is not a fit and proper person. The nature of the offences for which Mr Khungar had been convicted in 1992 were, as the authority saw it, related to the work now proposed to be done by Khungar and KHLL. They go to the question of Mr Khungar's integrity. Moreover, the Authority say, Mr Khungar took no steps to make good the losses (some £1,000,000) that the lenders had suffered as a result of his criminal conduct. The performance by Mr Khungar of his business activities since 1992 had been taken into account by the Authority. In this respect they noted that the FSA had needed to issue a warning letter following the investigation of 1999. Then Mr Khungar had failed to disclose the convictions, the bankruptcy and the 1999 investigation and warning in his HSF2 Application Form.

30 **Mr Khungar's case**

35 32. Mr Khungar explained that he had been in business arranging mortgages since 1993. He had received no complaints and built up a sold reputation.

40 33. Regarding the convictions and sentence in 1992, Mr Khungar emphasised that he had paid the penalty for these. He had lost everything. He and his family had been “on the streets” and it would have been impossible to make reparations to the mortgage lenders. It was wrong and unduly harsh of the Authority to have sought to bring the past into the present. Otherwise, he argued, however could a person start again? He should not be punished for life. The right approach, he said, was for the Authority to concentrate on the present situation.

45 34. To the extent that he had wrongly answered the questions in the application form (HSF2) the reasons, he said in evidence, were that he had either not read them or where he had he had misinterpreted them or had forgotten facts to which the questions related.

50 **Conclusion**

35. We have to determine what (if any) is the appropriate action for the Authority to take in relation to the matters referred to us by Mr Khungar and KHLL. For this purpose we have examined the evidence before us and have given careful consideration to the points made by Mr Khungar himself or on his behalf by Ms Angela Khungar.

36. We start with the most recent event, namely Mr Khungar's explanation, when giving evidence, as to why he answered the questions in the HSF2 Form as he did. The questions in the Form were clear and unambiguous. Mr Khungar's answers in the Form were misleading and we do not accept that they were given as the result of advice that he had received. We
5 think that the answers he gave to the Authority's enquiries and the explanations that he produced when giving evidence show that he was not at any stage prepared to be frank with the Authority, as regulator, or indeed, with the tribunal. That feature itself demonstrates a lack of integrity on Mr Khungar's part.

10 37. Going back to earlier events, such as the convictions and the bankruptcy, we see a sufficiently close similarity between the nature of Mr Khungar's business activities in the 1980's and the business activities of KHLL today to make those earlier events relevant to the present exercise. The scheme of the Financial Services and Markets Act is for the Regulator
15 to decide what is relevant in determining a person's fitness and propriety to carry on a particular business. The Act does not leave the Applicant to make his own decision, as Mr Khungar sought to do, as to what should or what should not be taken into account in determining his fitness, propriety and integrity. He must answer the questions accurately and leave the decision to the Authority.

20 38. Thus taking into account the convictions, the bankruptcy, the investigation of 1999 and the subsequent warning and Mr Khungar's failure to disclose these in his HSF2 Form, we are satisfied the he does not meet the fit and proper test. On this basis we conclude that KHLL should not be given authorization and Mr Khungar should not be approved to perform the relevant functions. In particular KHLL has not shown that it has the resources in the
25 sense of management and staff who are able to comply with regulatory requirements.

39. We dismiss the Reference.

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**STEPHEN OLIVER QC
CHAIRMAN**

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RELEASE:

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