

REGULATED ACTIVITIES – Own-initiative variation of permission – Supervisory notice varied a Part IV permission by removal of all regulated activities with immediate effect – Reason for Notice being breaches of threshold condition 5 (suitability) and Principles 1 (conducting business with integrity) and 11 (dealing with FSA in an open and cooperative way) – In his application for permission to conduct regulated activities the Applicant had failed to disclose a number of relevant convictions and had also failed to disclose that he had been the subject of bankruptcy proceedings – Whether notice to that effect is the appropriate action for the Authority to take – Yes – Application dismissed

FINANCIAL SERVICES AND MARKETS TRIBUNAL

**WILLIAM FAULKNER T/A POLICYLINK AND
APSLEY HOMES ESTATE AGENCY**

Applicant

- and -

FINANCIAL SERVICES AUTHORITY

The Authority

**Tribunal: STEPHEN OLIVER QC
CHRISTOPHER BURBIDGE
MICHAEL HANSON FCA, ACIB**

Sitting in public in Belfast on 13 September 2006

The Applicant appeared in person

Sarah Clarke, counsel, of the Financial Services Authority, for the Authority

© CROWN COPYRIGHT 2006

DECISION

1. Mr William Faulkner, the Applicant, has referred to this Tribunal a First
5 Supervisory Notice dated 17 March 2006 (“the Supervisory Notice”). The decision of
the Authority, an “Own-Initiative Variation of Permission” (“OIVOP”), varies Mr
Faulkner’s permission by removing all regulated activities with immediate effect.

2. The Authority took this action because it appeared to it that Mr Faulkner was
10 failing to satisfy Threshold Condition 5 in that the Authority was not satisfied that he
was a fit and proper person. The grounds for the Authority’s concerns were, first, that
Mr Faulkner had a large number of previous convictions and a bankruptcy order
recorded against him; second, that Mr Faulkner had not disclosed those matters to the
Authority at any stage and, third, that Mr Faulkner had not provided an adequate
15 explanation for those failures.

3. Mr Faulkner presented his own case. He gave evidence in person. He had
two character witnesses, i.e. Mr James McKendry (who had worked in an
accountancy capacity for Mr Faulkner for some five years) and a Mr Peter Whitcroft
20 who had worked for Mr Faulkner for about two years until Christmas 2005. The
Authority’s witnesses were Mr Richard Quinnell (employed by the Authority as a
supervisor of Mortgage Intermediaries and Credit Unions within the Small Firms
Division) and Mr Michael Lord (employed by the Authority as Head of the Mortgages
and Credit Unions Department within the Small Firms Division).

25

Background to the Reference

4. Mr Faulkner is a sole trader, operating from an address in Belfast, Northern
Ireland. He was granted permission on 27 January 2005 by the Authority under Part
30 IV of the Financial Services and Markets Act 2000 (“the FSMA”) to carry on the
following regulated activities:

- (a) advising on investments (non-investment insurance business) (excluding
pensions transfers and opt-out),
- 35 (b) arranging deals and investments,
- (c) assisting in administration of insurance,
- (d) dealing in investments as agent (non-investment insurance business),
- (e) making arrangements (non-investments insurance business),
- (f) agreeing to carry on a regulated activity in respect of mortgage contracts and
- 40 (g) making arrangements in respect of regulated mortgage contracts.

Subsequent to the granting of permission the Authority became aware that Mr
Faulkner had a number of previous criminal convictions recorded against him and a
bankruptcy order that has been made against him on 29 March 1996 (which had been
45 discharged).

5. As part of the Authority’s application process for permission to conduct
mortgage and general insurance activities, Mr Faulkner had been required to complete

two forms, namely an application form on behalf of the firm (“FAF”) and an application form for Approved Persons and Individual Controllers (“APF”).

5 6. The completed forms had been submitted electronically to the Authority by Mr Faulkner on 18 January 2005. Neither form contained any information adverse to Mr Faulkner.

10 7. In particular, on the APF Mr Faulkner had not disclosed his previous convictions or the bankruptcy order despite the specific requirements to do so:

15 (a) At Question 28a of the APF, Mr Faulkner answered “No” to the Question: *“Has the individual ever been convicted of any offence involving fraud, theft, false accounting or other dishonesty? ... (Convictions spent under the Rehabilitation of Offenders Act 1975 must be included ...)”*

We were referred to a schedule of offences starting in August 1985 and ending in July 2004. These included convictions on three counts of fraudulently using a road fund licence in November 1987 and for dishonestly handling stolen goods in April 1988.

20 (b) At Question 29 of the APF, Mr Faulkner answered “No” to the Question: *“Has the individual any convictions for any offences other than those listed in Q28 above which are not spent, whether or not in the United Kingdom (excluding traffic offences unless these resulted in a ban from driving or involved driving without insurance)?”*

25 Mr Faulkner had been convicted in September 1992 and sentenced to three months imprisonment on two counts of assaults on a police officer in the execution of his duty, one count of resisting a constable in the execution of his duty and one count of failing to provide a breath specimen. Mr Faulkner had been convicted on 4 October 30 1994 at the Dumfries Higher Court on one count of possession of a controlled drug with intent to supply and had been sentenced to seven years imprisonment.

35 (c) At Question 32 of the APF, Mr Faulkner had answered “No” to the Question: *“Is the individual, or has the individual ever been, the subject of any bankruptcy proceedings ...?”*

Mr Faulkner had been the subject of a Bankruptcy Order made on 29 March 1996 (which had since been discharged).

40 (d) At section (g) of the APF, Mr Faulkner had indicated “Yes”, that he had read and understood the declaration. The relevant parts of the declaration read: *“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 45 disclosed to the FSA, or another regulatory body. If there is any doubt about the relevance of information, it should be included.*

By signing this declaration:

I confirm that the information in this form is accurate and complete to the best of my knowledge and belief and that I have read the notes to this form”.

5 (e) The guidance notes repeat in similar terms the statement set out at paragraph (d) above.

8. At no stage did Mr Faulkner ever inform the Authority of the matters referred to in the previous paragraph of this Decision. The Authority found out about these matters from another source. (We mention at this stage that Mr Faulkner asked for disclosure of the identification of that other source. We could not see that this was relevant to the matters raised in the present reference. We therefore refused the application.) On 4 November 2005 the Authority wrote to Mr Faulkner outlining a number of his previous convictions and the fact of the discharged Bankruptcy Order and referred to the fact that these matters have not been disclosed in the applications for permission. The Authority further informed Mr Faulkner that it was preparing to take action to prevent him from conducting regulated mortgage and general insurance business with immediate effect and to cancel his Part IV permission.

9. On 15 November 2005 Mr Faulkner wrote to the Authority pointing out a number of features which, in essence, were the grounds for his argument, in the present proceedings, that the right order for the Tribunal to make would be to discharge the First Supervisory Notice. Mr Faulkner drew attention to the fact that there had been no complaint against his conduct of his business activities throughout the five years of his carrying on the business. He stated that he believed that under the Rehabilitation of Offenders Act, he had been within his rights not to disclose the offences to which Questions 28a and 29 (see paragraph 7 above) referred. He pointed out that he had challenged the drug-related conviction before the European Court of Human Rights which had ruled that he had not had a fair hearing when he had taken his conviction on appeal; this was because he had not had the opportunity to be professionally represented. He had been awarded a monetary sum in compensation but the Secretary of State for Scotland had not directed that a further appeal should take place. He said that he had been advised while in prison that his drug conviction became spent after five years. He also said that he had given his business to two other parties who are forming a limited liability company and were making an application for authorization. (We heard nothing more about his last point.)

10. On 5 December 2005 the Authority wrote to Mr Faulkner stating that it intended to proceed with the OIVOP (variation and cancellation) proceedings. The Authority outlined its reasons for doing this. The letter stated that, if Mr Faulkner had had any doubts about whether the information should have been disclosed, he should have sought clarification from the Authority.

OFT Proceedings

11. On 28 July 2005, the Office of Fair Trading (OFT) notified Mr Faulkner of its decision to revoke his consumer credit licence on the ground that he was unfit to hold such a licence because he had committed offences involving fraud or other dishonesty, he had committed offences involving violence and his substantial criminal

history showed a blatant disregard for the law. Further, the OFT alleged, Mr Faulkner had failed to disclose his convictions to the OFT at any stage. Mr Faulkner had required his consumer credit licence in order to operate a business of “cheque cashing”.

5

12. On 28 July 2005 the OFT further notified Mr Faulkner of its decision to issue him with a prohibition under the Estate Agents Act 1979 preventing him from acting as an estate agent on the grounds that he was unfit to hold such a licence due to his previous convictions. Further, attention was drawn to the fact that Mr Faulkner had failed to disclose his convictions to the OFT at any stage.

10

13. Mr Faulkner appealed against both findings. His appeal was successful. A copy of the decision was provided to us.

15 **The Supervisory Notice**

14. Pursuant to section 45 of the FSMA and having regard to the Guideline Principles, i.e. PRIN, ENF and COND, the Authority on 17 March 2006 removed all regulated activities from the permission previously granted to Mr Faulkner. Accordingly Mr Faulkner may not now conduct any regulated activities. The Supervisory Notice took immediate effect in accordance with the provisions of section 53 of FSMA.

20

The relevance of the outcome of the OFT proceedings

25

15. In his Reference Notice and in his reply to the Authority’s Statement of Case Mr Faulkner stated in essence that the action taken against him by the Authority is similar to that taken by the OFT. His success in his appeal against the OFT decision should be taken as establishing that he is a fit and proper person to hold an Estate Agents’ Licence and a Consumer Credit Licence; on this basis he should be considered fit to hold the permission originally granted by the Authority. To the extent that he relies on the OFT decision, we think that it has little weight in relation to the matters to be decided by this Tribunal. We agree with the Authority that there is a significant difference in terms of the potential effect on consumers between the limited activities, namely estate agency and cheque cashing, that Mr Faulkner operates under the OFT approvals, when compared with the extensive mortgage and general insurance permissions held under the FSMA with all their consequent risks to consumers. In this connection we note the observation of this Tribunal in *Shafquat Rajah v FSA*, 17 May 2005, where the Tribunal observed that:

30

35

40

“For many members of the public, entry into a mortgage contract is the largest and most important financial transaction in which they ever engage. Insurance contracts require good faith on the part of the proposer in disclosing material information. The Authority rightly contended that a sole trader applying to the Authority for authorization must be able to demonstrate that he will conduct his business with integrity and in compliance with proper standards in order to satisfy the Authority that he is fit and proper and so as to maintain public confidence in those working in the regulated environment.”

45

We note that the panel that heard the OFT appeal decided that they “would be uncomfortable disqualifying him where the arguments are finely balanced”. The Authority has a different test to apply. It is under a mandatory statutory duty to ensure that the person concern satisfies and will continue to satisfy the Threshold Conditions. If the Authority is not so satisfied, then the Authority is under a statutory duty to act. The Authority has done so by the present Supervisory Notice having decided that Mr Faulkner no longer satisfies the threshold conditions contained in Schedule 6 to FSMA, and therefore no longer meets the Part IV permission. The Authority exercised its OIVOP power, in pursuance to section 45(1) of FSMA, because Mr Faulkner had been failing to satisfy the threshold conditions (section 45(1)(a)) and because it was desirable to exercise that power in order to protect the interests of consumers or potential consumers (section 45(1)(c)). Those two statutory criteria require us, in determining the appropriate action, to focus on matters that were not necessarily in point in the OFT proceedings and are not necessarily affected by the outcome of the OFT proceedings.

Mr Faulkner’s criticisms of his convictions

16. Mr Faulkner contended that his drugs conviction had been unfair. He further alleged that many of the other convictions had been the result of a vendetta on the part of the Northern Irish police authorities against him personally. That vendetta had, he claimed, been the cause of the present proceedings because the police authorities must have been the source of the information disclosed to the Authority.

Conclusions

17. It seems to us that the fact of Mr Faulkner’s criminal convictions coupled with his failure to disclose those and his failure to disclose his previous bankruptcy must necessarily have given rise to serious concerns about him and his ability to conduct his business with integrity and in compliance with proper standards.

18. We note that, despite the clearest obligation to do so, Mr Faulkner failed to disclose numerous previous convictions on the APF. He failed to disclose his previous bankruptcy on the APF despite the express obligation to do so. And the fact that he answered “No” to certain questions on the APF where he should have answered “Yes” indicates that Mr Faulkner had taken a deliberate decision not to disclose that information to the Authority.

19. The fact that Mr Faulkner deliberately decided not to disclose the information, despite the clear and unambiguous wording of the APF (and the opportunity to seek advice from the Authority) indicates, taking the most favourable view of things, that Mr Faulkner had formed his own view as to the significance and relevance of his convictions and his bankruptcy. However it is not for an applicant to form his own view on matters of this sort. The regulatory responsibility lies exclusively with the Authority and an applicant must not displace this by exercising his own judgment. We take a more serious view in any event; it seems to us that Mr Faulkner

deliberately sought to hide information which he knew might have caused the Authority to have refused his application. He knowingly failed to disclose offences for dishonesty and the serious offence of possession of drugs with intent to supply.

5 20. In those respects we think that Mr Faulkner demonstrated a lack of openness
and candour with the Authority in relation to matters which he knew or ought to have
known would be highly significant to its decision-making process on whether to grant
him the permission he sought. He thereby prevented the Authority from making a
fully informed assessment of his fitness for the permissions sought and subsequently
10 granted. It is relevant to mention that at no stage following the grant of the
authorization did Mr Faulkner disclose the adverse information to the Authority. We
note in this connection a point made in the course of evidence that a second set of
bankruptcy proceedings have been commenced against Mr Faulkner. We believe that
those did not result in a bankruptcy order; nonetheless they were matters that should
15 have been disclosed.

21. A further matter that concerned us was the belief expressed by Mr Faulkner
that getting a mortgage for a client was not a matter of concern to the FSA because it
was regulated by other bodies. He mentioned in this connection the “Ce-MAP”
20 qualification given by the relevant Institute. He did not have the qualification but he
expressed the view that that possession of that qualification afforded permission to
conduct mortgage business. This is not the case. Authorization by the Authority is
required for the conduct of mortgage business. Mr Faulkner should have known this.
That factor further indicated a lack of understanding of the standards required to
25 conduct mortgage business.

22. We have taken account of the evidence of Mr Faulkner’s character witnesses,
both of whom had worked with him or for him for some years without encountering
any cause for concern. Our overall conclusion, however, is that Mr Faulkner has not
30 been open and candid with the Authority in relation to matters which he knew or
ought to have known were highly relevant to the Authority’s decision-making
process. To the extent that he has tried to explain these failures, he has not been
successful. He should have understood the express and unambiguous language of the
APF form.

35 23. More generally, Mr Faulkner’s extensive criminal record indicates persistent
offending over a long period of time, being offences that include dishonesty and a
serious drugs conviction. Mr Faulkner is not, we think, fit and proper and no longer
satisfies Threshold Condition 5 (suitability). In all those circumstances it is, we think,
40 proportionate within the meaning of ENF 3.5.2 for the Authority to impose the
requirement set out in the Supervisory Notice and the variation of permission upon
Mr Faulkner in pursuance of the Authority’s statutory objectives and in order to
protect consumers.

45

24. For all those reasons we direct the Authority to issue a Second Supervisory
5 Notice confirming the decision to maintain the variation of Mr Faulkner's permission
as set out in the First Supervisory Notice.

10

STEPHEN OLIVER QC
CHAIRMAN

15

FIN 06/0004