



Appeal number: FIN/2010/0004

FINANCIAL SERVICES — withdrawal of company's approval and cancellation of permission — prohibition of approved person for making or assisting in making of fraudulent mortgage applications — whether Authority's case established — yes — penalty imposed — scale of appropriate penalty — whether sufficient account taken of person's means — yes — reference dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

ALISTAIR CURREN

and

B-ASSURED FINANCIAL SERVICES LIMITED Applicants

- and -

THE FINANCIAL SERVICES AUTHORITY The Authority

**Tribunal: Judge Colin Bishopp
Andrew Lund
Peter Burdon**

Sitting in public in Edinburgh on 14 January 2011

Mr Alistair Curren appeared for himself and for the second Applicant

Ms Sarah Clarke, counsel, appeared for the Authority

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DECISION

1. This is, or at first appeared to be, a joint reference by Mr Alistair Curren and B-Assured Financial Services Limited (“B-Assured”) of various decisions made by the Authority. Mr Curren was, at all material times, the only director of B-Assured and the holder of 99% of its issued shares. The decisions were as follows:

- (a) To impose on Mr Curren, pursuant to s 66 of the Financial Services and Markets Act 2000 (“FSMA”), a penalty of £100,000 for his failure to comply with Statements of Principle 1, 4 and 7 of the Authority’s Statements of Principle and Code of Practice for Approved Persons (“APER”) in his controlled function roles, while undertaking those roles at B-Assured;
- (b) To withdraw the approvals granted to B-Assured for Mr Curren to perform several controlled functions, namely CF1 (Director), CF8 (Apportionment and Oversight), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer), on the grounds that Mr Curren lacked integrity and was consequently not fit and proper to undertake those functions;
- (c) To prohibit Mr Curren from performing any function in relation to any regulated activity carried on by an authorised person, an exempt person or an exempt professional firm, for the same reasons;
- (d) To cancel B-Assured’s FSMA Part IV permission to carry on regulated activities because of its failure to satisfy the requisite threshold conditions prescribed by Sch 6 to FSMA, essentially because of Mr Curren’s lack of fitness, B-Assured being entirely dependent on him for the satisfaction of those conditions.

2. It was not clear from the reference notice which of those decisions was the subject of a challenge. Mr Curren applied, in December 2008, and at the Authority’s invitation, for a variation of B-Assured’s approvals, in accordance with s 44 of FSMA, by adding a requirement that it should cease conducting all regulated activity with immediate effect. The cancellation of its permission was effected pursuant to s 44(4), as it was then no longer approved to carry on any regulated activity. Mr Curren did not suggest that B-Assured’s approvals should not have been withdrawn, nor that its permission should not have been cancelled; on the contrary, he agreed that the Authority had dealt with B-Assured correctly. We treat B-Assured’s reference, if it was made at all, as withdrawn (giving, if necessary, our consent to such withdrawal) and proceed to consider only Mr Curren’s personal reference.

3. The essence of the Authority’s case is that Mr Curren, as the controlling director of B-Assured, submitted dishonest mortgage applications for some of B-Assured’s clients, that he knew (or at the least should have known) that the applications were dishonest, and that he has otherwise conducted B-Assured’s business in a manner which shows he is not fit and proper to be an approved person. His conduct, it says, is of a very serious kind, and merits both prohibition

and the imposition of a severe penalty. Mr Curren admits a lack of competence, and blames overwork, but he denies dishonesty or any lack of integrity; he and B-Assured were, he says, the victims of his clients' dishonesty. He also argues that the prohibition imposed on him is unnecessarily severe, and that the penalty is wholly disproportionate to the gravity of his failings and his means.

4. Mr Curren represented himself at the hearing of the references; the Authority was represented by Sarah Clarke. We heard the oral evidence of John Hunter, an approved person and formerly a colleague of Mr Curren at the Prudential Assurance Company Limited, of Anthony Eddington, a forensic investigator employed by the Authority, and of Mr Curren. We also had various relevant documents. Following the hearing there were some further written exchanges about Mr Curren's means, a matter relevant to the scale of any penalty we might think appropriate, and Mr Curren made some further observations about his culpability, though those observations do not seem to us to add materially to what went before.

5. B-Assured was authorised by the Authority with effect from 25 October 2006, and Mr Curren was approved from the same date to perform the various controlled functions we have listed above (with some variations of no significance for present purposes). B-Assured acted, principally, as a mortgage and insurance broker though we understood it also offered some investment advice. Mr Curren had an assistant, at least for some of the time during which B-Assured carried on business, but he was the only approved person employed by it.

6. It emerged that Mr Curren has worked in the financial services industry for much of his working life. Before he set up B-Assured, he had been an approved person, for about three years, at another authorised firm, Sesame Limited. While at Sesame, he took an examination intended to assess his competence to advise on mortgage borrowing four times, and failed on each occasion. Sesame informed the Authority that he was not fully competent to act as a mortgage adviser. In the light of that information, the Authority decided to impose as a condition of the approval it granted to Mr Curren, when he applied for the permissions he and B-Assured needed, that he be supervised, for six months, by Mr Hunter (whom Mr Curren nominated for the purpose), who was to be present at any visit by the Authority's staff and who was to review all B-Assured's cases before Mr Curren signed them off.

7. Mr Hunter's evidence was that, while he had indeed worked with and been friendly with Mr Curren, they had lost touch after they had both been made redundant by the Prudential in 2000. In 2006 Mr Curren contacted him to arrange that they meet for a drink and a game of golf. A document produced to the Authority by Mr Curren during the course of his application was an agreement dated 23 October 2006 between him and Mr Hunter, by which Mr Hunter undertook to provide the supervision the Authority required. Mr Hunter acknowledged that it was his signature on the agreement, though he told us he could not recall having signed it, nor having agreed to provide the requisite supervision. More importantly for present purposes, he had not in fact undertaken any of the supervision the Authority required. Mr Curren did not dispute any of

that evidence; his explanation, when he gave his own evidence, was that he had simply forgotten about this condition of his authorisation.

8. The Authority argues that Mr Curren's failure to respect the condition is evidence of dishonesty and a lack of integrity, or at the least, gross incompetence. It relies upon the failure as a breach of several Statements of Principle, of which the most important is, we think, APER Statement of Principle 1, which is that "An approved person must act with integrity in carrying out his controlled functions". Mr Curren recognised that his failure to ensure that Mr Hunter did in fact supervise him was a serious error on his part, but assured us that it was indicative of nothing worse than forgetfulness.

9. We find ourselves unable to accept that argument. The agreement with Mr Hunter was, as we have said, dated 23 October 2006, and was provided to the Authority on 24 October. Mr Curren's and B-Assured's permissions and approvals were granted the following day. It is apparent from other material that Mr Curren began undertaking controlled functions immediately. Mr Curren must have gone to some trouble to contact Mr Hunter, whom he had not seen for about six years, in order to secure his agreement to act as supervisor. It is impossible to believe that he could have forgotten so quickly that he had had such a meeting, or the purpose of it. We have no doubt that Mr Curren simply disregarded a requirement of which he was well aware. Indeed, we find it impossible to resist the conclusion that Mr Curren produced a document evidencing Mr Hunter's agreement to supervise him because it was necessary to do so in order to obtain authorisation, but without any intention of ever securing any such supervision.

10. Central to the Authority's case is the submission by Mr Curren of four clients' mortgage applications which were supported by false documents. There was no dispute that the documents were false; the Authority says Mr Curren knew, or at the least should have known, that the documents were false before he submitted the applications to the prospective lenders, while he argues that he is guilty of no more than carelessness, albeit he recognises his admitted carelessness to have been serious. As the underlying facts, taken mainly from Mr Eddington's evidence and the available documents, are not disputed we can deal with them fairly briefly before coming to the conclusions to be drawn from them.

11. The first of the clients made several applications. Two were undated and their precise place in the chronology is unclear, but it is conspicuous that in one she claimed an annual income of £37,000 and two years and eight months of continuous employment, while in the second she claimed an annual income of £120,000 plus a bonus of £20,000, and three years' continuous employment (by the same employer). The third application is dated 6 November 2006 (a matter of a fortnight after Mr Curren and B-Assured were authorised). The claimed income was the same, at £120,000 plus £20,000 bonus, but the length of the employment (by the same employer) had grown to three years and six months. All three forms were signed by Mr Curren as a means of showing to the prospective lender that he had verified the information contained in them.

12. Among documents secured by the Authority in the course of its investigation was an email, undated but apparently produced in November 2006, from Mr Curren to an unidentified recipient, requesting two payslips. The email

named the employee (Mr Curren's client) and an employer, gave an address for the employer, and specified the employee's national insurance number and the claimed salary and bonus. With this email were found two payslips, for September and October 2006, showing that the client had received salary and bonus at the stated rates, paid monthly by cheque. Later enquiry by the prospective lender revealed that the purported employer—which in the meantime had produced a letter confirming the employment—could not be found by search of the telephone directory or at the companies' registry, and that the address given for it was a residential address. Copies of the client's bank statements were requested; when produced they showed that the client was overdrawn, and there was no sign of regular large credits to the account. On 27 January 2007 Mr Curren wrote to the lender to the effect that the payments (over £7,000 net per month) were made, not by cheque as the payslips produced indicated, but in cash.

13. Shortly after, Mr Curren submitted another application for the same client, but to a different possible lender. The application again claimed a total gross income of £140,000, though made up of a basic salary of £65,000, guaranteed bonus of £40,000, commissions of £10,000 and income from market stalls of £25,000. Two days later the client herself wrote to the same lender, claiming a total gross income of £140,000, but with a different composition. Later the same month Mr Curren wrote to yet another lender, claiming on his client's behalf that she earned a basic salary of £120,000 with an annual bonus of £20,000 (rather than the more complicated composition he had recently advanced); her period of employment was on this occasion slightly shorter than that claimed before.

14. The second client's applications were submitted a few months later. There is rather less evidence of Mr Curren's involvement though it is clear, as he did not deny, that the supporting material was false, in that it claimed the client had been employed for about five years by an employer which existed, but at an address different from the one given, and which had never in fact employed the client. B-Assured's file contained a "fact-find" form, signed by Mr Curren, by which he asserted that he had verified the information supplied by the client.

15. Mr Curren has, in addition, admitted that in October 2007 he prepared, but did not sign, employer's references for two other clients. Both had purportedly been employed by the same Glasgow company for more than two years. The references were then signed by "Paul Bathgate", and submitted by B-Assured with mortgage applications to two different lenders, one for each client. Mr Curren accepts the Authority's evidence that the purported employer had come into existence less than a year previously, and that it had never had a director or employee called Paul Bathgate.

16. The Authority's primary case is that Mr Curren must have known that he was assisting his clients to advance dishonest, if not fraudulent, mortgage applications. It says (though it did not produce any evidence in support) that it is possible to obtain apparently authentic payslips from internet providers, in return for a fee, and there is good evidence in the shape of his email requesting two payslips that that is what Mr Curren did; and that he was likewise party to the provision of false letters from the clients' supposed employers. Alternatively, it says, he can have been under no illusion that these documents were not authentic,

yet he sent them to the lenders in support of what he must have realised were suspicious, if not worse, applications. It points, too, to Mr Curren's having made the inherently implausible claim that the first of the clients we have mentioned was paid very large sums in cash, despite his having provided, on her behalf, 5
payslips showing she was paid by cheque.

17. Mr Curren's explanation was that it had not occurred to him that his clients might lie to him, and through him to mortgage lenders, about their earnings and employment. He accepted that he had submitted the applications, with confirmation that he had verified the information in them, but denied that he had 10
done anything, in particular by procuring false payslips or a false employer's letter, to assist his client. Incompetence and pressure of work had, he said, led him to fail to check the applications properly, but he had not knowingly submitted fraudulent applications. He added that, even though he submitted applications endorsed with statements that he had verified the information in them, he 15
considered it was for the lenders rather than him to check the truth of the applications.

18. The evidence that the clients' applications were, if not fraudulent, then certainly dishonest, is in our view overwhelming. The changes in income and period of employment, and the letters asserting employment which was not only 20
untrue but impossible, speak for themselves, and it is quite implausible that Mr Curren could honestly assert that his client was paid over £7,000 a month in cash without first closely questioning his client and obtaining clear evidence to that effect in order to satisfy himself of the truth of the assertion. By his own account he did not do so. It would be difficult to believe that a young, inexperienced 25
broker might be so naïve; but Mr Curren is a man of mature years who has, as we have said, spent much of his working life in the financial services industry, some of it with a large, well-known institution. Even if one were to take his assertions about overwork and incompetence at face value it is impossible to believe that he did not realise that some at least of what his clients supposedly told him could not 30
be true. We cannot go so far as to find, on the evidence before us, that Mr Curren himself knowingly procured false payslips and employers' letters, but we are nevertheless satisfied that he knew they were false (and if he did not, it can only be because he deliberately closed his eyes to the obvious).

19. The Authority places some reliance on B-Assured's compliance history, 35
which it alleges is poor to the extent that it is another factor necessitating the prohibition of Mr Curren, who was at all times B-Assured's compliance officer, since he alone had approval for the undertaking of controlled function CF10 (Compliance Oversight). In fact, he delegated the compliance function to an outside organisation (which is not in itself objectionable) but, the Authority say, 40
did so for purely cosmetic reasons since, if he read the reports produced for B-Assured by that organisation, he did not follow the advice or heed the warnings which were given. In particular, he failed to keep his records up to date, a factor which in itself made the outside organisation's task more difficult.

20. These failings—which Mr Curren did not deny—amount, says the 45
Authority, to breaches of the requirements of its Handbook, specifically Senior Management Arrangements, Systems and Controls (“SYSC”), 3.1.1R, 3.1.6R and

3.2.20R, which require an authorised firm, respectively, “to take reasonable care to establish and maintain such systems and controls as are appropriate to its business”, “to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them” and to “take
5 reasonable care to make and maintain adequate records of matters and dealings (including accounting records) which are the subject of requirements and standards under the regulatory system”. Mr Curren’s response, as before, was that his failings were not due to any lack of integrity on his part, but were no more than the consequence of his being overworked and incompetent.

10 21. In February 2009 the Authority served on B-Assured a notice pursuant to s 166 of FSMA, requiring it to provide a report by a skilled person. The skilled person—intended to be an approved person with suitable experience—was to review all of B-Assured’s pension transfer and (where a client had been advised to borrow into retirement) mortgage advice files relating to the period from 25
15 October 2006 (the date from which B-Assured became authorised) to 5 December 2008. The report was to be provided by 1 May 2009. The first step, as the notice specified, was for Mr Curren to provide a short-list of skilled persons from which the Authority would select one. Mr Curren did not produce a short-list, despite a reminder, nor did he produce a report by any skilled person, claiming that he
20 asked someone of his acquaintance to produce a report, and then forgot about the requirement. He was able to provide us with no better explanation.

22. We do not accept that Mr Curren forgot about the section 166 notice. We are satisfied that he received the notice (which he did not deny) and understood exactly what was required of him (and if he did not his failure to seek clarification
25 is inexplicable). His initial claim to have asked someone to act as the skilled person was revealed to be untrue as he gave his evidence, during the course of which he admitted that he had done nothing about the matter at all. We are satisfied, as in the case of the supervision, that Mr Curren simply disregarded the requirement.

30 23. In the course of its investigation the Authority discovered that Mr Curren had failed to declare some of his commission income to HM Revenue and Customs, despite his having been advised by his accountant—if indeed such advice was necessary—that he should do so. Though serious enough, this failing is nevertheless by no means as great as the others on which the Authority relies.
35 Mr Curren’s explanation, as before, that his failure to declare this income was due to an oversight rather than anything worse. We do not accept that explanation. This is, we have concluded, another example of Mr Curren’s blaming his memory for his failure to do something which he knew perfectly well he was required to do, but which he found inconvenient.

40 24. In summary, we do not accept Mr Curren’s claims that his failings are due to incompetence, overwork or forgetfulness. He is, as we have said, a man of mature years, with long experience in the financial services industry. He has been an approved person in the past, working at a large financial institution. It is impossible to believe that he was not aware of the importance of complying with
45 regulatory requirements, or that he did not understand the reasons for their imposition. He had no plausible explanation of his failure to secure Mr Hunter’s

supervision, rejecting as we do his claim that it was attributable to forgetfulness, or his failure to obtain a skilled person's report or declare the whole of his income for tax purposes. We are satisfied his failures were deliberate. He agreed that he was aware that mortgage fraud was rife, but made the wholly incredible claim that it had not occurred to him that his clients might make untruthful statements. His putting forward his clients' implausible and inconsistent claims of high incomes cannot be reconciled with even gross incompetence. We cannot go so far, on the material before us, as to find that Mr Curren put his clients up to making fraudulent applications, but we have no doubt that he knew the applications were dishonest and submitted them in that knowledge.

25. Even were we to be persuaded that Mr Curren was no more than incompetent, the cumulative effect of these failings is such that we are satisfied that the only possible responsible course the Authority could have adopted was to withdraw his approvals and prohibit him from carrying on any controlled function. His inability, if it is that, to respect regulatory requirements, not merely in their detail but at all, makes it an inevitable conclusion that he is not fit and proper to be an approved person. It was plain to us that Mr Curren is either incapable of understanding, even in the most general terms, the duties of an approved person carrying on controlled functions or, which we think is more probable, does have some understanding of the relevant requirements but chooses to ignore them. Whichever of those is the correct view, we have concluded that nothing short of withdrawal of all Mr Curren's approvals and his prohibition would represent adequate protection for the public.

26. In those circumstances we dismiss the reference so far as it relates to the withdrawal of Mr Curren's approval, and to his prohibition. The remaining question is whether the imposition of a monetary penalty was appropriate and, if so, the amount of that penalty.

27. Mr Curren's argument, in essence, was that prohibition was in itself a severe sanction, and that the imposition of a financial penalty in addition on a man deprived of his livelihood and of limited means was excessively severe. The Authority's position was that Mr Curren's conduct was of such a character that prohibition—which is in any event intended not to punish but to protect the public—was not enough. The gravity of his behaviour made it necessary to impose a penalty, as punishment of Mr Curren and as a deterrent to others. Merely prohibiting a person from such conduct in the future is quite clearly insufficient.

28. We agree with the Authority, and for the same reasons, that a penalty is appropriate. As we have explained, we are satisfied that Mr Curren put his name to what he knew were dishonest mortgage applications, and he wilfully failed to comply with the requirements of his regulator. We should add in case there is any doubt about the matter that we consider the requirements were reasonable and proportionate (a proposition which Mr Curren did not dispute). His four-fold failure of the examination to which we have referred made supervision an inevitable condition of his approval, since the examination was designed to scrutinise his ability to perform the function for which he sought approval. And there were already serious and justified concerns about Mr Curren's ability (and

willingness) to comply with the regulatory requirements by the time the Authority requested a skilled person's report.

29. APER Principle 1 requires an approved person to "act with integrity in carrying out his controlled function", Principle 4 requires him "to deal with [the Authority] ... in an open and cooperative way" and Principle 7 to "take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system". These Principles do not have statutory force, but they are all fundamental essentials of regulation. It will be apparent from what has gone before that there can be no doubt that Mr Curren has failed to comply with all of them.

30. The Authority's policy when imposing a penalty is described in the part of its Handbook known as DEPP. We are not bound by that policy, and may come to our own conclusion about the appropriate amount but it is the practice, in the interests of consistency, to pay heed to the policy, and also not to impose a penalty greater than that a person who has offended and who has read DEPP might reasonably expect.

31. The Authority's starting point was that the penalty for the breach of Principle 1 should be £100,000; for the breach of Principle 4 £25,000, and for the breach of Principle 7 a further £25,000, making a total of £150,000. DEPP para 6.5.2G(5) provides some further guidance:

"The size, financial resources and other circumstances of the person on whom the penalty is to be imposed

- (a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.
- (b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty."

32. Mr Curren produced some evidence of his means and of his debts, and the Authority was satisfied that he would suffer some financial hardship if the full penalty were to be imposed. It reduced the aggregate penalty to £100,000 in consequence. It was not, however, persuaded that Mr Curren's conduct could properly be marked by a lesser penalty, nor that he had produced evidence to show that a penalty of that amount would put him in serious hardship, or at risk of insolvency. It took into account the fact that he had profited from B-Assured's activities to the extent of £40,472, being his 99% share of the profits earned by B-Assured while it was carrying on controlled functions.

33. At the hearing, Mr Curren was ill-prepared to deal with the question of financial hardship, and rather vague when questioned. We agreed to give him further time to produce additional evidence, and he did eventually produce some to the Authority, which was later passed to us. At best it is unforthcoming, and
5 some of what he has provided must be incorrect since it conflicts with other information he has provided. In particular, further questioning has revealed that the income first declared by Mr Curren was substantially less than the income he later conceded he had. It is clear to us that Mr Curren has not dealt with this matter, too, with the frankness we would expect.

10 34. The submission to lending institutions of dishonest mortgage applications is, in our view, a very serious matter. Persons in Mr Curren's position earn commission in return for carrying out enquiries into the veracity of what is said in the application, and lending institutions should be able to rely with confidence on their having done so. Mr Curren's claim that he believed it was for the lender
15 rather than him to check the applications is wholly implausible in the light of the statement within the forms, which he signed, to the effect that he had verified the information. Even were we satisfied that Mr Curren was no worse than incompetent, it is plain that he has signally failed to meet the standard properly to be expected. If, as we consider has been established, he knowingly submitted
20 dishonest applications, his conduct merits a severe penalty; it amounts to a breach of trust. His failure to do more about his being supervised than to procure Mr Hunter's signature on an agreement, his failure to obtain a skilled person's report and his failure to keep proper records are, in our view, not merely aggravating factors but serious failings in themselves, revealing Mr Curren as a man who does
25 not treat the regulatory requirements imposed on approved persons, for the protection of the public, with respect. His attitude towards his tax liability, and the somewhat dismissive way in which he dealt with the matter as he gave oral evidence, reinforce the conclusion that Mr Curren lacks the probity and integrity required of an approved person. In short, we reject his evidence that he was
30 deceived by his clients; we are quite satisfied that he knowingly helped them to make dishonest applications, and that his evidence before us was untruthful.

35. Determining the proper penalty is inevitably a matter of impression rather than the subject of a mathematical exercise, although in the interests of consistency we have considered a number of other penalty decisions made by the
35 Authority including, in particular, the penalties imposed on Mr Andrew Greystoke and Atlantic Law, upheld by the tribunal and later endorsed by the Court of Appeal in *Greystoke and another v FSA* [2011] EWCA Civ 74. Having done so, we find ourselves unable to say that a starting point of £150,000 for failings of the gravity we have described is too severe; left entirely to ourselves we might well
40 have arrived at a higher figure. We are additionally not persuaded that Mr Curren has shown that a penalty of even that magnitude would cause him excessive hardship; on the contrary, we are left in little doubt that he has avoided full disclosure of his financial resources and has equivocated about those resources he has disclosed, a course of conduct which leads inevitably to the suspicion, if no
45 more, that he is not as impecunious as he would have the tribunal believe. We do, however, recognise that it is undesirable that applicants to this tribunal should be deterred by the risk that the penalty will be increased, save in a clear case, and we

do not consider that this case is so clear that we should adopt that course. We have decided, therefore, that the penalty should not be adjusted.

36. The reference is, accordingly, dismissed in its entirety. The Authority's decisions are upheld. Our decision is unanimous.

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Colin Bishopp
Upper Tribunal Judge
Release date: 21 March 2011