Reference number: FS/2010/0015

INSURANCE BROKER — assisting fraudster by continuing to place business with him when knowing risks were not being insured — forgery of policy documents — deceit of clients — whether prohibition appropriate — yes — whether financial penalty appropriate following police caution for same conduct — yes — but penalty reduced to £10,000 in particular circumstances of applicant

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DAVID JOHN BEDFORD **Applicant**

- and –

THE FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: Judge Colin Bishopp
Mr Christopher Chapman
Mr Christopher Burbidge

Sitting in public in London on 25 July 2011

The Applicant appeared in person

Mr Martin Watts, counsel, for the Authority

DECISION

Introduction

1. By a decision notice dated 16 June 2010 the Authority informed the applicant, David Bedford, that it had decided to make an order prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm, and to impose on him a financial penalty of £100,000. Mr Bedford referred the decision notice to the tribunal on 12 July 2010. His reference notice does not dispute the substance of the decision, but he argues that the prohibition is excessive in its scope; that a penalty of £100,000 is too great, not only in principle but also because it is impossible for him to pay it; and that the combined effect of the prohibition and the penalty will be to cause him considerable financial hardship.

2. Mr Bedford represented himself at the hearing, and confirmed to us that he does not dispute the underlying factual basis of the Authority's case, with which we can accordingly deal relatively briefly. As the facts were undisputed we heard no oral evidence, although Mr Bedford did give us some information about his current circumstances, financial and otherwise. The Authority was represented by Mr Martin Watts of counsel.

3. Mr Bedford is, or at the relevant time was, an insurance broker. He made the point to us that he has no formal qualifications of any kind, and that he had established his reputation by the success of his work. Between July 2006 and January 2008, the period with which the decision notice was concerned, he was responsible for managing the Financial Risk Division of ESR Insurance Services Limited ("ESR"). At the relevant time ESR had a non-executive chairman, four executive directors including Mr Bedford and 42 employees.

4. Mr Bedford was approved to perform controlled function 1 (Director) from 14 January 2005 (on which date the Authority became responsible for the regulation of insurance brokers) to 19 March 2008. For a part of that period Mr Bedford was not, in fact, a director of ESR (he resigned because of a disagreement with a fellow-director, while remaining an employee, but was then re-appointed) but nothing turns on those events for present purposes. The main activity of the Financial Risk Division was to place surety bonds (guarantees to pay a loss sustained as a result of a breach of contractual obligations) and related insurance. An important part of Mr Bedford's role as head of the Financial Risk Division was to establish links to insurance markets into which he could place ESR's clients' risks.

5. The conduct relied upon by the Authority, all of which Mr Bedford admits, is, in summary form, as follows:

- From about 2003 Mr Bedford increasingly placed business with an American national named Wendell Clemons. It may well be that at first Mr Bedford believed, on reasonable grounds, that Mr Clemons was reputable but he now accepts that by about July 2006 he should have realised that his placing business with Mr Clemons posed, at the

least, unacceptable levels of risk to ESR's clients, and that by July 2007 he knew that Mr Clemons was committing a fraud, by accepting premiums for the underwriting of a risk but not actually securing the insurance at all. Mr Bedford nevertheless continued to place business with Mr Clemons until the end of that year. In all, Mr Bedford facilitated the theft by Mr Clemons of over £2.6 million (£1.43 million within the relevant period) of clients' premiums, more than £445,000 of which was stolen in the period when Mr Bedford knew Mr Clemons was committing a fraud. Mr Clemons has since been convicted of fraud and imprisoned.

- In August 2007 Mr Bedford forged documents in respect of the reinsurance of a contract to develop a disused military base. He did so by copying a stamp from a legitimate insurance policy. His purpose was, in part, to conceal Mr Clemons' fraudulent behaviour.
- In and after September 2006, Mr Bedford issued insurance bonds purporting to provide cover with Gramercy Insurance Company but without obtaining their authority to do so. One such contract purported to provide cover of US$13.78 million and another cover of £900,000. In order to avoid detection of what he was doing, Mr Bedford arranged for the premiums that ESR received to be paid to Gramercy under false pretences.

6. It was Gramercy which discovered what Mr Bedford had done. It informed ESR's other directors, who set in train an investigation of Mr Bedford's conduct, which in turn led to the discovery of the other failings we have described. After some initial resistance, Mr Bedford admitted what he had done and the Authority accepts that he has since cooperated not only with it but also with ESR and others who became involved in the investigation and its aftermath.

7. The principal consequence of Mr Bedford's conduct was that the frauds that he either facilitated or committed exposed ESR's clients and third parties who relied on the existence of bonds or reinsurance to the risk of loss. At one point ESR's potential exposure from his activities amounted to as much as £200 million. It appears that by good fortune no client in fact suffered a loss; however, the discovery of the frauds and the resulting potential claims against ESR led to its being placed into administration in February 2008, followed by insolvent liquidation in February 2009. Mr Bedford, of course, lost his job and we understand his shareholding in ESR (he held 8% of the issued shares) became worthless. He was also prohibited by what is now the Department for Business, Innovation and Skills from acting as a director of a company for a period of nine years, and was a party to various civil actions designed to recover damages from him. Mr Bedford told us those actions had cost him, in all, about £200,000.

8. Mr Bedford agreed that the Authority's contentions about his conduct, as we have summarised them above, are correct. He told us that he was not expecting personal financial reward, and there is no evidence to suggest that he took a share of what Mr Clemons was stealing, nor that any other client money was received directly by him. However, he conceded that ESR was in some financial difficulty at the relevant time, which the commission income he earned from purportedly

placing clients' insurance helped to alleviate. He had, therefore, at least the prospect of an indirect benefit by reason of his shareholding in and employment by ESR. In addition, he told us, he let his desire to maintain the reputation he had built up of being able to place any risk get the better of him. He therefore claimed to have obtained cover in respect of difficult risks even though he had not and, in consequence, he deceived ESR and its clients.

9. Mr Bedford's conduct led to his being reported by ESR to the City of London police, which undertook an enquiry of its own; this enquiry was carried on in parallel with the Authority's investigation. The Authority's investigation staff interviewed Mr Bedford on 21 January 2009, and a warning notice was issued on 23 December 2009. On 7 June 2010 he received a police caution, and on the following day he made oral representations to the Regulatory Decisions Committee ("RDC"). The decision notice was issued, as we have recorded, on 16 June 2010.

Prohibition

10. The Authority's case is that each of the failings described above, even taken alone, demonstrates that the only possible finding that it could have reached was that by reason of his lack of honesty and integrity, Mr Bedford is not a fit and proper person to perform any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. Their cumulative effect, the prolonged period over which they occurred and their repetition can lead only to the conclusion that he poses a serious and continuing risk to the Authority's objectives of reducing financial crime and maintaining confidence in the UK financial services industry. For those reasons, Mr Watts argued, a more limited order, such as one restricted to the withdrawal of Mr Bedford's approval or prohibiting the performance of controlled functions, would be wholly inadequate.

11. Mr Bedford's position was that prohibition was unnecessary, and that a censure was enough. Even censure made him virtually unemployable in the financial services industry in any country which regulated in the same way as the United Kingdom; although the Authority's powers extend only to financial services transactions executed within the United Kingdom, in practice prohibition in the UK amounts to prohibition in most countries of the world. He had already had to move to Indonesia in order to gain any form of employment; prohibition would put even that employment at risk.

12. The power to make a prohibition order is contained in s 56 of the Financial Services and Markets Act 2000, the material part of which reads:

> "(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function."

13. The critical question is therefore whether the Authority and, now the decision has been referred, the tribunal can properly take the view that Mr

Bedford is not fit and proper to "perform functions in relation to a regulated activity". The purpose of the provision is not, as is sometimes thought, to punish the individual but to protect the public. For that reason the effects on the person concerned of prohibition are, at best, a subsidiary factor; the primary focus must always be on whether any lesser course is adequate for public protection. Nevertheless, the consequences for an approved person of his being prohibited are likely to be severe, and the step should correspondingly not be taken lightly; and it is no doubt for that reason that sub-s (2) provides that the Authority may, rather than must, make a prohibition order. We accept, in particular, Mr Bedford's claim that prohibition in the UK would seriously compromise his ability to obtain work in the financial services industry in most countries of the world.

14. In this case, however, it is impossible to see how the Authority could properly have taken any action short of prohibition. Mr Bedford's failings were far removed from an isolated lapse, corrected unprompted, or an error due to inexperience or even carelessness; he was guilty of a succession of serious failings over a period of, on the most conservative estimate, several months. It is true that he admitted his wrongdoing when it was discovered, but he took steps to conceal it before then. He stood to receive a personal benefit, even if indirectly, and he exposed his company's clients to considerable risk. Although, during the course of the hearing and in earlier written communications, he exhibited what we consider was genuine contrition, we were not persuaded that he fully recognised and understood the enormity of his conduct, and (on his own account) the mix of hubris and fantasy which led to it.

15. It is in our view an inescapable conclusion that, despite his contrition and his admissions, Mr Bedford is not fit and proper to undertake any regulated activity, that prohibition and nothing less is necessary, and that that part of his reference which relates to the prohibition order must be dismissed.

The financial penalty

16. As we have indicated, Mr Bedford received a police caution and he has also been subjected to a penalty by the Authority. We were somewhat troubled that the imposition of a monetary penalty after a caution might be seen as double jeopardy, or the making up by the Authority of a perceived inadequacy of the police caution. The topic was touched upon, rather briefly, at the hearing, and we asked for further written submissions on the point thereafter. It is appropriate to begin with the chronology.

17. The warning notice issued in December 2009 proposed, in addition to prohibition, the imposition of a penalty of £200,000. The caution was given, as we have said, on 7 June 2010, the day before Mr Bedford attended before the RDC to make oral representations about the warning notice, representations which led, or at least one must assume contributed to, the RDC's conclusion that the penalty should be the £100,000 imposed by the decision notice, rather than the higher amount referred to in the warning notice.

18. The Authority's power to impose a penalty is conferred on it by s 66 of the Financial Services and Markets Act 2000. The section was amended within the relevant period, and has been amended again since. The amendments made within

the relevant period are of no present significance. The material parts of the section, as it stood at the end of the relevant period, read as follows:

> "(1) The Authority may take action against a person under this section if—
>
> (a) it appears to the Authority that he is guilty of misconduct; and
>
> (b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (2) A person is guilty of misconduct if, while an approved person—
>
> (a) he has failed to comply with a statement of principle issued under section 64; or
>
> (b) he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act or by any directly applicable Community regulation made under the markets in financial instruments directive.
>
> (3) If the Authority is entitled to take action under this section against a person, it may—
>
> (a) impose a penalty on him of such amount as it considers appropriate; or
>
> (b) publish a statement of his misconduct.
>
> (4) The Authority may not take action under this section after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.
>
> (5) For the purposes of subsection (4)—
>
> (a) the Authority is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and
>
> (b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1).
>
> (6) 'Approved person' has the same meaning as in section 64.
>
> (7) 'Relevant authorised person', in relation to an approved person, means the person on whose application approval under section 59 was given."

19. We observe, before leaving the section, that it does not (as many civil penalty provisions do) preclude the imposition of a penalty where there has been a prosecution for the same conduct.

20. The caution recited Mr Bedford's offence in these terms:

> "Between 11/07/2007 and 13/12/2007 at within [*sic*] the jurisdiction of the Central Criminal Court you committed fraud in that, while occupying a position, namely Director, in which you were expected to safeguard, or not to act against, the financial interests of ESR Insurance Services Ltd, you dishonestly abused that position intending thereby to cause loss to ESR Insurance Services Ltd or to expose them to a risk of loss, contrary to sections 1 and 4 of the Fraud Act 2006."

21. It can be seen, therefore, that although the conduct described is, in essence, the same as that relied upon by the Authority, it is more tightly focussed, referring only to ESR and not to its clients, it makes no mention of Mr Bedford's facilitation of Mr Clemons' fraud, likewise makes no mention of the forgery, and it relates to a shorter period.

22. In his additional submission, Mr Watts drew attention to those differences, and also referred us to the observation of Stanley Burnton LJ in *DPP v Alexander* [2010] EWHC 2266 (Admin), at [6], that

> "Before us it is common ground that the defence of *autrefois convict*, or indeed *autrefois acquit*, has no application where what has occurred is a caution. A caution is not a conviction for the purposes of those defences, notwithstanding that a caution will only be administered if the accused person admits his guilt. The principles of *autrefois convict* and *autrefois acquit* are applicable only where there has been a finding by a court of guilt or innocence. They have no application to an extra-judicial procedure, such as the administration of a simple caution."

23. Thus, he said, the fact that a caution had been administered was irrelevant to the imposition of a penalty by the Authority. We interpose that this argument does not quite answer the point which concerned us, which was not whether Mr Bedford was being *convicted* twice, but whether he was being *punished* twice for essentially the same conduct. His argument, correct though it is, that the ingredients of the offence for which the caution was administered and the ingredients of the offence for which the Authority have imposed a penalty differ likewise seems to us not to address the question. However, Mr Watts' other arguments seem to us to be very much on point.

24. First, he referred us to the speeches in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. The case is quite different, in its factual background, from this, but one can derive some principles of wide application from, in particular, what Lord Bingham of Cornhill said at p 31B:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

25. There is no question of abuse in this case, Mr Watts argued, not merely because a caution is not a conviction, but because it is in the public interest that

appropriate punishment is imposed when an offence has been committed. He produced evidence, whose accuracy Mr Bedford has not challenged (although, as we shall explain, he did have some other observations to make about it) that the caution was administered, and the avenue of prosecution not pursued, because the Crown Prosecution Service advised the police that prosecution was unnecessary if, as the warning notice indicated, sanctions were to be imposed by the Authority. The fact that he had been cautioned and also penalised by the Authority did not cause any unfairness to Mr Bedford; the two represented a proportionate approach to the imposition of punishment. Moreover, although the caution indicated that he would not ordinarily be prosecuted once it had been given, it could not be taken as any guarantee of immunity from punishment. That was particularly the case when, as here, a warning notice had already been given, and the caution was administered when Mr Bedford's oral hearing before the RDC was imminent.

26. Mr Bedford's response did not really deal with the issue which concerned us. We say that not in order to criticise, conscious as we are that Mr Bedford is not a lawyer, but merely to record that we had no counter-argument to Mr Watts' submissions, which we have accordingly scrutinised with great care. Having done so, we have reached the conclusion that they are right; there is no impediment to the imposition of a monetary penalty by the Authority, nor to our confirming or directing the Authority to modify the penalty. The theme of Mr Bedford's response was the magnitude of the penalty, against the background of the financial and other losses he had already suffered, and his having undergone a lengthy and, as he emphasised, extremely stressful investigation.

27. We think it appropriate to begin by making the point that we are surprised Mr Bedford was not prosecuted. His conduct was such that, had he been convicted of the offence as it was recorded in the caution, he would almost certainly have been sentenced to an immediate term of imprisonment. It was this factor which prompted our concern about double jeopardy: had Mr Bedford been convicted and imprisoned, would it be appropriate to impose a penalty in accordance with s 66 in addition? We do not propose to answer that question, but instead to observe that it seems to us that our task is to determine the correct amount of the penalty for the totality of the conduct we have outlined above, taking account of all the information about the case which is available to us, but disregarding the fact that Mr Bedford might have been, but was not, prosecuted. The financial penalty should be viewed as just that, and not a substitute for a criminal sanction.

28. It will be readily apparent from what has gone before that we consider this a serious case of assisting another to commit fraud, breach of trust and dereliction of duty. Leaving Mr Bedford's personal circumstances out of account, it cannot be said that the £200,000 proposed in the warning notice was excessive; if anything it was lenient. We reach that conclusion after considering other penalties imposed by the Authority, and reviewed by this tribunal, particularly *Atlantic Law LLP and Andrew Greystoke* (see also the observations of the Court of Appeal at [2011] EWCA Civ 74), *Graham Betton* and *Alistair Curren*.

29. The primary purpose of Mr Bedford's appearance before the RDC was to persuade it to reduce the penalty from the proposed £200,000 because of the hardship it would cause him. The enforcement team, after themselves conducting

an enquiry into Mr Bedford's means, recommended that, if the penalty were to be reduced at all, the minimum proper amount was £31,000. Mr Bedford argues that even that sum is excessive. In the event, the RDC reduced the penalty to £100,000.

30. Mr Bedford points out that he has cooperated with all of the investigating authorities, the administrator and the liquidator, that he has admitted his guilt, that he has made some amends in the course of the civil proceedings, that he has lost his job and been forced to move to Indonesia in order to work at all, that the prohibition will further compromise his ability to earn a living, and that he has suffered from a prolonged investigation during the course of which he was arrested and interviewed on several occasions. It was in this context that he complained of his having been subjected to two different investigations, with the consequence that he was obliged to live in considerable doubt, for a long time, about what the overall outcome for him would be.

31. He also places some reliance on the Authority's published policy (at DEPP 6.5.2G(5)) that the "purpose of a penalty is not to render a person insolvent or to threaten the person's solvency". We accept, as does the Authority, that Mr Bedford now has very limited financial resources, that his earning capacity is and is likely to remain modest, and that the imposition on him of a substantial penalty will cause financial hardship and might threaten his solvency. We nevertheless cannot disregard the pertinent comment made by the tribunal in *Atlantic Law LLP and Andrew Greystoke*, at [110], that

> "The fact that the purpose of imposing a financial penalty is not to bring about insolvency does not mean that the Tribunal cannot and should not fix a penalty which may have that unfortunate result."

32. The tribunal in that case went on to point out that the victims of those who commit financial fraud may well suffer that fate; here, it is only by good fortune that ESR's clients did not suffer what might have been catastrophic losses when the insurance for which they had paid was found not to be in place.

33. The imposition of any penalty has two principal purposes: punishment and deterrence (a third purpose, disgorgement, does not arise in this case). Mr Bedford's case is that he has already suffered punishment enough and, inferentially, that his experience following the discovery of his actions is sufficient to deter others.

34. It is certainly true that Mr Bedford has had an unpleasant, one might say very unpleasant, time since his exposure, but that is always the case when one has committed serious offences and has been discovered. There is nothing unusual about Mr Bedford's experience, and we cannot see it as a reason for imposing no penalty at all. However, leaving aside deterrence, to which we shall come shortly, we cannot see any purpose to imposing on a person in Mr Bedford's position a penalty he is unable to pay. It is not, we think, an immaterial consideration that if the imposition of such a penalty should provoke his bankruptcy, that eventuality would quite possibly cause prejudice to his other creditors. Accordingly, though we recognise the force of what was said by the tribunal in *Atlantic Law LLP and Andrew Greystoke*, we think that course should be adopted only in a clear case, which we are not persuaded this is.

35. For those reasons we have decided to direct the Authority to reduce the penalty from £100,000, a sum which we are satisfied Mr Bedford has no realistic prospect of paying, to £10,000. We have considered whether it should be reduced, as Mr Bedford urged upon us, to nil, but have concluded that the gravity of his conduct is such that the imposition of no penalty at all is not an appropriate course. A penalty of £10,000 will no doubt cause hardship, as any penalty should, but we have concluded that it will not cause excessive hardship as it is a sum which Mr Bedford should be able to pay, even if by instalments.

36. It is inevitable that the imposition of only a modest penalty because of the personal circumstances of the offender will diminish the deterrent effect, since the amount finally determined becomes the "headline" figure. For that reason, though we recognise it is not for us to determine prosecution policy, we repeat our surprise that Mr Bedford was not prosecuted, and emphasise our own view that a starting point of £200,000 in a case of this gravity is appropriate. However, the need to deter others does not justify the imposition of a penalty of that magnitude in the particular circumstances of this case.

37. Our unanimous conclusion is that the appropriate action for the Authority to take is to prohibit Mr Bedford from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm, and to impose on him a penalty of £10,000. The reference is determined in those terms.

Colin Bishopp

Tribunal Judge

Release date: