FS/2010/0040

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

BETWEEN

(1) DAVID JOHN SIME

(2) ELMSWOOD.EU LIMITED

Applicants

-and-

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: **Andrew Bartlett QC (Judge of the Upper Tribunal)**

Ian Abrams

Nick Douch

Sitting in public in London on 9-10 November 2011

Date of written decision: 10 January 2012

For the Applicants: **Mr Sime in person**

For the Respondent: Clare McMullen

APPROVAL FOR CONTROLLED FUNCTIONS - FSMA ss59, 60, 61 –Whether first applicant satisfied threshold conditions for approval – whether fit and proper

AUTHORISATION FOR REGULATED ACTIVITIES – FSMA ss40, 41 – Whether second applicant satisfied resources condition for authorisation

DECISION

INTRODUCTION

1. Mr Sime applied (1) on his own behalf for approval as an individual to carry out certain controlled functions at Elmswood.EU Ltd ("Elmswood"), and (2) on behalf of Elmswood, of which Mr Sime is currently the sole director and shareholder, for authorisation to carry on a number of regulated activities. By decision notices dated 8 December 2010 the Financial Services Authority ("the FSA" or "the Authority") refused the applications.

2. The Authority was not satisfied that Mr Sime was a fit and proper person to carry out the controlled functions or, given that Elmswood would be wholly dependent on Mr Sime, that Elmswood had the necessary resources. The Authority's reasoning was based principally on the Authority's view that he had not shown himself to be open and cooperative with the Authority in the way in which he had made the present applications. The Authority also took into account a number of allegations made against Mr Sime by other persons.

3. Mr Sime has referred the matters to the Tribunal, contending that the applications should be granted. By the Financial Services and Markets Act 2000 ("FSMA") s133 the Tribunal's function, having heard the evidence, is to determine what, if any, is the appropriate action for the Authority to take in relation to the matters referred.

THE EVIDENCE

4. We were supplied with a large quantity of documentation. We also heard oral evidence from Mr Sime, from his wife Paula Sime, and from a Mr John Leslie of Leslie & Nuding, who had made allegations of misconduct by Mr Sime. Mrs Sime had almost no involvement in the relevant events and we did not find that her evidence assisted us. Where we had relevant reservations about the evidence given to us, we will so indicate in the course of setting out our factual findings.

THE APPLICABLE PROVISIONS AND OUR APPROACH TO THE ISSUES

5. The relevant function of the Authority in the present context is the protection of consumers: FSMA s2. Part IV of the Act contains the provisions relating to permission to carry on regulated activities and Part V contains the provisions relating to applications for individual approval to carry out controlled functions.

6. The controlled functions to which Mr Sime's application relates are CF1 (director), CF10 (compliance oversight), CF11 (money laundering reporting) and CF30 (customer functions). The regulated activities that he wishes to carry out through Elmswood are:

    a. advising on investments including pension transfers and opt-outs

    b. arranging deals in investments

    c. making arrangements with a view to transactions in investments

    d. advising on regulated mortgage contracts

    e. arranging regulated mortgage contracts

    f. making arrangements with a view to regulated mortgage contracts.

7. The threshold conditions which a firm is required to satisfy in order to be granted a Part IV permission include adequacy of resources. This includes human resources and effective means by which to manage risks.

8. FSMA section 61(1) provides that the Authority may grant an application for approval only if it is satisfied that the candidate is a fit and proper person to perform the function to which the application relates.

9. The part of the FSA Handbook entitled "The Fit and Proper Test for Approved Persons" (known as FIT) contains guidance on minimum standards for becoming and remaining an approved person.

10. Fitness is not judged simply in the abstract, but must also be considered in relation to the particular functions and activities which are in view and the

particular context in which they are to be carried out: see FIT 1.1.2G, 1.3.1G, 1.3.2G, 1.3.3G and 2.2.1G.

11. FIT 2.1.3G contains a long (non-exhaustive) list of matters of past conduct which the FSA will take into account. This list is reflected in the questions on the application form.

12. The Authority's case before us contained two elements. One was that Mr Sime had failed to make certain disclosures that he ought to have made, thereby demonstrating an attitude to the Authority that was neither open nor cooperative. This first element does not raise any special question concerning what approach we ought to take. We received evidence concerning the disclosures and must resolve the relevant issues by consideration of the evidence.

13. The second element was less clear cut. The Authority submitted that since 2006 Mr Sime had been involved in a serious of incidents which individually were not of great gravity but which in combination resulted in doubt over his fitness. His relationship with every entity with which he had been associated in that period had ended in acrimonious dispute. Allegations were made against him which, if true, reflected on his integrity. The Authority submitted:

> "although each of the complaints made against Mr Sime may not have been fully substantiated, they cannot all be dismissed out of hand .... the collective effect of all these concerns [viz, including the non-disclosures] is such that the Applicants cannot satisfy the Tribunal that Mr Sime is fit and proper to perform the controlled functions to which the application relates."

14. We acknowledge that the terms of FSMA s61(1) effectively require us to direct the granting of the applications only if we are satisfied as to the candidate's fitness and propriety. This is part of the means of fulfilling the objective of consumer protection. But we are troubled by the apparent submission that, if allegations are made and are left unresolved, that may be sufficient on its own to result in the failure of the application on the ground that we cannot be appropriately satisfied. If that is what the Authority intended to submit, we consider that it gives too great a role to unproven allegations, which may be mistaken or even malicious. Mr Sime has previously been approved by the Authority. We would take a lot of persuading that it would be right to deprive an applicant, whose fitness and propriety had previously been established to the Authority's satisfaction, of his ability to earn his livelihood in the financial services industry because of unproven and unresolved allegations. Where the matter

comes to the Tribunal, we consider it is our duty, so far as the evidence allows, to reach conclusions on the allegations. If on examination they are not substantiated, we should disregard them. Any other approach would mean that the Authority could refuse approval simply on the basis that an allegation has been made and the Authority has not investigated it.

15. Mr Sime cited to us the well-known case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA. That case was concerned with the implicit limits upon the statutory powers of a public authority. We do not consider that it is applicable to the issues which arise in the present proceedings. The question for us is not whether the FSA has acted reasonably but whether we are satisfied on the evidence that Mr Sime is fit and proper for the relevant functions.

THE FACTS

General background

16. Mr Sime worked in various roles for insurance companies from 1979 to 2004. His last appointment in that part of his career was as area sales manager at Watford for Standard Life. He appears to have had a successful career in that sector.

17. In 2004 he moved to Savills Private Finance in London and began to gain experience as an independent financial adviser. At Savills he was approved to perform CF22 (investment adviser trainee) from February 2004 to December 2005 and then CF21 (investment adviser) until March 2006. He was on a self-employed contract. No issue arises from his work at Savills. Thereafter he was involved with three firms, first Leslie & Nuding, then RAM Financial Services Ltd ("RAM"), and finally Finance in Medicine Ltd ("FIM").

18. He moved to Leslie & Nuding during 2006, still on a self-employed basis. With other persons he incorporated Elmswood in about July 2006. Elmswood Private Finance Ltd ("EPF") was a wholly owned subsidiary of Elmswood, which traded as a mortgage broker and was an appointed representative of Leslie & Nuding. (We will not always distinguish between EPF and Elmswood, as the distinction is not material to the issues which we have to determine.) Mr Sime was approved to perform CF22 (investment adviser trainee) at Leslie & Nuding from May 2006 to

October 2007. While at Leslie & Nuding he was also approved for the CF1(AR) function as a director of Elmswood until June 2008.

19. In October 2007 he started working at RAM. During that month he was approved to perform CF21 (investment adviser), but from November 2007 to November 2008 his approval with RAM was for CF30 (customer).

20. At FIM he was approved to perform the CF1(AR) function from January 2008 and CF30 from December 2008. Both of these authorisations ended in October 2009.

21. After his relationship with FIM ended, an application was made for Mr Sime to perform controlled functions at CWS Financial Services. This was first made in October 2009. It became the subject of investigation and was ultimately withdrawn a year later. The application for approval for Mr Sime to which the present matter relates was made on 1 December 2009.

Mr Sime's disclosures to the Authority

22. On 24 September 2008 FIM made an application for Mr Sime to perform controlled functions. It was countersigned by Mr Sime as the candidate. It was an inapplicable short form of application. The FSA requested the correct long form, which was submitted on 14 October, again countersigned. In the declaration Mr Sime vouched that the application details were true and complete. The form made no specific disclosures in relation to fitness and propriety, but the covering letter made reference to "issues" at Leslie & Nuding, and to debts owed by RAM.

23. The Authority, in reply, asked for full disclosure of the "issues". FIM's response of 24 October 2008 provided incomplete explanations and selected documents, provoking from the Authority a further request for full explanations and all relevant documents. Accordingly on 11 November FIM provided further disclosure. This included a document signed by Mr Sime and his close colleague Mr Wintle headed "Relations, Departure and Current Position with Leslie & Nuding". This gave an account of Mr Sime's departure from Leslie & Nuding which stated that:

    a. Mr Leslie had sought an explanation concerning advice given to a Mr Wilson, who Mr Sime considered was a client of RAM, not of Leslie & Nuding. Mr Leslie on 22 May 2008 told Mr Sime that his CF1 status was

withdrawn because of issues with Mr Wilson's case, but this did not actually occur and in Mr Sime's view there were no grounds for it.

b. There was an incident on 23 May 2008 when Mr Sime was asked to leave Leslie & Nuding's office. There was an allegation that Mr Sime became violent, and the police were called to remove him.

c. Mr Sime and Mr Wintle were in dispute with Leslie & Nuding concerning alleged commission claw back entitlements.

d. Mr Sime was interviewed by police in September 2008 concerning contested allegations of fraud and theft made by Mr Leslie. The allegations were (1) Messrs Sime and Wintle had received sums from Premier Investments which should have been paid to Leslie & Nuding, and (2) a transaction with a Mr Hobson, a client of Leslie & Nuding, involving an Aegon Scottish Equitable offshore bond had been effected by Messrs Sime and Wintle for their own benefit without Mr Leslie's knowledge.

24. The FSA asked for explanations for the failure to disclose these matters in the long form which had been submitted on 14 October. This request gave rise to a further letter of explanation from FIM on 20 November, yet more questions from the FSA on 24 November, and a reply from FIM dated 1 December 2008, which stated:

> "Please find attached a separate statement from the Candidates explaining why they had originally answered the Long Form A in the way they did.
>
> Mike Wintle and David Sime did discuss fully all issues with FIM, most of which we collectively felt were of no interest to your fit and proper test, as we believed it was our responsibility to satisfy ourselves of their fitness and suitability to be advisors through us.
>
> ...
>
> ... our understanding of how to explain these issues, and most importantly how to answer your Long Form A questions, was totally incorrect, and if we could start the process again we would have immediately sent you every single piece of information subsequently provided."

25. The gist of the attached statement was that the allegations were outrageous and fanciful, that although they were on police bail at the time when the application was made, legal advice was that this did not constitute “legal proceedings”, and that with hindsight they should have provided at the start all the information ultimately provided.

26. The content of the legal advice was subsequently confirmed in writing. The FSA considered the information, and the way it had been provided, and decided to grant FIM’s application for approval of Mr Sime.

27. At the time of making this application Mr Sime should have been fully aware of the need to make full and accurate disclosure to the FSA in connection with any application for approval, and should have understood that the FSA wished to make its own judgment on allegations which Mr Sime regarded as unfounded. As the candidate, it was up to him to satisfy himself that he could properly sign the declaration which he made. After the delays and difficulties encountered with the FIM application, Mr Sime should have been left in no doubt on those points.

28. In October 2009 CWS submitted a short form application for approval of Mr Sime to perform controlled functions. This contained the usual declaration by Mr Sime. The form stated in relation to the sections on employment history and fitness and propriety: “If there has been a change to the detail in this section since your last approval, you must submit a Long form A as opposed to a Short Form A informing the FSA of the revised detail.” The use of the short form was not appropriate in Mr Sime’s circumstances, because of changes. This is something that Mr Sime ought to have appreciated, particularly given the similar error made in the submission of the application by FIM. We note in passing that the wording of the short form implies that (as one would expect) the FSA retains earlier applications and is able to refer back to them.

29. After prompting by the FSA, Mr Sime countersigned a long form application by CWS on 14 January 2010. This answered ‘yes’ to certain questions seeking disclosure of material matters in the fitness and propriety section, and attached additional details.

30. In the meantime, in December 2009 Mr Sime had also made the Elmswood application for approval to perform controlled functions, using Long Form A. In this application he answered ‘yes’ to questions 5.09, 5.10a, 5.10b, 5.11a and

5.11e in the fitness and propriety section, and attached further details in relation to each of these questions on a separate sheet. The further details referred to the accusation of poaching an investment client (presumably Mr Wilson) at Leslie & Nuding, Mr Sime's removal from the Leslie & Nuding office by police, the breakdown of the relationship between FIM and EPF, and some financial matters, including a county court judgment against EPF. In relation to his removal from the Leslie & Nuding office Mr Sime stated: "The FSA have full details of this incident from last year." The same additional details were provided again on 14 January 2010 in connection with the CWS application.

31. The declaration on the form includes the statement: "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".

32. The Notes to Form A contained the following general statement:

> "Do not assume that information is known to the FSA merely because it is in the public domain, or has previously been disclosed to the FSA or to another regulatory body. In all circumstances, disclosures should be full, frank and unambiguous. If there is any doubt about the relevance of information, it should be included."

33. Ms McMullen submitted on behalf of the Authority that this Note was included because the Authority wished to have all relevant information directly and fully included in each application, irrespective of anything previously supplied in connection with earlier applications, because it would be a time-consuming and resource-intensive task for the Authority to cross-refer to earlier applications. Whilst we accept this explanation, in our view the wording of the Note fails to make the intention clear. Instead of directly stating that everything must be included with the application, even if previously supplied, it tells the applicant or candidate *not to assume* that information is known to the FSA simply because it has been previously disclosed. Mr Sime, as he pointed out to us, made no such assumption. Rather, Mr Sime knew with certainty that the FSA had actual knowledge of the information which he had previously supplied in connection with the FIM application, because the information had been considered by the FSA and had eventually resulted in the approval of that application. What Mr Sime wrongly assumed, as someone unfamiliar with the workings of the FSA might, was that the FSA had a filing system which enabled the FSA to link up all information concerning a particular individual without difficulty. We keep this point in mind when considering the details of the Authority's case on Mr Sime's failures

to give full disclosure, although ultimately it is of limited practical significance on the facts of this particular case.

34. The Authority's case on disclosure relates specifically to the application made by Mr Sime in December 2009. The Authority alleges five non-disclosures, and says additionally that the details which Mr Sime gave were wholly inadequate, and that the five non-disclosures were either reckless or deliberate. According to the Authority the matters which he should have disclosed for the purposes of the Authority's assessment of his fitness and propriety, and did not disclose, were:

    a. an allegation that, whilst at Leslie & Nuding, he invested the funds of a Mr Bailey other than in accordance with the client's instructions;

    b. an allegation that he misappropriated commission due to Leslie & Nuding (on transactions for a Mrs Witkin and a Mr Coan), that civil proceedings were in contemplation to recover those funds, and that he was interviewed by the police on 17 September 2008 in relation to the said allegation of misappropriation;

    c. that he was suspended and dismissed by RAM;

    d. an allegation that he acted improperly while at RAM by putting client applications on hold without the appropriate consent and, further, that he resubmitted business via another entity (ie, other than RAM);

    e. that he owed (or, at the very least, potentially owed) substantial commission claw back to RAM.

35. In order to reach conclusions on these five points we must review the events relating to them.

Leslie & Nuding: the Bailey complaint

36. In late 2006 and early 2007 Mr Sime and Mr Wintle were involved with a transaction at Leslie & Nuding for a Mr Bailey. It was apparent from the evidence that Mr Bailey was a knowledgeable investor. Funds from Scottish Mutual were transferred to a Scottish Equitable SIPP. According to the transfer details

confirmed by Mr Sime to Mr Bailey by letter of 26 February 2007 the self-invested elements included large amounts placed with "Premier", including with a fund called "Premier Options". It seems this fund involved property investments valued in US dollars, or at least the fund was denominated in US dollars. According to a subsequent email from Mr Bailey, it was Mr Bailey himself who had chosen Premier, albeit this was after an introduction by Mr Sime.

37. The first written complaint from Mr Bailey was more than a year later, in April 2008, when he stated, among other things, that he had not been aware that his money had been invested in a dollar property fund or that there was an exchange rate risk.

38. In the autumn of 2008, after a telephone conversation with Mr Leslie, Mr Bailey made a formal complaint to Leslie & Nuding. This appeared in two versions, a letter dated 15 September 2008 and a different version dated 16 October 2008. The differences between and reasons for the two versions were not explained. The complaint included that the US dollar investment had been unauthorised and that the exchange rate risk had not been made known to him.

39. Solicitors acting for Leslie & Nuding and their insurers wrote to Mr Sime on 21 May 2009, informing him of Mr Bailey's allegations and of the possibility that proceedings might be issued against Leslie & Nuding, and asking for Mr Sime's comments. The letter set out five allegations of professional negligence (breach of contract or tortious breach of duty) which the solicitors said Mr Bailey was making against Mr Sime.

40. The letter also contained the following paragraph:

> "Please note that our client reserves the right to recover from you any damages and/or settlement sum paid to Mr Bailey in respect of the above losses and arising as a result of your fraudulent and/or dishonest actions or omissions."

41. No fraud or dishonesty was alleged against Mr Sime, either by Mr Bailey or by Leslie & Nuding. We infer that the reference to fraud was precautionary, and reflected the terms of Leslie & Nuding's professional indemnity policy, since such policies normally preserve a right to recover, in the event of fraud, from a person who would otherwise be entitled to the benefit of the policy. The paragraph was a reservation of rights, not a notification of intention to begin proceedings against

Mr Sime, and was evidently included in the letter so that Mr Sime would not be giving assistance under any misapprehension.

42. Mr Sime replied on 22 May 2009 by email. It seems this went astray and was not seen by the solicitor dealing with the matter, but we accept Mr Sime's evidence that he sent it, and he produced a copy of it, which he had forwarded to his assistant at Elmswood from his home email on the same day. (It is possible that Mr Sime's email was diverted into the solicitors' junk email because of the nature of the address from which it was sent.) Mr Sime's reply did not address the allegations head on but it stated that Mr Leslie was fully aware of the transactions, that Mr Leslie had already received assistance on the matter from Mr Sime and that, from memory, there was plenty on file to satisfy all the points raised by Mr Bailey. The reference to earlier assistance was to a three page document provided by Mr Wintle in January 2009, which had been drafted with Mr Sime's assistance.

43. It does not appear from the evidence that there was any contact with Mr Sime concerning the Bailey matter subsequent to 22 May 2009.

44. Scottish Equitable was unable to produce evidence of an instruction to justify its allocation of the funds, and Mr Leslie was unable to find such evidence on file. Leslie & Nuding's insurers subsequently decided to settle Mr Bailey's claim.

45. Mr Leslie's evidence did not in our view add anything of substance concerning Mr Sime's involvement in the Bailey matter. Mr Sime's own evidence concerning the allocation of the funds was that the first he knew of the allocation to the Options fund was by an email from Mr Howard of Premier on 10 January 2007, and he assumed that the allocation had resulted from an instruction given by Mr Bailey direct to Mr Howard.

46. On the evidence before us we are not satisfied on the balance of probabilities that Mr Sime did anything wrong in relation to the Bailey transaction.

47. We did not find Mr Sime's attitude to dealing with the allegation altogether satisfactory, and we found the way he dealt with it to be revealing of his personality. While we appreciate that Mr Sime's ability to respond in his email of 22 May 2009 was limited by his not having the file, he did not attempt directly or systematically to address the five allegations of professional negligence, to the

extent that he could. His email could fairly be described as a 'brush off' of the allegations. It asserted that Mr Bailey's complaint arose from disappointment with investment performance and was not bona fide. It contained an allegation that Mr Leslie had been less than honest with Mr Sime. It also said:

> "We also believe the [*sic*] John Leslie assisted Bailey in his letter of complaints against his own firm as part of a misguided vendetta against myself and Mr Wintle. We believe this to be the case as mistakenly Mr Nuding sent us 2 letters from Bailey, one dated one day after the other!!"

48. This reaction showed a degree of aggression which was unnecessary and inappropriate in a professional context, a readiness to make accusations against others without a sufficient basis for doing so (since there was nothing to show misconduct by Mr Leslie or lack of bona fides on the part of Mr Bailey), and a lack of close attention to detail (since the letters were not dated one day apart but were dated 15 September and 16 October). When asked in cross-examination about the nature of his email response, Mr Sime's lack of patience and lack of judgment concerning an appropriate response was very apparent; he made clear his resentment about being asked to deal with allegations which he regarded as unjustified and said the matter was "becoming boring". These qualities of defensive aggression, lack of patience, and lack of attention to detail were illustrated on a number of occasions in the course of the hearing before us.

49. On Long Form A question 5.09 states: "Is the candidate, or has the candidate ever been, the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity?". The Notes to the Form state: "This question covers internal investigation by an authorised firm in addition to investigations by a regulatory body at any time." Mr Sime correctly answered 'yes' to this question on his application form, but in the further details which he supplied he made no mention of the Bailey complaint.

50. When asked why he had not disclosed it, he made three points:

    a. it was not a justified complaint; he only had to disclose justified complaints, and he had FSA notes at home which said so;

    b. the solicitors' letter contained a number of 'ifs' and did not warrant ticking a 'yes' to there being proceedings against him;

c. it was not an investigation of his conduct but an investigation of Leslie & Nuding.

51. As regards the first point, we allowed Mr Sime to supplement his evidence after the hearing by sending us the notes that he had in mind. He sent us the provision in FIT 2.1.3G which states that the matters to which the FSA will have regard include, but are not limited to, "whether the person has been the subject of any justified complaint relating to regulated activities".

52. In our view this provision is beside the point. It is part of an explanation of matters taken into account by the FSA when determining a person's honesty, integrity and reputation; it is not guidance on how to fill in Form A. The question on the form was not restricted to honesty, integrity and reputation but was equally of relevance to competence and capability. FIT 2.1.3G did not contain anything to justify Mr Sime in answering question 5.09 otherwise than in accordance with the declaration that he made, namely, accurately, completely, and after reading the notes to the Form.

53. Mr Sime's second point was not directly relevant to question 5.09, which was a question about whether he had been the subject of investigation, not a question about proceedings being commenced. He raised this second point because the FSA argued additionally that the Bailey matter should have been disclosed in answer to question 5.03(b)(i).

54. The latter question reads: "Is the candidate aware of ... any proceedings that have begun, or anybody's intention to begin proceedings against the candidate for a CCJ or other judgment debt?" We do not see the relevance of this question in the circumstances and we reject the FSA's argument. No judgment debt was involved, nor any proceedings to obtain payment of a judgment debt, nor was there any notification of an intention to begin proceedings against Mr Sime in relation to the Bailey matter, whether for a judgment debt or indeed for anything else.

55. In relation to question 5.09 Mr Sime's third point had some force, albeit of a rather technical nature. While it is true that the solicitors' letter stated that it was being alleged that he personally had been in breach of duty, it was actually the claim against Leslie & Nuding that was the subject of the investigation, rather than Mr Sime himself. Disclosure was arguably not required by question 5.09.

However, in our view a person with an open attitude to the FSA would have disclosed the Bailey matter in order to be on the safe side, and in pursuance of the instructions in the Notes that in cases of doubt disclosure should be made ("If there is any doubt about the relevance of information, it should be included").

Leslie & Nuding: the Witkin and Coan commissions

56. The allegation by Leslie & Nuding was that in May and June 2007 EPF and/or Mr Sime (with Mr Wintle) received commission from investments arranged on behalf of two customers (Witkin and Coan), which was paid into bank accounts controlled by EPF and not into the Leslie & Nuding account as required under the arrangement between Leslie & Nuding and EPF. EPF then failed to pass on Leslie & Nuding's share of the commission received.

57. The allegation was first raised as a query by Mr Leslie by email of 13 June 2008. This elicited a combative and unhelpful reply from Mr Sime, stating that he welcomed the involvement of the FSA in the reconciliation of commission, looked forward to speaking with the FSA about how Leslie & Nuding conducted business, and until FSA investigations were complete would correspond no further. The reply said nothing about the two commissions in question.

58. Mr Leslie inquired on 23 June 2008 whether the transactions were as a result of advice given via Leslie & Nuding or through other means. Mr Sime replied on 26 June, in Delphic terms, that they were "client only instructed investments through Premier". Mr Leslie responded on the same day with further questions about how retail customers were shown the funds in question and why the commissions were paid to the EPF bank account. A long reply from Mr Sime on 4 July dealt only with queries relating to other commissions.

59. Mr Leslie gave evidence that he was informed on the telephone by Premier that the transactions were through Leslie & Nuding.

60. Mr Leslie wrote on 4 July 2008, putting questions on how the clients came to make the investments, whether they were Leslie & Nuding transactions, and whether the commissions and reasons for suitability were disclosed to the clients. He stated: "... if the clients were advised through Leslie & Nuding, it is clear that you stole the commission from us and we will call in the Police to investigate. As a result of your non cooperation in relation to this particular matter, we have had

no alternative than to inform the FSA that we terminated both of you from your control functions with Leslie & Nuding on that basis." Mr Sime's response on 8 July 2008 gave no answers but accused Mr Leslie of harassment.

61. Mr Leslie contacted the police, alleging theft of £2,816 commission. The police interview of Mr Sime took place in mid-September. On 20 November 2008 Premier stated to Leslie & Nuding in writing that the destination of the commissions resulted from a communication between the Premier representative (meaning Mr Howard) and Mr Sime, and that Premier considered it to be a payment to Leslie & Nuding.

62. On 11 November 2008 FIM wrote to the FSA in connection with the FIM application for approval of Mr Sime, enclosing a statement signed by Mr Sime and Mr Wintle. The report referred (among other things) to Mr Sime's interview by the police regarding the allegation of theft of commissions. It stated:

> "The theft allegation related to marketing allowances paid by Premier Investments. Mr Leslie alleged he was entitled to a split of 24% on these payments, which he was not. If he felt that he was he would have provided a contract that said so, which he did not. Instead he involved the police again under theft by an employee. We have never been employees of L&N as we were self employed and he had no self employed contractual right to these payments. Premier pay the introducer of the client to them, in this case Mr Sime. Premier have confirmed as such on many occasions."

It also asserted that the theft allegation was part of a campaign by Mr Leslie to bully Mr Sime into a more favourable resolution of an argument over reconciliation of commissions.

63. It is plain that Mr Sime's conduct in regard to the Witkin and Coan commissions was the subject of a police investigation in September 2008, and accordingly that when Mr Sime came to make his own application in December 2009 the matter ought to have been disclosed again in response to question 5.09. It was not. The further details provided by Mr Sime for question 5.09 made no mention of the investigation for theft of commissions. Nor was there any explicit cross-reference to it elsewhere in the application. (An answer to another question referred to the incident of removal by the police from the office, but not to the interview in connection with the theft allegation.)

64. We acknowledge that the FSA already had details of the theft allegation and of the police interview. Mr Sime knew this, and cannot have intended positively to

conceal these matters from the FSA in December 2009. But he was either careless in filling in the form or perhaps hoped (even if unconsciously) that the matters might be overlooked if he did not draw attention to them again. By failing to mention them in the December 2009 application Mr Sime was guilty of making a false declaration that the application form information was accurate and complete, and he did not demonstrate the open and cooperative attitude to the regulator which he should have done.

65. As regards the substance of the allegation of theft, we note in particular Mr Sime's continual evasion of the questions asked by Mr Leslie, and the careful wording of the signed statement which he made to the FSA in November 2008, which took refuge in the difficulty which Mr Leslie had in providing clear written proof of Leslie & Nuding's entitlement to share the commission and in the absence of a written agreement between Mr Sime and Leslie & Nuding. Mr Sime's evidence on this aspect during cross-examination was unimpressive. He claimed that the commissions were paid to EPF and to Mr Sime because Mr Wintle was convinced by Mr Howard of Premier that it was a legal thing to do, and asked that it be done, on the basis that the investments into Premier were unregulated. He also claimed that Mr Wintle introduced the clients to Premier, and was unable to explain why the statement signed by both of them in November 2008 stated that he, Mr Sime, made the introduction.

66. From the evidence we heard, we infer that Mr Sime and Mr Wintle took the view that, because the investments in Premier were unregulated, they could claim to be entitled to the whole of the commissions, on the ground that the investments were outside the scope of their agreement with Leslie & Nuding. They therefore decided to take all of the commissions themselves and not to tell Leslie & Nuding about it. Mr Sime's attempts at the hearing to distance himself from the Witkin and Coan transactions, as if he had had nothing to do with them at all, were unattractive. It was clear to us that Mr Sime was uncomfortable about the transactions and was not confident that he was in the right as regards his commission entitlement. There is a clear contrast with the case of Bailey, which also involved unregulated investments in Premier, and where the commission was shared with Leslie & Nuding. Mr Sime did not give a convincing explanation of why the transactions were treated differently from the case of Bailey. He may have had a legal justification on the interpretation of the agreements for diverting the commissions, but it was contrary to the way that they had been doing business, and he and Mr Wintle did not approach the issue in an open fashion by telling Mr Leslie what their interpretation was, and how they proposed to proceed, but instead simply diverted the commissions without telling him.

67. So far as the allegation by the FSA is that Mr Sime failed to disclose that civil proceedings were in contemplation to recover the Witkin and Coan commissions, we find nothing to support it. In July 2008 there was a vague threat by Mr Leslie to commence civil proceedings relating to the more general position on the reconciliation of commissions as between Leslie & Nuding and Mr Sime, but we have not found any notice of intended civil proceedings in relation to the Witkin and Coan commissions.

RAM: suspension or dismissal

68. The FSA alleges that Mr Sime failed to disclose in his December 2009 application that he was suspended and dismissed by RAM.

69. Under "Employment details" (Question 4) for the period May to October 2008, Mr Sime indicated that EPF employed him, and that his employer was an appointed representative of RAM. Under "Reason for leaving" Mr Sime ticked the box for "Resignation". For the period October 2008 to October 2009 he indicated that EPF continued to employ him, and that his employer was an appointed representative of FIM. For both periods, he gave EPF's address, not the addresses of RAM or FIM where he actually worked, contrary to the guidance in the Notes.

70. By contrast, in the CWS long form application, made on 14 January 2010, he showed that he had worked for RAM on a self-employed basis from October 2007 to October 2008, and gave his reason for leaving as both "Resignation" and "Other".

71. As a further comparison, in the FIM application which Mr Sime had signed on 10 October 2008 he had shown his employer from October 2007 to October 2008 as RAM and had ticked "Resignation" as his reason for leaving.

72. We are bound to say that we find the wording of question 4 obscure. Under "Nature of employment" four options are given, which are "Employed", "Self-employed", "Not employed", and "Full-time education". Part c asks for the name of the "employer", but there is no guidance on whether this is intended to cover only employment properly so-called, or whether the word 'employer' is here used to include a firm for whom a candidate works on a self-employed basis. The Notes to section 4 do not assist. It appears that Mr Sime interpreted the

questions in one way in his own December 2009 application and in a different way in the CWS January 2010 application. Moreover, we are not entirely sure what the answers he gave in his December 2009 application as to "Reason for leaving" in October 2008 were intended to mean, given that he did not leave EPF and that he did not name RAM as his employer. On any view, the answers that he gave were a muddle, albeit a muddle which may have been contributed to by the ambiguity of the questions and the lack of relevant guidance in the Notes.

73. Strictly speaking, since Mr Sime was not an employee of RAM, he could not be either suspended or dismissed. We interpret the FSA's allegation to mean that Mr Sime's contract with RAM was terminated by RAM, and that this fact (assuming it was a fact) ought to have been disclosed. This could have been indicated by ticking the box next to "Reason for leaving" which stated "Termination/dismissal".

74. It is clear from contemporary evidence that as at July 2008 RAM was suffering cashflow difficulties and was not making punctual payments to its self-employed agents, such as Mr Sime. A cheque for £11,245 from RAM to Mr Sime was returned unpaid in September 2008. This was not the only sum owing. In a note dated 12 September 2008 RAM's Mr Reed (who is now deceased) acknowledged that one option for Mr Sime was to "walk away and transfer to another adviser". After various chasers from Mr Sime, he emailed RAM on 2 October stating that he was owed nearly £50,000 and could not go on any longer without being paid.

75. In a reply of the same date Mr Reed stated his regret that the position with the bank was such that he could not send a transfer of £50,000. He then went onto the offensive and raised an issue that three cases submitted by Mr Sime had been placed on hold, and that the files did not show that this had been done on client instructions. He reiterated: "As I have said previously ... if you do not want to continue your relationship with RAM, then I would be sad but understand."

76. Mr Sime's reply of 7 October 2008 dismissed the concern about the three clients, stating that there would be no issue over treating them fairly (TCF). He pointed out that RAM was in breach of contract by not paying what was due, and accused Mr Reed of stealing his commission. In referring to breach of contract, he seems to have meant, if translated into legal terms, that RAM was in repudiatory breach of contract, and that the contract was at an end. In oral evidence to us Mr Sime said that he had ticked "Other" in the CWS form as a reference to the breach of contract.

77. Mr Reed's reply of 14 October complained that Mr Sime had not addressed the TCF issue and that the accusation of theft was libellous. He stated that the delay in payment was due to RAM's bankers insisting on the overdraft limit, and in addition he was concerned about recovery of possible claw backs of commission if Mr Sime did not stay with RAM, since it appeared that Mr Sime intended to leave. The letter referred to previous offers to meet with Mr Sime and concluded: "if we do not hear from you, within the next 7 days, then I suggest I commence the appropriate actions to terminate your regulatory status with this firm."

78. Mr Reed did not wait for the 7 days to elapse. Instead he wrote again on 16 October 2008, telling Mr Sime that he was subject to immediate suspension as an authorised representative of the company. He said he had established that an application for new business which had been submitted through the firm had been resubmitted to a different insurance company under a different agency. He stated that any commissions received on business submitted by Mr Sime would be held against outstanding clawback liability.

79. Mr Sime replied by email on 17 October. The email was intemperate. Mr Sime's own description of it, when he gave evidence to us, was that it was "a defensive-aggressive email". Mr Sime's anger at the time is understandable, but the terms in which he wrote did not evince a professional attitude. He repeated the allegation that Mr Reed had stolen his commission. He stated, among other things, that it was not in clients' interests to deal with a business in such financial difficulty as RAM. He asked if Mr Reed was trading "slovenly", presumably meaning "solvently". For present purposes the first paragraph of the email is of particular importance:

> "Your notification to me was unnecessary given that you breached my contract with you some week ago. I have as such **NO OBLIGATION OF ANY KIND TO YOU WHATSOEVER**.. [*sic*] Also the premise of your e-mail was wrong."

Mr Sime seems to mean by this paragraph that the contract had already been terminated (that is, in legal terms, by Mr Sime's acceptance on 7 October 2008 of RAM's repudiatory breach) before Mr Reed's latest letter. This is why, in Mr Sime's view, Mr Reed's letter was unnecessary, why Mr Sime no longer owed obligations to RAM, and why the premise of Mr Reed's letter (sent by email) was wrong.

80. That Mr Sime considered that his relationship with RAM had already ceased before Mr Reed's letters of 14 and 16 October 2008 is confirmed by Mr Sime's signature on 10 October 2008 of the FIM application form, which stated that he had resigned from RAM. By 2010 Mr Sime appears to have become confused about this, since in a letter to the FSA dated 10 June 2010 he stated that his contract was terminated by RAM's letter of 16 October 2008.

81. When Mr Sime gave evidence to us he claimed that prior to 10 October 2008 he had written a resignation letter to RAM; and his wife claimed to have seen such a letter before it was sent. He said it had been written on a home computer, which was not backed up and had since been decommissioned. If that is correct, it shows a poor attitude to record-keeping on his part. From this and other evidence, he seemed to have an insufficient grasp of the importance of keeping a clear and transparent audit trail of important dealings with contracting parties or clients.

82. Mr Reed wrote again on 20 October 2008, but we have not been provided with a copy of the letter. Mr Sime replied in more moderate terms. On 11 November Mr Reed submitted a form to the FSA giving notice that Mr Sime had ceased to perform controlled functions for RAM. The form gave as the reason "Dismissal/termination of employment or contract" on 4 November 2008. The additional details stated:

> "Admitted to delaying an application already made via this firm without supplying confirmation this was on the instructions of the client, and the [*sic*] withdrew application and submitted to an alternative insurer via another IFA firm, in breech [*sic*] of his Adviser agreement."

83. From subsequent correspondence we discern that Mr Reed took the view that the clawback position changed a debt of nearly £50,000 owed by RAM to Mr Sime into a debt of just under £10,000 owed by Mr Sime to RAM.

84. RAM went into liquidation and the statutory meeting of creditors was held in June 2009.

85. Based on the history set out above, we consider it is somewhat harsh to criticise Mr Sime specifically for not ticking the box that indicated "Termination/dismissal". Different interpretations could be placed on the meaning of the questions in the form and on exactly how the contract between Mr Sime and RAM came to an

end, and we do not think that the precise facts and correct analysis were clear even to Mr Sime at the time. What ought in our view to have been disclosed was the fact that the relationship had ended in an unsatisfactory fashion, with allegations of misconduct being made on both sides.

RAM: client applications on hold or resubmitted; commission claw back

86. The FSA contends that Mr Sime failed to disclose:

    a. an allegation that he acted improperly while at RAM by putting client applications on hold without the appropriate consent and, further, that he resubmitted business via another entity (ie, other than RAM);

    b. that he owed (or, at the very least, potentially owed) substantial commission claw back to RAM.

87. In oral evidence Mr Sime did not dispute that he put some client instructions on hold because RAM's financial position was precarious. This delayed the putting of the clients' funds into SIPPs. Given the contemporaneous evidence that we have seen concerning RAM's financial position in the second half of 2008, we are not convinced that it was misconduct for Mr Sime to advise his clients not to proceed through a company that appeared to be about to fail. However, we were not favourably impressed by his oral evidence when cross-examined on this topic. When pressed by Ms McMullen's questions, it seemed to us that his lack of control over his anger affected the way he answered. He did not answer directly the criticism that his actions delayed the clients' investments. He said that he or others had telephoned the clients to explain the situation, and that no client ever complained. He claimed that a file note should exist to show that such calls were made. The way he saw it was that the risk to the clients, arising from RAM's financial situation, was not that the funds would be lost but that the clients would have to pay his introduction fees a second time. It seems that he saw the situation primarily through the prism of his own interests.

88. The evidence did not satisfy us that Mr Sime owed claw back commission to RAM. There was no clear evidence of this from RAM's records, nor any evidence of the liquidator seeking payment from Mr Sime.

89. Accordingly, we do not find either that Mr Sime was guilty of misconduct in relation to the SIPP clients or that he owed claw back to RAM. However, as we have already indicated, if he had adopted an open attitude with the FSA, as he ought to have done, he would have disclosed to the Authority in his December 2009 application that the relationship with RAM had ended in an unsatisfactory fashion, with allegations of misconduct being made on both sides.

Other matters

90. Mr Reed of RAM, in a letter to the FSA dated 15 February 2010, made a further allegation that pension changes had been made for a client called Mr Wilson, that the changes had cost Mr Wilson in the region of £100,000, and that Mr Wilson told him he had never received any of the correspondence which Mr Reed knew would have been on RAM's files at the time of the sale. The implication from Mr Reed's letter was that there was some misconduct on this case by Mr Sime. Mr Sime denied that there was any mis-selling claim by Mr Wilson. The FSA produced no evidence of such a claim. The Financial Services Compensation Scheme had records of two claims against RAM, neither being by a Mr Wilson. The evidence before us does not demonstrate that there is any substance in the allegation made by Mr Reed against Mr Sime in relation to Mr Wilson.

91. In the autumn of 2009 Mr Sime and FIM fell out. The disagreement arose essentially over how best to deal with indebtedness of Mr Wintle. Mr Sime's emails in that period include some that are intemperate and abusive, indicating again his inability to deal calmly and professionally with situations that made him angry.

92. In order to progress the CWS application he needed a reference from FIM. On 23 November 2009 FIM responded negatively to CWS's request. Mr Carter of FIM wanted a personal guarantee from Mr Sime on business written through EPF. This was provided. By email of 29 December 2009 Mr Carter sent Mr Sime an unsigned reference addressed to CWS, asking him to confirm it was acceptable, and indicating it that he would send it to CWS when he received confirmation of payment of the amount outstanding to FIM in order to validate the statement in the reference that there were no outstanding clawbacks owed to FIM. According to FIM the total due was £413. On 4 January 2010 Mr Sime forwarded Mr Carter's email and the unsigned reference to a Mr Ninnim, asking him whether CWS could use it and send something on to the FSA. Mr Sime stated in his message that he was being held to ransom on the clawback, that he contested

he owed the amount stated, that the disputed amount was small, that more than half of it was Mr Wintle's responsibility, and that the reference was otherwise clean. CWS sent the reference on to the FSA. This conduct by Mr Sime was ill-considered, because he was clearly hoping that the unsigned reference would be used in a way its writer had not intended, but it was not deceitful, because his message to Mr Ninnim explicitly drew attention to the fact that he had not paid the disputed sum.

93. There was much mention of Mr Wintle in the evidence. Mr Sime sought to blame him for some of the things that had gone wrong. We did not hear from Mr Wintle, and the nature of Mr Sime's working relationship with him was not fully explored. We do not consider it appropriate to make specific findings about what ultimately went wrong when Mr Sime and Mr Wintle fell out over money.

OUR ASSESSMENT OF MR SIME

94. Mr Sime's disclosure to the Authority was not what it ought to have been. He did not treat the FIM application with sufficient seriousness, and signed a false declaration. After the difficulties and delays encountered with the FIM application, he should have understood (1) the importance of satisfying himself fully as to the accuracy and completeness of an application for approval, and (2) that the FSA wished to make its own judgment about allegations which Mr Sime regarded as unfounded. He failed or was unwilling to learn from this experience.

95. He was careless or reckless in filling in his December 2009 application. He failed to mention the theft allegation and police interview; while the FSA knew of them, his failure to mention them rendered his declaration untrue and indicated an uncooperative attitude to the FSA's requirements. He made a misjudgment in not taking the opportunity to disclose the Bailey matter in order to demonstrate an open attitude to the regulator. He failed to provide clarity regarding the circumstances in which he left RAM and failed to disclose that the relationship had ended in an unsatisfactory fashion, with allegations of misconduct being made on both sides.

96. His combative and evasive reactions to the various allegations made against him showed an impatient inability to control his temper, a degree of aggression which was unnecessary and inappropriate in a professional context, and a readiness to make extravagant accusations against others without a sufficient basis for doing

so. Because of his lack of patience, it appears to have been beyond his ability to rebut allegations by dealing with them directly, systematically, and comprehensively. He was unable to deal calmly and professionally with situations that made him angry.

97. We found him arrogant. He adopted an unrealistic position that fault was always 100% with someone else. In his oral opening he described himself to us as "a cut above the rest". This claim was not borne out by (for example) his defective applications for approval, the way he dealt with the Witkin and Coan commissions, or the way he managed his departure from RAM. We were also concerned by his attitude to record-keeping, and instances of his lack of close attention to detail.

98. Because of the nature of the issues and the contentions put forward by the FSA our factual findings have been concentrated upon the negatives. These need to be balanced by the positives. We gained the impression that Mr Sime was hard working, was ordinarily good to his employees or colleagues, and normally acted with honesty and integrity. It was when he was under pressure and insufficiently supported that he let himself down.

99. In our judgment the Authority was correct not to regard him as fit and proper for the controlled functions for which he applied for approval in December 2009, given the context in which it was proposed that he would work. The Authority was also correct to refuse the application by Elmswood, on the basis of insufficient human resources, because Elmswood would be wholly dependent upon Mr Sime.

100. We wish to make clear that this conclusion is not a decision that Mr Sime is not fit and proper for work in the financial services industry. In a well-controlled environment with proper support and supervision he could again be successful, as he was when he worked for insurance companies. What he is not suitable for is an environment where he works without effective supervision and support. Our decision is unanimous.

CONCLUDING REMARKS

101. In the course of our reasoning we have felt obliged to make some criticisms of Form A and of the Notes. We have not been shown the current versions; if the

same criticisms apply to them, we hope the FSA will address them and make revisions.

102. The FSA experienced some difficulty in providing legible photocopies of the Form submitted by Mr Sime in December 2009. There was some suggestion that this was due to the colour of the original. If the Form is redesigned, we hope it will be made easy to photocopy clearly in black and white in case of need.

103. The exhibits to Mr Leslie's statement were carefully numbered and were cross-referenced in detail in his statement, but the bundle for the hearing was presented to us in such a way that all the exhibit pages were renumbered with different numbers and the original numbers were not visible. This meant that the previous work of numbering and cross-referencing was largely wasted, it made our task more difficult, and it slowed down the hearing. If those preparing bundles insist on renumbering pages which are already adequately numbered, we hope that in future they will do it in such a way that the original numbers, as referred to in the text of the witness statement, remain visible.

104. The multiple applications and the events to which the allegations related involved a mass of detail, from which we have done our best to pick out the points that are pertinent to our decision. The documents ran to 1200 pages. We would have been materially assisted, and our task would have been easier, if the Authority had provided a chronology, identifying the principal events in order, cross-referenced to the relevant pages or dividers.

Andrew Bartlett QC

Judge of the Upper Tribunal

Release date 10 January 2012