Case number FS/2011/0020 & 0021

FINANCIAL SERVICES — withdrawal of approval and cancellation of permission — prohibition of approved person for making and assisting in making of fraudulent mortgage applications — whether Authority's case established — yes — reference dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARK ANTHONY FINANCIAL MANAGEMENT
and
MARK ANTHONY HURST AINLEY

Applicants

- and –

THE FINANCIAL SERVICES AUTHORITY

The Authority

TRIBUNAL: JUDGE GREG SINFIELD
CHRISTOPHER CHAPMAN
NICK DOUCH

Sitting in public in London on 26, 27 and 28 March 2012

Mr John Virgo, counsel, instructed by Michelmores LLP for the Applicants

Mr Sharif Shivji, counsel, instructed by the Financial Services Authority, for the Authority

DECISION

Introduction and decision referred

1. This is a joint reference by Mark Anthony Financial Management ("MAFM") and Mr Mark Ainley of various decisions made by the Financial Services Authority ("the Authority"). Mr Ainley was, at all material times, a sole trader and MAFM was the trading name that he used for his business. It was accepted by counsel for the Applicants that the fate of MAFM was parasitic on that of Mr Ainley as the two were, for the purposes of these proceedings, the same.

2. The reference concerns the Authority's decisions to:

> (1) withdraw Mr Ainley's approval to perform controlled functions under section 63 of the Financial Services and Markets Act 2000 ("the Act");
>
> (2) prohibit Mr Ainley from performing any function in relation to any regulated activity under section 56 of the Act;
>
> (3) impose a financial penalty of £150,000 on Mr Ainley under section 66 of the Act; and
>
> (4) cancel MAFM's permission to carry on regulated activities under Part IV of the Act under section 45 of the Act.

3. The essence of the Authority's case is that Mr Ainley submitted false and misleading mortgage applications on his own behalf and on behalf of clients (Mr and Mrs G) knowing them to be false and that, therefore, he is not fit and proper to be an approved person. The Authority submits that Mr Ainley's conduct is of a very serious kind, and merits the withdrawal of his approval in relation to MAFM, prohibition and the imposition of a severe penalty. Mr Ainley accepts that the mortgage applications contained some inaccuracies but he denies dishonesty or any lack of integrity; he and MAFM were, he says, misled by others in relation to his own mortgage applications and by his clients, Mr and Mrs G, in relation to the mortgage applications which he submitted on their behalf. 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.

Role of the Tribunal

4. Section 133 of the Act provides that, on a reference, the Tribunal must determine what (if any) is the appropriate action for the decision maker to take in relation to the matter referred to it. This is not an appeal against the Authority's decisions but a complete rehearing of the issues which gave rise to the decisions. The issue for this Tribunal to decide, in these proceedings, is whether the allegations of misconduct by Mr Ainley have been established to the appropriate standard of proof. At the hearing, it was agreed that the Tribunal would make findings in relation to the Authority's allegations and any decision as to the appropriate financial sanction would be reserved to be decided, if necessary, at a further hearing.

Allegations of misconduct

5. The Authority alleges that Mr Ainley is guilty of serious misconduct within section 66(2) of the Act in that:

(1) On 8 September 2006, Mr Ainley submitted a mortgage application on behalf of Mr and Mrs G containing false and misleading information about Mr G's income and circumstances which he knew to be false or misleading or in respect of which he was reckless as to whether such information was true and complete.

(2) On 5 September 2007, Mr Ainley completed and submitted a mortgage application on behalf of himself and his wife in relation to their home containing false and misleading information about his own income which he knew to be false or misleading.

(3) On or around 22 June 2009, Mr Ainley submitted a mortgage application on behalf of Mr and Mrs G containing false and misleading information about Mr G's income and circumstances which he knew to be false or misleading or in respect of which he was reckless as to whether such information was true and complete.

(4) Between July 2009 and April 2010, Mr Ainley entered into sale and rent back arrangements with consumers in relation to seven properties when he and MAFM were not authorised by the Authority to do so and he was personally involved in the submission of mortgage applications on his own behalf containing false and misleading information about his income, the source of the deposits for the purchases and the interest he would acquire in the properties all of which he knew to be false or misleading.

(5) During the investigation into the allegations listed above, Mr Ainley repeatedly made statements to the Authority which he knew to be false or misleading.

Applicable statutory provisions and guidance

6. The Authority's statutory objectives are set out in section 2 of the Act. The relevant functions of the Authority in the present context are the protection of consumers and reduction of financial crime.

7. Section 56 of the Act gives the Authority power to prohibit an individual from performing any function in relation to a regulated activity if it appears to the Authority that the individual is not a fit and proper person to perform that function.

8. Section 63 of the Act provides that the Authority may withdraw a person's approval under section 59 to perform controlled functions if the Authority considers that the person is not a fit and proper person to perform the function to which the approval relates.

9. Guidance on whether a person is regarded as fit and proper is contained in the Authority's Handbook in the part entitled Fit and Proper Test for Approved Persons

("FIT"). FIT 1.3.1G provides that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person to perform a particular controlled function. Among the most important considerations will be the person's honesty, integrity and reputation.

10. Section 64 of the Act provides that the Authority may issue statements of principle with respect to the conduct expected of approved persons and a code of practice for the purposes of determining whether or not a person's conduct complies with the statement of principle. The part of the Authority's Handbook entitled Statements of Principle and Code of Practice for Approved Persons ("APER") sets out the principles which have been issued pursuant to section 64 of the Act. Statement of Principle 1 ("APER 1") states "An approved person must act with integrity in carrying out his controlled function".

11. Section 66(2) of the Act provides that a person is guilty of misconduct if, while an approved person, he fails to comply with a statement of principle issued under section 64. Section 66 also provides that, where a person is guilty of misconduct, the Authority can impose a financial penalty of such amount as it considers appropriate.

12. Part IV of the Act contains the provisions relating to permission to carry on regulated activities. Section 45 of the Act authorises the Authority to cancel a person's Part IV permission if it appears to the Authority that, inter alia, the person is failing or likely to fail to satisfy the Threshold Conditions. Section 41 of the Act provides that the Threshold Conditions, in relation to a regulated activity, means the conditions as set out in Schedule 6.

13. The relevant Threshold Condition for the purposes of this decision is Threshold Condition 5 (Suitability). Threshold Condition 5 is set out in paragraph 5 of Schedule 6 to the Act and provides that:

> "The person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances including:
>
> (a) his connection with any person;
>
> (b) the nature of any regulated activity that he carries on or seeks to carry on; and
>
> (c) the need to ensure that his affairs are conducted soundly and prudently."

14. Guidance on the Threshold Conditions is contained in the Authority's Handbook of Rules and Guidance in the part entitled Threshold Conditions ("COND"). COND 2.5.2G(1) requires the firm to satisfy the Authority that it is "fit and proper" to have Part IV permission having regard to all the circumstances including its connection with other persons, the range of its regulated activities and the overall need to be satisfied that its affairs are and will be conducted soundly and prudently. COND 2.5.6G provides that the Authority, in determining whether a firm will satisfy and continue to satisfy Threshold Condition 5 in respect of conducting its

business with integrity and in compliance with proper standards, may have regard to whether the firm has been open and cooperative in all its dealings with the Authority and is ready, willing and organised to comply with the requirements and standards under the regulatory system.

Meaning of integrity

15. The meaning of integrity was considered by the Tribunal in *Hoodless and Blackwell v FSA* (2003). The Tribunal observed at [19]:

> "In our view "integrity" connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)"

While the passage quoted above is useful guidance as to the meaning of the concept, the second sentence is clearly not the only circumstance in which a person can be said to lack integrity. In the subsequent cases of *Vukelic v FSA* (2009) at [23] and *Atlantic Law LLP and Greystoke v FSA* (2010) at [96], the Tribunal has cautioned against attempting to formulate a comprehensive definition of integrity. As the Tribunal in *Vukelic* observed, integrity remains a concept "elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market."

16. A lack of integrity does not equate to dishonesty. While a person who acts dishonestly is obviously also acting without integrity, a person may lack integrity without being dishonest. One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements. Such behaviour was found to be evidence of a lack of integrity by the Tribunal in *Vukelic* at [119]:

> "It may be that Mr Vukelic was not dishonest on this transaction in the sense of deliberately participating in a scheme to deceive and we are prepared to accept that he was not. But he turned a blind eye to what was obvious and failed to follow up obviously suspicious signs. We do not believe that an educated professional in a senior position could have been oblivious to the signs that the transaction depended on concealment for its success. It is possible, but unlikely, that Mr Vukelic simply failed to spot what should have been obvious to a person in his position. But if that had been so it would have resulted from an inexcusable failure to ask obvious questions."

The Tribunal in *Allen v FSA* (2009) adopted the view of the Tribunal in *Vukelic* that to turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity. We take the same view in this case.

Evidence and findings of fact

17. The Authority submitted 11 bundles of documents, not all of which were referred to at the hearing. The Authority called five witnesses: Mr C Walmsley formerly of the Authority; Mr Paul Leavers of PJT Finance; Mr Damian Holmes, formerly of Royal Bank of Scotland; Mr James Cook of The Mortgage Shop (South East) Limited; and Mr Paul Clifton formerly of Property Cashpoint Limited. Mr Ainley gave evidence on his own behalf. He did not call any witnesses. On the evidence before the Tribunal, we find the facts to be as set out below.

Burden and standard of proof

18. Counsel for Mr Ainley emphasised the seriousness of the allegations against Mr Ainley and submitted, relying on observations of the Lord Chief Justice in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 at [30], that the Tribunal must be satisfied to a very cogent level of proof before finding that the allegations are established.

19. The question of the relation of the seriousness of allegations to the standard of proof was considered by the Supreme Court in *In Re S-B (Children) (Care Proceedings: Standard of Proof)* (2010) 1 AC 678. In that case, the Supreme Court held at [10]-[13]:

> "[10] The House of Lords was invited to revisit the standard of proof of past facts in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11, where the judge had been unable to decide whether the alleged abuse had taken place. The suggestion that it would be sufficient if there were a "real possibility" that the child had been abused was unanimously rejected. The House also reaffirmed that the standard of proof of past facts was the simple balance of probabilities, no more and no less.
>
> [11] The problem had arisen, as Lord Hoffmann explained, because of dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned (para 5). He pointed out that the cases in which such statements were made fell into three categories. In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 and *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace. This was what Lord Nicholls was discussing in *Re H (Minors)*, above, at p 586. Yet, despite the care that Lord Nicholls had taken to explain that having regard to the inherent

probabilities did not mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. In the third category, therefore, were cases in which the judges were simply confused about whether they were talking about the standard of proof or the role of inherent probabilities in deciding whether it had been discharged. Apart from cases in the first category, therefore, "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not" (para 13).

[12] This did, of course, leave a role for inherent probabilities in considering whether it was more likely than not that an event had taken place. But, as Lord Hoffmann went on to point out at para 15, there was no necessary connection between seriousness and inherent probability:

> "It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

Lady Hale made the same point, at para 73:

> "It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

[13] None of the parties in this case has invited the Supreme Court to depart from those observations, nor have they supported the comment made in the Court of Appeal that *Re B* "was a 'sweeping departure' from the earlier authorities in the House of Lords in relation to child abuse, most obviously the case of *Re H*" ([2009] EWCA Civ 1048, para 14). All are agreed that *Re B* reaffirmed the principles adopted in *Re H* while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", which had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said."

20. In written submissions made after the hearing, counsel for Mr Ainley acknowledged that the civil standard of proof, on the balance of probability, applied

but referred us to the observations of the Tribunal in *Chhabra and Patel v FSA* [2009] FSMT 072 at paragraph 54 that

> "… some things are inherently more likely than others and cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in a reprehensible manner. Generally speaking, people tend not to commit serious offences not least because of the consequences likely to follow if they do and someone with a good character is less likely to behave badly than someone with a bad character. Someone who values their reputation will be less likely to imperil it than someone known to be disreputable. The more inherently unlikely it is that something has happened the more persuasive the tribunal will need to find the evidence pointing that way before concluding it to be more likely than not."

21. We consider that the observations in *B v Chief Constable of Avon and Somerset Constabulary* are not appropriate to this case. This case does not fall into that category of cases, such as sex offender orders and anti-social behaviour orders which the law classes as civil but which are "quasi-criminal" in nature and in relation to which the courts have held that the criminal standard of proof is appropriate.

22. The observations of the Tribunal in *Chhabra* predate the judgment of the Supreme Court in *In Re S-B*. In that case, the Supreme Court clearly rejected the idea that the more serious the conduct alleged, the more inherently unlikely it is and the more cogent or persuasive the evidence needed to prove that it happened. Factors such as good character must be taken into account when assessing whether it is more likely than not that the conduct occurred, as the Tribunal did in *Chhabra*, but such factors do not necessarily make the conduct inherently improbable and do not lead to any requirement that the evidence required to prove such conduct must be more persuasive. We consider that the standard of proof to be applied in this case is, as the Supreme Court held in *In Re S-B*, the ordinary civil standard of proof namely whether the alleged misconduct more probably occurred than not.

First mortgage application on behalf of Mr and Mrs G

23. The Authority alleges that, on 8 September 2006, Mr Ainley submitted a mortgage application to Northern Rock on behalf of Mr and Mrs G containing false and misleading information about Mr G's income and circumstances. It is common ground that the income of £99,000 per year stated on the mortgage application was significantly higher than that declared on Mr and Mrs G's tax returns to HM Revenue and Customs. For the year 2006/2007, Mr G's tax return showed his total income to be £31,551. The issue is whether Mr Ainley knew that the information shown on the mortgage application was false or was reckless as to whether the information was correct.

24. Mr and Mrs G first became clients of Mr Ainley in 2006. They had previously been advised by another IFA and Mr Ainley had a copy of the other IFA's report in

his files from the year before. It said in relation to Mr G that he was 54, self-employed with the Manson Group, on a 'salary' (sic) of £4,000 a month.

25. On 23 June 2006, Mr Ainley created a fact find for Mr G which recorded that Mr G was 55 and his health was good and his employment details were shown as "consultant/contracting" for the Manson Group in St Albans for 15 months earning £48,000 gross per annum. Mr Ainley said in evidence that he understood Mr G had the status of part-employee, which gave him a part-guaranteed income, and part-contractor. He said that the £48,000 recorded as income related only to Mr G's earnings as an employee. Mr Ainley said that he had not "taken details … of [Mr G's earnings from] the contracting side of things". Mr G signed the declaration at the end of the fact find confirming that the information set out in the document was an accurate representation of his current financial situation. Mr Ainley's evidence was that, at that point, he was also made aware that Mr G had multiple sclerosis ("MS") and that it was affecting his speech and physical movements on occasions but not his ability to do his work. Mr Ainley said he had not seen Mr G's payslips at the time of the fact find but may have done so at some point although this is not mentioned in his witness statement.

26. Mr Ainley produced another fact find on 14 August 2006 for Mr and Mrs G. That fact find showed Mr G as self-employed with a net monthly income of £4,500 (i.e. £54,000 net per annum) and an expected retirement age of 65. The **net** monthly income of £4,500 was considerably higher than the figure of £4,000 **gross** in the fact find two months earlier. Mr Ainley did not have any satisfactory explanation for the difference when it was put to him in cross-examination. He said that he did not know if it was an error or simply the amount which the £4,000 would have been when grossed up. This, of course, could not be correct as the £4,000 was expressed to be gross in the earlier document and the £4,500 was expressed to be a net figure. Mr Ainley acknowledged in cross-examination that he took the print out of the fact find to Mr and Mrs G, went through it with them, made corrections where necessary and then they signed it. The fact find had a client declaration at the end, rather more detailed than that on the earlier fact find, confirming that the details given were correct. The fact find was signed by Mr and Mrs G and by Mr Ainley on 8 September 2006.

27. On 8 September 2006, Mr and Mrs G also signed a mortgage application to Northern Rock prepared on their behalf by Mr Ainley. The mortgage application form contained a statement that it is an offence to knowingly give false, inaccurate or misleading information when applying for a mortgage at the beginning of the form and a declaration of truth immediately above the signatures of Mr and Mrs G. The form also contained an Intermediary/Adviser declaration confirming that Mr and Mrs G could afford the mortgage payments. Mr Ainley signed the declaration and dated it 11 September 2006 which was the date the application was submitted. The mortgage application stated that Mr G had been a permanent employee (rather than a self-employed contractor) of the Manson Group since 1 February 2005 with a gross salary of £99,000 (rather than £48,000 gross per annum, as stated in the fact find in June, or £54,000 net per annum, as stated in the fact find in August). The application also stated that Mr G's anticipated retirement age was 65-70 which took no account of Mr

G's MS. Mr and Mrs G agreed to pay Mr Ainley a fee of £2,150 for preparing the application.

28. In evidence, Mr Ainley said that he did not know that the mortgage application contained any false or misleading information and that he did not have any reason at the time to doubt the information given to him by Mr and Mrs G. His witness statement said that Mr G provided him with a list of details of additional income in the region of £50,000 in June 2006 and suggests that the monthly net figure should have been £5,500 which would have grossed up to £99,000. In evidence, Mr Ainley explained the increase in Mr G's income between the fact find in June and the date of the mortgage application by saying that he understood from discussions with Mr G that he had changed his status with Manson Group and was receiving the increased amount as part salary and part commission based on clients he was bringing to the firm.

29. Also on 8 September 2006, Mr Ainley prepared a life protection term assurance illustration for Mrs G for life cover of £305,000 for 10 years. Manuscript annotations to the print out say "Additional info re income ([Mr G]) - £48k basic + Comm £22k Car All £8k & £20-22k pens/rent/all". Above that annotation is another, addressed to Mr Ainley's PA saying "transfer this to mort f-find". Mr Ainley's evidence in cross-examination was that the annotation was written at the time the mortgage application was made but due to an administrative error it was never added to the fact find.

30. On 11 September 2006, the same day as the mortgage application was submitted, Mr Ainley wrote to Mr G summarising a recent meeting with him about his pension arrangements. The letter stated that:

> "During our review of your affairs, we identified certain issues and specific requirements: in respect of your health, you suffer from an illness, which cannot be cured, but can be made more comfortable to deal with, via a new drug. This drug, you advise, has recently become available, but is expensive. You also have certain debts that have accrued over the past 2 years or so, which you would like to remove. We discussed ways of obtaining cash immediately from inexpensive sources, one of which being your pension funds."

31. The letter stated that Mr G was "currently working on a freelance basis, receiving a reasonable salary". The retirement report enclosed with the letter stated that Mr G was currently 55 and had no intended retirement date and hoped to continue working for a further 10 years but that his health may prevent that. The letter of 11 September 2006 was not consistent with Mr Ainley's evidence in his witness statement that Mr G

> "was confident and relaxed about his financial position. In the time I had known [Mr G] from 2006 to the time of the mortgage applications, the client had not informed me of any negative change to his state of health or his potential to continue to work at the current or previous levels."

32. Mr Ainley said in cross-examination, although it was not in his witness statement, that he did briefly look at Mr G's bank statements which showed amounts coming through that confirmed his explanations for his income.

33. We find that the statement in the Northern Rock mortgage application that Mr G was an employee on an annual salary of £99,000 was false. We were not shown any evidence to support it and it was inconsistent with Mr G's tax return and the fact finds completed by Mr Ainley. We also find that Mr Ainley knew that the information about Mr G's employment status and earnings contained in the mortgage application was false. We reach that conclusion because the fact finds in June and August and the review letter in September were all created by Mr Ainley and all show that Mr G was self-employed. As to Mr G's earnings, the same documents show a significantly lower level of earnings than £99,000 a year. We do not accept Mr Ainley's explanation that the first fact find excluded income from Mr G's role as contractor because we cannot see why any IFA would exclude such obviously relevant information as a source of income almost equal to the amount shown. We reject the evidence of the annotation to the life protection term assurance illustration for Mrs G. Its reference to £22,000 income from pensions, rent and allowances seems to be contradicted by the review letter of around the same date suggesting that pensions would be an inexpensive source of cash for Mr G. That suggestion would be unnecessary if Mr G was already obtaining a substantial income from his pensions. In any event, the annotation does not support an income from employment of £99,000.

34. In conclusion, we find that the mortgage application submitted to Northern Rock on behalf of Mr and Mrs G contained false and misleading information about Mr G's employment status and earnings. We also find that Mr Ainley knew the information was false and misleading.

Mortgage application on behalf of Mr and Mrs Ainley in relation to their home

35. The Authority alleges that, on 5 September 2007, Mr Ainley submitted a mortgage application to First Active, a part of Royal Bank of Scotland, for a mortgage of £175,269 on behalf of him and his wife in relation to his home containing false and misleading information about his income.

36. The application was made electronically and the information was entered online and then used to populate a print out. It is not disputed that the application showed Mr Ainley as having a basic gross salary of £100,000, a net monthly income of £8,000 and a net profit before tax of £96,000. It also showed a net profit before tax of £75,000 for the previous year. According to records held by HMRC, Mr Ainley's net income before tax as declared on his tax returns was as follows:

Year	**Amount**
2006/2007	£28,603
2007/2008	£31,692
2008/2009	£45,397

37. Mr Ainley said that the figures of £100,000 and £8,000 were his actual drawings from the business. He accepted that the figure of £96,000 given for net profit was incorrect and should have been approximately £31,000 at the time. He further said that he spoke to Mr Damian Holmes at RBS who told Mr Ainley he was happy that the net profit, drawings and joint incomes were sufficient for the loan. Mr Holmes said that he could not recall dealing with Mr Ainley or MAFM in relation to the mortgage application but, having reviewed emails provided by the Authority, he accepted that he was the business development manager dealing with the application.

38. Mr Ainley initially claimed in the RDC proceedings that the figures on the mortgage application had been entered incorrectly by his PA at the time, Ms Freitas, who was responsible for submitting the online application. The Authority obtained transcripts of telephone conversations between Mr Ainley and Mr Holmes which showed that Mr Ainley had been responsible for submitting his own online application. The transcript does not disclose that Mr Holmes said he was happy that the net profit, drawings and joint incomes were sufficient for the loan or any specific discussion about such matters. Mr Ainley said that conversation may have been at another time or with another person. It is clear from the transcript, however, that this was the first conversation between the two. Mr Holmes's evidence in cross-examination was that he would not have assured an applicant that a mortgage application would be accepted, but he would have indicated whether it was likely to be successful.

39. Counsel for Mr Ainley submitted that the joint incomes of Mr and Mrs Ainley would have been sufficient to support a mortgage application for £175,000 and so there was no motive for Mr Ainley to inflate his income.

40. In evidence, Mr Ainley said that drawings meant the money that he took out of MAFM's bank account and that he took £100,000 from MAFM's account. He accepted in cross-examination that he was probably taking more money out of the account than the business was making in profit in 2005-6 and 2006-7 but said that funds would have already been in the account from previous years and from money that he had put into the business when it started. In relation to the net profit figure of £96,000, which we note is 12 times the figure given for net monthly income, Mr Ainley said that the form was populated from the input information and that he would not have entered £96,000 as the figure for an annual net profit. An example of the online form was provided to us and showed that, under “Income details”, a self-employed applicant was asked to provide average personal income over the past two years and a note explained that meant estimated annual drawings from the business. The form also asked for net monthly income.

41. Mr Ainley said in evidence before the RDC and the Tribunal that he was out of the office on 5 September 2007 when the application was submitted. The transcript of the call between Mr Ainley and Mr Holmes is dated 5 September and shows that Mr Ainley intended to submit the application himself on that day. Although the transcript is not timed, an email sent by Mr Holmes to Mr Ainley at 12:48 on 5 September shows that the call must have taken place before that time.

42. The mortgage application was shown as received by RBS at 16:25 on 5 September 2007. The packaging confirmation, a form which had to be submitted by the intermediary to verify the borrower's identity, for the mortgage was signed by Mr Ainley. The application and packaging confirmation had to be re-submitted some two weeks later, when it was done by Ms Freitas, as RBS rejected the original application on the ground that evidence of identity had to be verified by a third party.

43. On 5 October 2007, Mr Ainley called RBS to complain about the application fee being added to the mortgage loan amount. The transcript of that call shows Mr Ainley as saying "I put my own application in. … I am the broker and I processed this case myself."

44. The online application form clearly asked for details of income which meant annual drawings for self-employed persons. Mr Ainley said that he drew £100,000 from the business during the relevant period even though the profit, as declared on his tax returns, was just over £30,000. We do not accept Mr Ainley's evidence on this point. Mr Ainley did not produce any evidence to support his testimony that he took £100,000 from MAFM's accounts during the relevant period. The only evidence as to Mr Ainley's drawings from MAFM is the bank statements for MAFM for April 2009 – February 2010 which show a monthly transfer of £1,500 from MAFM's account to Mr Ainley's personal bank account. The statements for his personal bank account for roughly the same period do not disclose any other significant sources of income. Mr Ainley's assertion that the figures for income on the application form were accurate is inconsistent with his position before the RDC that the figures were the result of an error by Ms Freitas when she completed the online form.

45. In conclusion, we find that the mortgage application completed and submitted to First Active by Mr Ainley stated amounts in relation to his annual and monthly income which he knew to be false.

Second mortgage application on behalf of Mr and Mrs G

46. The Authority alleged that, on or around 22 June 2009, Mr Ainley submitted a mortgage application to the Halifax on behalf of Mr and Mrs G containing false and misleading information about Mr and Mrs G's income and circumstances which Mr Ainley knew to be false or misleading.

47. The application stated that Mr G had been employed by a company called Wyndeham Grange Limited in Brighton since 1 February 2005, earning £67,000 gross per year. However, Mr G's tax return for the tax year 2008/2009 showed an income of £5,116. The tax return for the previous year, 2007/2008 showed Mr G's income as £5,861. The application also stated that Mr G's anticipated retirement age was 70.

48. As in the case of the first mortgage application on behalf of Mr and Mrs G, it is common ground that the income declared on the mortgage application was significantly higher than that declared on Mr and Mrs G's tax returns to HM Revenue and Customs. The issue is whether Mr Ainley knew that the information about Mr and Mrs G's income and circumstances was false or misleading or was reckless as to whether or not the information was correct.

49. Mr Ainley conducted an annual review of Mr and Mrs G's financial circumstances in July 2008. In a letter, dated 15 July 2008, he recorded that Mr G:

(1) had formally left his employer and had no new employer;

(2) did not receive any income from any other employment; and

(3) received "income from a sickness and accident claim" which was due to expire in November 2008 at which point their Northern Rock mortgage deal also expired.

The letter went on to record that Mr G may take up part time consultancy with another employer. There is no mention of any other income although Mr Ainley said he had been told in 2006 that there was an additional £20,000 - £22,000 from pensions and other sources.

50. A few months later, in November 2008, Mr Ainley requested a pension illustration for Mr G. The request stated that Mr G's tax rate might be 20% but could be zero and asked for a quote on both scenarios. The illustration request recorded Mr G's health as being "very poor (has MS)" and stated "client is looking to draw max income now, due to ill-health but may choose to cease income - in event that property sale will produce a lump sum to draw down". Mr Ainley acknowledged in his evidence that he knew at that point that Mr G's income was very low and he was in poor health.

51. In 2009, Mr Ainley made a mortgage application to The Woolwich on behalf of Mr G. Mr Ainley said that Mr G advised him that his income was £90,000. Mr Ainley said that The Woolwich had initially agreed to accept the secondary income, similar to the situation with the Manson Group in 2006 described above, but then changed its mind. Mr G decided not to go ahead with the mortgage with The Woolwich. Mr Ainley said that the decision was because Mr G had previously had a bad experience with The Woolwich. Mr Ainley said that the reason for the withdrawal of the application was not because The Woolwich had asked to see evidence of earnings. We were not shown any evidence to support Mr Ainley's assertion that Mr and Mrs G had previously had a bad experience with The Woolwich.

52. On or around 22 June 2009, Mr Ainley submitted a further re-mortgage application on behalf of Mr and Mrs G to Halifax. The application recorded that Mr G had been employed since 1 February 2005 on a permanent basis as a regional sales manager for a company called Wyndeham Grange Limited in Brighton, earning £67,000 gross per year. It was accepted on behalf of Mr Ainley that the date of 1 February 2005 must have been entered incorrectly.

53. Mr Ainley said that Mr G told him he had started freelancing with the Manson Group so he knew there was an income although he said that he did not ask for any evidence of employment or earnings because of the previous explanations. Mr Ainley accepted that Mr G must have told him various untruths but he did not know that at the time.

54. The application form also stated that Mr G's expected retirement age was 70. Halifax appear to have queried Mr G's anticipated retirement date because MAFM wrote a letter dated 23 June 2009 to Halifax saying:

> "To confirm; both applicants will continue to work to the age of 70. Their incomes will not change and neither applicant's job involves manual labour."

Mr Ainley said in evidence that the letter had merely represented what he had been told by Mr G and that his own opinion was irrelevant.

55. On 26 June 2009, Mr Ainley sent a letter to Mr and Mrs G summarising the discussions and advice relating to the mortgage. The letter stated that MAFM was required "to establish to the best of our ability, that you are able to afford the product that you decide upon" and recorded that "your income is likely to be stable". Mr Ainley said in evidence that he felt that the statement that the income would be stable was accurate because, based on what Mr G had told him, the current situation would be stable.

56. Mr Ainley compiled a further fact find, shown as completed on 1 July 2009 but Mr Ainley said in evidence that it had been completed on 27 May which is shown as the date of issue. This shows Mr G as having a gross annual income of £90,000. Mr Ainley explained that he had only put Mr G's income as £67,000 on the Halifax mortgage application because that was what he was earning with the Wyndeham Grange and the balance was from freelance work back with Manson, and it was not required to validate the mortgage application.

57. Mr and Mrs G wrote a letter, dated 23 August 2010, to Mr Ainley saying that at the time of the Northern Rock application (the first mortgage application) they informed him that Mr G's total income was in the region of £99,000 made up of £48,000 income plus commission of £22,000 and car allowance of £8,000 from employment with Manson Group and a further £21,000 pension and unearned income from other sources. The letter also stated that, at the time of the Halifax application, Mr G's income was £67,000 from employment with Wyndeham Grange with a further £23,000 from freelance work with the Manson Group. Mr and Mrs G did not provide any evidence that corroborated the statements made in the letter. We note that their letter is impossible to reconcile with the information as to Mr G's income declared on his tax returns for the relevant years, the earlier fact finds compiled by Mr Ainley and the information recorded in the July 2008 annual review letter and the November 2008 pension illustration. In the absence of any evidence in support and any opportunity to test it in cross-examination, we reject Mr and Mrs G's letter as evidence of the facts stated in it.

58. We conclude that Mr Ainley knew that the statement in the mortgage application to the Halifax that Mr G had been working at the Wyndeham Grange since 1 February 2005 was false. We reach this conclusion because Mr Ainley had stated in the Northern Rock mortgage application in September 2006 that Mr G had worked as an employee of the Manson Group in St Albans since 1 February 2005. Further, he

stated in the letter to Mr G dated 15 July 2008 that Mr G had left his (unnamed) employer.

59. We also find that, contrary to what he put on the form and confirmed in writing to the Halifax, Mr Ainley must have known that it was unlikely that Mr G would continue to work to the age of 70 because of his very poor health. In 2006, Mr Ainley had recorded that Mr G had questioned whether he would even be able to work to the age of 65. Only a few months after the application, Mr Ainley described Mr G's health as "very poor (has MS)" in a request for a pension illustration.

60. It is difficult to see how Mr Ainley could have believed that the statement that Mr G's income would remain stable during the 12 years until his expected retirement at 70 could be true given Mr Ainley's knowledge of Mr G's increasingly poor state of health since 2006. The fact find, purportedly dated 1 July 2009, recorded Mr G's gross income as £90,000, although no particulars are given of the employer. Again, it is impossible to reconcile this information with that provided by Mr Ainley in the Halifax mortgage application submitted the week before or the fact that he knew Mr G's income was very low due to ill health at the time of the request for a pension illustration a few months earlier.

61. In conclusion on this issue, we find that the mortgage application and subsequent correspondence submitted to the Halifax on behalf of Mr and Mrs G contained false and misleading information about Mr G's income and circumstances. We also find that Mr Ainley knew that the information was false and misleading when he submitted the application to the Halifax.

Sale and rent back arrangements

62. Between July 2009 and early 2010, Mr Ainley entered into seven sale and rent back arrangements. The sellers sold their homes to Mr Ainley and, at the same time, entered into agreements to buy back an interest in the property and to rent the property from Mr Ainley so that they could continue living in their homes. Mr Ainley accepted that he and MAFM were not authorised by the Authority to enter into sale and rent back transactions in relation to residential property but said that he did not know that the purchases were sale and rent back transactions. The Authority does not accept that Mr Ainley did not know that they were sale and rent back transactions. Each of the seven purchases was funded by a buy to let mortgage. Six of them were funded by mortgages from Birmingham Midshires and one was funded by a mortgage from Mortgage Works. Five of the mortgages were processed by The Mortgage Shop and two were processed by MAFM. The Authority alleges that the mortgage applications in relation to all seven transactions contained false and misleading information and that Mr Ainley knew that the information was false.

63. The seven properties, their purchase prices, mortgage loans and the dates on which they were purchased were as follows:

Property	Purchase Price	Loan	Date of Completion
Property 1	£64,000	£47,899	31 July 2009
Property 2	£80,000	£71,099	3 August 2009
Property 3	£250,000	£145,900	7 August 2009
Property 4	£160,000	£117,399	25 August 2009
Property 5	£175,000	£115,489	11 September 2009
Property 6	£170,000	£127,500	5 February 2010
Property 7	£95,000	£66,500	30 April 2010

64. All the sale and rent back properties purchased by Mr Ainley were offered as investment opportunities by Property Cashpoint Limited which also traded as Residential Investments. We heard evidence from Mr Clifton who was formerly managing director of Property Cashpoint. He stated that, as far as he could recall, he had never spoken to Mr Ainley about any of the transactions but he believed that the Property Cashpoint salesman would have told an investor that a transaction was a sale and rent back property because it would be a much better proposition to have a long term tenant already in place than to have to find a tenant. He also said that it would be apparent to an investor from the paperwork (eg the joint venture agreements, the long-term tenancy agreement and the trust deed) that the seller would become the tenant.

65. Explanatory notes provided by Property Cashpoint, which were produced by Mr Ainley from his records, provide an explanation of the Joint Venture Agreement and Trust Deed. The notes state that:

> "The Joint Venture Agreement and Trust Deed ("the deed") has been created for parties intending to enter into an arrangement whereby after one party sells their property they subsequently enter into an agreement with the person that bought their property to buy back an equitable share in the property and both parties jointly agree to let the property to the original owner with an agreement that when the property is sold in the future both parties will benefit from the sale of the property. In the deed the person buying the property is known as the Owner Investor and the seller who buys the equitable share and rents the property back is known as the Equity Holder."

66. The Property Cashpoint explanatory notes make it clear that the seller subsequently rents the property back from the buyer. Mr Ainley said in evidence that he had not read the notes or had not read them properly. In answer to a question from

the Tribunal, Mr Ainley said that he was hoping that the investment would be self-contained and would not affect his normal business. He said that:

> "[In] a normal buy-to-let property purchase, you would have to be involved doing it all yourself. This clearly was a different proposition, where you didn't have to put very much money in and the entirety of the documentation was taken care of for you. I could have been a lot more aware of the documents that were being sent to me."

67. We also heard evidence from Mr Cook, the managing director of The Mortgage Shop (South East) Limited. The Mortgage Shop introduced Mr Ainley to Property Cashpoint and arranged mortgages for the first five of the seven properties purchased by Mr Ainley. Mr Cook said that The Mortgage Shop arranged buy to let mortgages for Mr Ainley with Birmingham Midshires. Mr Cook stated that all the transactions were presented to The Mortgage Shop by Residential Investments as buy to lets. Mr Cook said that The Mortgage Shop did not arrange mortgages for sale and rent back transactions because, at that time, the lenders would not provide any loans in relation to sale and rent back transactions. Just prior to submission of the first mortgage application, an employee of The Mortgage Shop sent an email to Mr Ainley requesting details of his basic income, bonus and additional income from buy to lets, investments and pensions. Mr Ainley replied by email on 14 July 2009 stating:

> "T/O £300,000. Income drawings, £5k per month, net profit - £38k. No BTL or other income."

68. Mr Cook's evidence was that, as a result of the email, they understood Mr Ainley to be employed with a total annual income of £98,000 and that was why those statements appeared in the mortgage applications.

69. As the documents relating to all seven sale and rent back transactions were essentially the same apart from details as to price and address, it is sufficient to set out the details of just one, Property 4, for the purposes of this decision.

70. The Property Cashpoint promotional brochure for Property 4 showed the agreement type as a two way joint venture. The purchase price was £160,000 with a mortgage amount of £120,000 requiring a mortgage payment of £484 per month. The details also stated that the rent was £575 per month and the investor's deposit contribution was nil. There was an arrangement fee, payable to Property Cashpoint, of £3,234, inclusive of VAT. All costs were expressed to be paid within the deal including "legals, disbursements, broker fees, searches, bridging, refurb and miscellaneous costs".

71. The mortgage application in relation to the purchase of Property 4 was submitted to Birmingham Midshires on 29 July 2009. The Tribunal was shown a print out of the online application form. The application was in the name of Mr Ainley and was for an interest only mortgage in the amount of £117,399. The form states that the application was for a "new mortgage, buy-to-let". It shows that the purchase price of the property was £160,000 and that the source of the deposit was

"applicant's own savings". The form shows Mr Ainley's employment status as "employed" and gives details of earnings as follows: "Employed income details: basic income 60,000, bonus 38,000".

72. The contract of sale for Property 4 was between Mr and Mrs F, as sellers, and Mr Ainley, as purchaser. The purchase price was shown as £160,000. The transaction completed on 25 August 2009. One of the special conditions of sale in the contract provided that Mr Ainley would, immediately following completion, enter into a pre-emption agreement with Mr and Mrs F and, at his own expense, register the right of pre-emption over his title.

73. On completion, £117,399 of the purchase price came from Birmingham Midshires. The balance of £42,601 was financed by Mr Ainley with a loan from PJT Finance. PJT Finance provided Mr Ainley with the facility to draw down monies secured against his own home. On 18 August 2009, Mr Ainley borrowed £43,624.83 from PJT Finance and it was credited to Mr Ainley's personal bank account on that day with a reference (we assume generated by PJT Finance's bank) to Property 4. A completion statement from the solicitors shows that £43,589.83 was remitted to the solicitors in two payments. There was no explanation for the discrepancies between the balance and the amount borrowed from PJT Finance or the £35 difference between the amount borrowed and the amount remitted to the solicitors.

74. Mr Ainley entered into a joint venture agreement with Mr and Mrs F, the sellers of Property 4. The joint venture agreement in relation to Property 4 is undated but it appears to have been entered into on or around the date of completion of the sale, ie 25 August 2009. Under the agreement, Mr Ainley, as legal owner of the property, agreed to hold the equity in the property on trust for the benefit of himself and Mr and Mrs F. The equity is defined as "... the balance remaining of the sale price after the repayment of the mortgage and the discharge of sale costs". The agreement also provided that Mr and Mrs F would purchase a share in the equity equal to the lower of 38 per cent of the net sale price and the equity less 10 per cent. The purchase price was £160,000 and the mortgage was £117,399 so the equity was £42,601 or approximately 27 per cent ie lower than 38 per cent. Mr and Mrs F agreed to purchase a share equal to the equity less 10 per cent (worth approximately £38,000 at that time) for £60,000. The joint venture agreement stated that Mr and Mrs F purchased the share of the equity with a view to the property being let to them under the long-term tenancy agreement. The long-term tenancy agreement is defined in the joint venture agreement as an agreement between Mr Ainley, as owner investor, and Mr and Mrs F, as equity holder, in relation to the letting of the property.

75. We were not shown any long term tenancy agreement for Property 4 (or any of the properties) but we were shown an agreement for tenancy between Mr Ainley and Mr and Mrs F. Under that agreement, Mr Ainley agreed to grant a tenancy to Mr and Mrs F. Mr Ainley signed the agreement for tenancy. The tenancy agreement was in the form of an assured shorthold tenancy in relation to the property for a term of 12 months. Mr Ainley did not sign the assured shorthold tenancy agreement. The assured shorthold tenancy agreement was signed, as were all the assured shorthold tenancy agreements, by Paul Clifton Properties, an entity linked with Property

Cashpoint, not by Mr Ainley. Although there were documents in the transactions which were signed by Mr Ainley, he said that those were simply presented to him by a courier as documents required to be signed by him and returned which he did without reading them closely and then immediately returned with the courier.

76. Following the signing of the documents, the amount of £60,000 from Mr and Mrs F for the equity was paid to Mr Ainley's solicitors. Mr Ainley then paid an arrangement fee to Property Cashpoint. The amount of £43,624.83 that Mr Ainley borrowed from PJT Finance was repaid on 27 August 2009.

77. Immediately following completion, Mr Ainley and Mr and Mrs F entered into the pre-emption agreement for Property 4. Under this agreement, Mr Ainley granted Mr and Mrs F the right to buy the freehold interest in the whole of the property on the occurrence of a pre-emption event during a period of 10 years. A pre-emption event is defined as where Mr Ainley decides to sell the property and the purchase price is the price stated in an offer notice given by Mr Ainley at that time.

78. The Authority alleges that the applications for mortgages to fund the purchases of the properties were false and misleading in that:

> (1) they did not disclose that each property would be subject to a sale and rent back arrangement under which the seller would remain in possession as a tenant with a pre-emption right over the property and that Mr Ainley would only hold a part interest in the property;
>
> (2) apart from the Mortgage Works application which did not require a statement of income, they stated that Mr Ainley was employed and that his annual income was £98,000; and
>
> (3) apart from the Mortgage Works application which did not ask the question, they stated that Mr Ainley would fund the deposits from his own savings.

79. In relation to the first allegation, there is no dispute that the mortgage lenders were not told that, on acquisition, Mr Ainley would immediately sell a share in the properties to the sellers and let the property to them. As a result, none of the lenders were aware that they were effectively providing Mr Ainley with 100 per cent of the funding to buy around 70 per cent of the property rather than providing a 70 per cent advance to buy the whole of the property. Equally, the lenders were not aware that the properties were occupied by persons who owned a share in the properties.

80. Mr Ainley does not say that the mortgage lenders knew that the transactions were sale and rent back but maintains that he thought the purchases were buy to let and that is what the mortgage lenders were told. Property Cashpoint had identified a series of investment properties and this was stated in the promotional literature it was using to promote investment in these properties. Property Cashpoint arranged for a mortgage through The Mortgage Shop and bridging finance from PJT Finance. Mr Ainley said he thought that he was being offered an identified property with a tenant and that he was unaware, at the time, that these were sale and rent back transactions.

81. In relation to the value of the properties, there was an independent valuation in relation to each of these purchases which determined the open market value of each property which was the price in the contract. There was no suggestion that the values used were not the open market values. Mr Ainley said that mortgage lenders were not misled over the price. That was the price paid to the sellers. On behalf of Mr Ainley, it was submitted that the fact that the sellers buy back a share in the property does not decrease the value of the property or the lender's security. The lender takes a charge over the whole property at the outset which is registered and takes priority over any subsequent dealings which are entered into in relation to the property.

82. We do not accept Mr Ainley's evidence that he thought that he was purchasing buy to let properties and did not know that the sellers were also to be tenants. Mr Ainley acknowledged that he knew these were not normal buy to let purchases and that seems to have been one of the attractions. The explanatory notes provided to him made it clear that the sellers were to remain in occupation as tenants as did many of the transactional documents that he signed (the joint venture agreement and trust deed, the long term tenancy agreements, which we did not see but were told about, and the agreement for tenancy). We do not accept that Mr Ainley would not have read the explanatory notes given that he was hoping that his normal business would not be affected by his new venture and this involved acquiring seven properties worth almost £1,000,000 and taking on mortgage liabilities of almost £700,000. For the same reasons, we do not accept that Mr Ainley signed the transaction documents without being aware of what they contained. We find, on the balance of probabilities, that Mr Ainley knew that he was entering into sale and rent back transactions and that the mortgage lenders were misled when they were told that they were making loans in relation to buy to let transactions.

83. As to the allegation that Mr Ainley knowingly misstated his employment status and overstated his income in the applications to Birmingham Midshires, Mr Ainley's case is that the information on the mortgage applications was incorrect but that was because the application was completed by The Mortgage Shop incorrectly. In relation to the last application to Birmingham Midshires, which was processed by MAFM rather than The Mortgage Shop, Mr Ainley stated that his income details were merely copied across from the previous applications. Mr Ainley's case on this point is weakened by the fact that his email of 14 July 2009 suggested to The Mortgage Shop that he was employed with a total annual income of £98,000 and also that Mr Ainley does not appear to have raised any issue about the statements on the application form until after the start of the Authority's investigation. In an email dated 25 August 2010, Mr Cook of The Mortgage Shop states that The Mortgage Shop used information provided by Mr Ainley but goes onto say that "clearly, there has been some confusion". In our view, there was certainly some confusion about Mr Ainley's employment status. The email of 14 July did not state that Mr Ainley was employed and the only evidence that Mr Ainley had ever said that he was employed was from Mr Cook who seemed to be reporting what he had been told by others. We are not satisfied that Mr Ainley told The Mortgage Shop that he was employed. We are satisfied, however, that the email of 14 July did communicate and was intended to communicate to The Mortgage Shop that Mr Ainley had a gross annual income of £98,000. As we have found in relation to the mortgage application made in respect of

his own home (see [35] to [45] above), Mr Ainley's annual income was far short of £98,000.

84. Finally, we consider whether the applications to Birmingham Midshires were incorrect in stating that Mr Ainley would fund the deposits for the properties from his own savings and whether Mr Ainley knew that they were incorrect. The Authority states that Mr Ainley represented to Birmingham Midshires that the deposit, by which the Authority means the balance of the purchase price, came from his own savings whereas it was, in fact, borrowed from PJT Finance. Mr Ainley has contended that the statement in the mortgage applications was not inaccurate for several reasons.

85. First, Mr Ainley said that deposit should be understood in the sense used by conveyancers of the ten per cent of the purchase price payable no later than exchange of contracts. In the case of the properties, there was no deposit payable. For example, in relation to Property 4, the contract shows the purchase price as £160,000 but the space for "deposit" is blank. There was no separate deposit payable because exchange and completion would take place on the same day. That, however, does not explain why the mortgage application form stated that the deposit came from Mr Ainley's own savings if there was no deposit. We accept that the use of the term 'deposit' is potentially ambiguous. It seems to us unlikely that Birmingham Midshires, in the context of a loan of typically around 70% of the value of the property, would ask for details of the purchase price and then immediately follow that with a question about the source of the 10 per cent deposit payable on exchange. In the context in which it arises, we consider that the term deposit can only be taken to mean the balance of the purchase price.

86. Secondly, Mr Ainley said that The Mortgage Shop knew that the deposits were funded because he had told them so and they had said that there was no issue with that. He believed that they would have told the lender. Mr Ainley said that when MAFM processed the last application to Birmingham Midshires, they merely used the previous applications as a template without reviewing it. There was no other evidence to support Mr Ainley's statement that he had informed The Mortgage Shop about the funding arrangements for the balance of the purchase price. It was not mentioned in Mr Ainley's witness statement and was not put to Mr Cook of The Mortgage Shop by Mr Ainley's counsel when Mr Cook gave evidence earlier in the proceedings. In view of those facts, we conclude on the balance of probabilities that Mr Ainley did not inform The Mortgage Shop that the deposits would be funded by external providers.

False and misleading statements to the Authority

87. The Authority alleges that, during the investigation into the allegations dealt with above, Mr Ainley repeatedly made false and misleading statements to the Authority which he knew to be false and misleading. In our view, Mr Ainley repeatedly made false and misleading statements to the Authority and continued to do so before this Tribunal.

88. In relation to the applications for mortgages on behalf of Mr and Mrs G, Mr Ainley maintained before the Authority during the investigation and before the Tribunal that he had been misled by his clients. We have found above that Mr Ainley was aware in 2006 and even more clearly in 2009 that Mr G had serious health and financial issues.

89. In relation to the application for a mortgage for his and his wife's home, Mr Ainley has presented different explanations to the Authority at different times: that Mr Holmes at RBS was happy that the net profit, drawings and joint incomes were sufficient for the loan; that Ms Freitas had entered the figures incorrectly; that the income figures were accurate because his drawings from MAFM's bank account exceeded the profits of the business. For the reasons set out above, we do not find any of the explanations credible. In addition, Mr Ainley provided the Authority with a copy of the packaging confirmation submitted by Ms Freitas on 17 September 2007 in support of his contention that she had completed and submitted the form containing incorrect income figures. Mr Ainley initially withheld the fact that he had completed and signed the first packaging confirmation on 5 September. We have found, based on the telephone conversation with RBS on 5 October, that Mr Ainley completed and submitted the online application himself.

90. In relation to the purchase of the seven sale and rent back properties, we have found that Mr Ainley misled the mortgage lenders about the nature of the transactions and the financial arrangements. Consistent with that deception, Mr Ainley also misled the Authority. In relation to the funding of the balance of the purchase price, Mr Ainley at no point volunteered to the Authority that the balance was funded by PJT Finance.

Conclusions

91. Both parties made closing submissions in writing a few days after the hearing. In the closing submissions on behalf of Mr Ainley, counsel emphasised that Mr Ainley was a man under stress not just because of the unfamiliar experience of giving evidence in the Tribunal but also because of his medical condition. The medical condition was the subject of reports submitted by Mr Ainley. The submissions acknowledge that, at times, Mr Ainley was slow to answer questions and had "a vacant and detached countenance" but that these features should not be taken by the Tribunal as indicating evasiveness or lack of honesty. We did not hear any evidence from the doctors who had examined Mr Ainley. The medical reports were not accepted by the Authority. We accept that, in common with many who appear in the Tribunal, Mr Ainley was understandably nervous and may have found giving evidence and being questioned stressful. We have taken those factors into account and, in reaching our conclusions, have given greater weight to the contemporaneous documents and the explanations given by Mr Ainley in his witness statements than the answers given in cross-examination before us.

92. In summary, our findings in relation to each allegation are as follows.

(1) the mortgage application submitted to Northern Rock on behalf of Mr and Mrs G in September 2006, contained false and misleading information about Mr G's employment status and earnings and that Mr Ainley knew the information was false and misleading;

(2) the mortgage application completed and submitted to First Active by Mr Ainley on behalf of himself and his wife in September 2007 contained information in relation to his income which he knew to be false;

(3) the mortgage application submitted to the Halifax on behalf of Mr and Mrs G in June 2009 contained false and misleading information about Mr G's employment status and earnings and that Mr Ainley knew the information was false and misleading;

(4) when he purchased the seven properties offered to him by Property Cashpoint, Mr Ainley knew that he was entering into sale and rent back transactions and that the mortgage lenders were misled when they were told that they were making loans in relation to buy to let transactions, he knowingly overstated his income in the applications to Birmingham Midshires, and he knew that the source of the deposits was not his own savings; and

(5) Mr Ainley made false and misleading statements to the Authority.

Decision

93. For the reasons given above, we consider that Mr Ainley acted without integrity in breach of APER 1 and failed to meet the standards of fitness and propriety required by Threshold Condition 5. We consider that the right course for the Authority is to withdraw Mr Ainley's approval to carry out controlled functions in relation to MAFM, to impose a prohibition on him, preventing him from carrying out any functions in relation to any regulated activity and to cancel MAFM's Part IV permission. Accordingly, we dismiss the reference so far as it relates to the withdrawal of Mr Ainley's approval and to his prohibition as well as the cancellation of MAFM's Part IV permission.

94. The remaining question is whether the imposition of a monetary penalty was appropriate and, if so, the amount of that penalty. We consider that behaviour such as that of Mr Ainley clearly requires that a substantial financial penalty should be imposed. As stated above, the decision as to the appropriate level of penalty in this case is to be the subject of a further hearing to be listed as soon as possible after the release of this decision.

95. Subject to the question of the amount of the financial penalty, the reference is dismissed. Our decision is unanimous.

GREG SINFIELD
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 13 July 2012