PERFORMANCE OF REGULATED ACTIVITIES – Respondent's refusal to approve performance by Applicant of controlled functions – three preliminary issues – whether Respondent in breach of time limit in section 61(3) – yes – whether that made the warning notice and the decision notice void – no - whether the fact that the Respondent has appointed investigators in respect of the Applicant are grounds sufficient in themselves for a conclusion that the Applicant is not a fit and proper person – no – reference not yet determined - Financial Services and Markets Act 2000 ss 61, 133 and 168

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

DAVID THOMAS

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: DR A N BRICE (Chairman)
COLIN BISHOPP
JOHN PARSLOE

Sitting in London on 22 and 23 July 2004

Michael Blair QC for the Applicant

David Mayhew of Counsel for the Respondent

PRELIMINARY DECISION AND DIRECTIONS

The preliminary issues

1. Mr David Thomas (the Applicant) referred to the Tribunal a decision notice issued by the Respondent on 16 January 2004 which refused an application by Brook Partners Limited. The application was made under section 60 of the Financial Services and Markets Act 2000 (the 2000 Act) and applied for the Respondent's approval of the performance by the Applicant of controlled functions for Brook Partners Limited. The reason for the refusal was that the Respondent was not satisfied that the Applicant was a fit and proper person to perform those functions within the meaning of section 61(1) of the 2000 Act.

2. On 18 June 2004 there was a hearing for directions when, under the provisions of Rule 13 of the Financial Services and Markets Tribunal Rules 2001 SI 2002 No. 2476 (the Rules), the Tribunal directed that three issues be determined at a preliminary hearing. Those three issues may be summarised as:

(1) whether the Respondent was in breach of the time limit of three months in section 61(3) within which it had to determine either to grant the application of Brook Partners Limited or to give a warning notice;

(2) if the Respondent was in breach of that time limit, what consequences followed; and

(3) whether the fact that the Respondent had appointed investigators under section 168 of the 2000 Act to conduct an investigation on its behalf in respect of the Applicant meant that the Respondent could not be satisfied (within the meaning of section 61(1)) that the Applicant was a fit and proper person to perform the controlled functions.

3. The first two issues were proposed by the Applicant and the third was proposed by the Respondent. The Tribunal left it to the parties to agree the final text of the preliminary issues. That final text (as amended at the preliminary hearing) is stated below within the context of the consideration of each issue.

The legislation

4. Three main strands of legislation are relevant to a consideration of the preliminary issues, namely: the legislation relating to the approval by the Respondent of the arrangement between Brook Partners Limited and the Applicant; the legislation relating to the appointment of investigators; and the legislation relating to the jurisdiction of the Tribunal. All references in this Preliminary Decision to sections are to sections in the 2000 Act unless otherwise stated.

The approval

5. Part V of the 2000 Act (sections 56 to 71) contains the provisions relating to regulated activities. Sections 59 to 63 comprise a group of sections which contains the provisions about the approval by the Respondent of the performance by a person of a controlled function under an arrangement entered into by an authorised person.

6. Section 59 provides that an authorised person must take reasonable care to ensure that no person (called a candidate) performs a controlled function under an arrangement entered into by the authorised person in relation to the carrying on of a regulated activity unless the Respondent approves the performance by the candidate of the controlled function to which the arrangement relates. Section 60 provides that an application for the Respondent's approval under section 59 may be made by the authorised person concerned. The relevant parts of section 61 provide:

> **"61(1) The Authority may grant an application made under section 60 only if it is satisfied that the person in respect of whom the application is made ("the candidate") is a fit and proper person to perform the functions to which the application relates.** ...
>
> **"61(3) The Authority must, before the end of the period of three months beginning with the date on which it receives an application under section 60 ("the period for consideration") determine whether-**
>
> **(a) to grant the application; or**
>
> **(b) to give a warning notice under section 62(2)".**

7. Section 62(2) provides that, if the Respondent proposes to refuse an application, it must give a warning notice to the interested parties (in this reference Brook Partners Limited and the Applicant). Section 62(3) provides that, if the Respondent decides to refuse an application, it must give a decision notice to the interested parties and section 62(4) provides that, if the Respondent decides to refuse an application, each of the interested parties may refer the matter to the Tribunal. Section 63 provides that the Respondent may withdraw an approval if it considers that the candidate in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates. Section 63 also contains provisions similar to those in section 62 about the giving of a warning notice, the giving of a decision notice and a reference to the Tribunal.

The appointment of investigators

8. The provisions about the appointment of persons to carry out investigations in particular cases are found in section 168. Subsections (3) and (5) provide that the Respondent may appoint one or more competent persons to conduct an investigation on its behalf. However, before such an appointment can be made, one of a number of conditions must be satisfied. The conditions relevant in this reference are: if it appears to the Respondent that there are circumstances suggesting that an offence under section 397 (misleading statements and practices) may have been committed (section 168(2)(a)); if it appears to the Respondent that there are circumstances suggesting that market abuse may have taken place (section 168(2)(d)); and if it appears to the Respondent that there are circumstances suggesting that an individual might not be a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person (section 168(4)(d)).

The jurisdiction of the Tribunal

9. The provisions relating to the jurisdiction of the Tribunal are found in Part IX (sections 132 to 137) and Schedule 13 of the 2000 Act. Section 132 establishes the Tribunal and section 132(2) provides that the Tribunal is to have the functions conferred on it by or under the Act. The relevant parts of section 133 provide:

"133(3) On a reference the Tribunal may consider any evidence relating to the subject-matter of the reference whether or not it was available to the Authority at the material time.

(4) On a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it.

(5) On determining a reference, the Tribunal must remit the matter to the Authority with such directions, if any, as the Tribunal considers appropriate for giving effect to its determination.

(6) In determining a reference made as a result of a decision notice, the Tribunal may not direct the Authority to take action which the Authority would not, as a result of section 388(2), have had power to take when giving the decision notice. ...

(8) The Tribunal may, on determining a reference, make recommendations as to the Authority's regulating provisions or its procedures."

10. Section 388(2) provides that, if a decision notice is preceded by a warning notice, the action to which the decision notice relates must be action under the same Part of the 2000 Act as the action proposed in the warning notice. Thus section 133(6) means that, when determining a reference made as a result of a decision notice, the Tribunal may not direct the Respondent to take action which is not contained in the same Part of the 2000 Act as the action mentioned in the warning notice. In this reference the warning notice was made under Part V which concerns the performance of regulated activities.

The evidence

11. A bundle of documents was produced by the parties. A witness statement by Mr Terence John Saunders, who is employed by the Respondent as a Manager within the Regulatory Transactions Division, was included in the bundle of documents. Mr Saunders' evidence related to preliminary issue (1). Mr Saunders did not give oral evidence at the hearing.

The facts

12. We find the following facts, based on the documentary evidence before us, for the purposes of this preliminary decision only.

The Applicant

13. The Applicant has had a career in the financial services industry for over thirty years. We were informed that, during that time, no complaint was made against him, and he had no problem with the Respondent or with any other regulatory body, until the events mentioned in this Preliminary Decision.

14. From 1996 the Applicant was an investment analyst, and was Head of the Investment Trust Corporate Finance Department, in the London Office of Brewin Dolphin Securities Limited (Brewin). Brewin acts as a corporate broker and was active within the split capital investment trust (splits) sector between 1998 and 2001. At that time the Applicant was approved by the Respondent to perform the controlled functions of investment adviser and corporate finance adviser as a consultant under a contract of

services with Brewin. He was part of a small corporate broking team dedicated to investment trust work.

15. While he was working for Brewin the Applicant was concerned with the modelling, promotion and marketing of a number of splits and with the re-structuring of other splits. He dealt with various investment corporations and managers but not with members of the public nor with Brewin's individual clients.

The investigations

16. In February 2002 the Respondent announced that it was making enquiries into various aspects of the market for splits. In May 2002 the Respondent published a report on those enquiries stating that it planned to investigate: the activities of those producing and distributing marketing materials; specific cases relating to alleged collusive behaviour within or between managers of splits; and possible mis-selling by advisers. In October 2002 and January 2003 the Respondent appointed investigators under section 168 to investigate the activities of fund managers and other firms who were active within the splits sector between 1998 and 2001.

17. In January 2003 Brewin ceased carrying out in London the type of investment trust work carried on by the Applicant. The Applicant therefore agreed with Brewin that he would no longer carry on the controlled functions. Instead, on 16 January 2003, he took up a part-time, paid, consultancy role with Brewin to assist in resolving issues relating to the historic investment trust business. Thereafter he was no longer required to be approved to perform controlled functions for Brewin.

18. As a result of the investigations which had been commenced in October 2002 and January 2003, the Respondent became concerned that the practices adopted in connection with the launch of splits, or the re-structuring of splits, may have involved offences relating to misleading statements or practices under section 47 of the Financial Services Act 1986 (the 1986 Act) (before 1 December 2001) or under section 397 of the 2000 Act (from 1 December 2001); or may have involved market abuse within the meaning of section 118; or may have involved contravention of the Statements of Principle and/or Conduct of Business Rules applicable at the relevant time.

19. Accordingly, in late June 2003 the Respondent appointed investigators to review the activities of additional firms and to review the conduct of specific individuals who had been employed by the firms under investigation. On 27 June 2003 investigators were appointed in respect of the Applicant. In total, investigators have been appointed to conduct investigations on the Respondent's behalf in respect of twenty-one firms, including Brewin, and thirty individuals, including the Applicant.

20. Investigators were appointed in respect of the Applicant because it appeared to the Respondent that the Applicant, by virtue of his role at Brewin and/or his involvement with the splits sector, was knowledgeable of and/or was involved with the practices surrounding the launch of new splits or the restructuring of existing splits. The reasons for the appointment were stated to be that there were circumstances suggesting that an offence relating to misleading statements or practices under section 47 of the 1986 Act (before 1 December 2001) and under section 397 of the 2000 Act (from 1 December 2001) may have been committed by the Applicant; it appeared that there were circumstances suggesting that market abuse may have taken place; and there were

circumstances suggesting that the Applicant might not be a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.

21. The concerns about the activities of the Applicant included questions as to whether a group of individuals agreed, expressly or impliedly, to support the sector by supporting the re-structuring of certain troubled funds; whether the lack of transparency surrounding these practices potentially produced a false and misleading impression of the performance of the splits sector and/or particular splits at a time when investment decisions were being made; and whether the Applicant had knowledge of, and participated in, these activities and through his actions contributed to the false and misleading impression concerning the performance of splits.

The application for approval

22. On 30 June 2003 Brook Partners Limited made an application for the Respondent's approval, under section 59, in respect of the performance by the Applicant of the controlled functions of investment adviser and corporate finance adviser under a contract for services. The intention was that the Applicant would work for Brook Partners Limited in the design of new investment trusts, in the conversion of old structures in the field of investment trusts, and in the promotion of investment trusts to institutional investors. The Applicant was not intended to have any contact with private or intermediate customers. We were informed that, if this reference is determined in favour of the Applicant, the offer of a contract for services by Brook Partners Limited will still be available to be taken up by the Applicant.

23. The application was received by the Respondent on 3 July 2003. On 31 October 2003 the Respondent issued a warning notice indicating that it was minded to refuse the application. Thereafter the Applicant made written representations to the Respondent. On 10 January 2004 the Respondent issued a decision notice refusing the application because it was not satisfied that the Applicant was a fit and proper person to perform the functions to which the application related within the meaning of section 61(1) of the 2000 Act. It is that decision notice which is the subject of this reference.

24. In reaching its decision the Respondent applied the criteria set out in Chapter 2 of the Respondent's Handbook at section 2.1 which states that, in determining a persons's honesty, integrity and reputation, the Respondent will have regard to a number of factors including: whether the person has been the subject of, or interviewed in the course of, any existing or previous investigation or disciplinary proceedings either by the Respondent or other named bodies; and whether the person has been notified of any potential proceedings of a disciplinary or criminal nature or of any investigation which might lead to those proceedings. Thus in reaching its decision the Respondent had regard to the fact that the Applicant was subject to an investigation which might lead to proceedings of a disciplinary or criminal nature or for market abuse.

25. In July 2004 the investigators interviewed the Applicant.

26. The Applicant is anxious to resume his career as a corporate finance specialist with particular experience in the investment trust sector. It is now over a year since Brook Partners Limited applied for approval and the Applicant has been unable to pursue his chosen career during that time. There was no evidence before us as to the progress of the investigations.

27. We now consider separately each of the issues for determination at this preliminary hearing.

Issue (1) - Time limits

28. The first issue was proposed by the Applicant and is whether the Respondent was in breach of the time limit within which it had to determine either to grant the application of Brook Partners Limited or to give a warning notice. The agreed text of the first issue was:

> "On the facts in this case as established by the evidence was the Authority in breach of the three months' (but extendable) time limit imposed on the Authority within which it must make a determination under section 61(3) of [the 2000 Act]."

29. The application made by Brook Partners Limited was received by the Respondent on 3 July 2003 and so the Respondent should have determined what to do by 3 October 2003. The warning notice was not given until 31 October 2003.

The arguments

30. Initially the Respondent sought to rely on the provisions of section 61(4). Section 61(4) provides that if the Respondent imposes a requirement under section 60(3) (requiring an applicant to present or verify information) then the period for consideration stops running on the day on which the requirement is imposed and starts running again on the day on which the required information is received. Specifically, the Respondent relied on the fact that it had made two requests for information which, it initially argued, had stopped the period for consideration from running. However, at the preliminary hearing Mr Mayhew for the Respondent accepted that the language of the requests was not effective to extend the time limit in section 61(3) and so he also accepted that the warning notice had not been given in time.

Conclusion

31. In the light of that admission we conclude that the Respondent was in breach of the time limit within which it had to determine either to grant the application of Brook Partners Limited or to give a warning notice.

Issue (2) - Consequences of breach of time limit

32. The second issue was also proposed by the Applicant and is, if the Respondent was in breach of the time limit, what consequences followed. The agreed text of the second issue was:

> "What, as a matter of law, are the consequences of a breach by the Authority of the time limit referred to in issue (1), so far as relevant to the jurisdiction and powers of the Tribunal?"

The arguments summarised

33. For the Applicant Mr Blair QC argued that section 61(3) contained the word "must" and so was mandatory in form. Parliament must have intended that there should be some legal consequences in the event of a breach of the time limit. A possible construction of section 61(3) was that if, in the stated time limit, the Respondent did not determine to give a warning notice then it must be taken to have granted the application. He invited the Tribunal to conclude that the failure to observe the time limit meant that the warning notice and the decision notice were void and to determine under section 133(4) that the appropriate action for the Respondent to take was to allow the Applicant to commence work as an approved person.

34. For the Respondent Mr Mayhew argued that the breach of the time limit did not render the warning notice and the decision notice void. If that had been the intention of Parliament then it would have been spelt out in the legislation. However, even if the warning notice and decision notice were void, that would still not make the Respondent satisfied that the Applicant was a fit and proper person within the meaning of section 61(1) and so he still could not be approved.

Reasons for decision

35. In considering the arguments of the parties we have first considered the framework of the 2000 Act to see if we can identify the intention of Parliament from its provisions. We then turn to consider the authorities cited to us to see what principles they establish. A consideration of the legislation and of the authorities will enable us to reach a view about the legal consequences of the breach of the time limit. We will then consider the jurisdiction and powers of the Tribunal in the light of the view we have reached.

36. In considering the framework of the 2000 Act, we have borne in mind that each provision has to be considered within the context of the Part of the Act in which it is found. We start with the specific provisions relating to the approval the subject of this reference . These provisions are found in Part V (sections 56 to 71) which covers the performance of regulated activities. Sections 59 to 63 are a group of sections in Part V which deal with the approval by the Respondent of the performance by persons of controlled functions under an arrangement with an authorised person. Section 61(1) provides that an application for approval can be granted *only* if the Respondent is satisfied that the Applicant was a fit and proper person to perform the functions to which the application relates. We find this provision significant because it points to the conclusion that it is unlikely that Parliament intended an approval to be given, as it were, by default.

37. There are other provisions in the Act which contain time limits and which do not state the consequences of a failure to comply with them. One example is section 52 falling within Part IV which deals with permission to carry on regulated activities. Section 52 contains the provisions about the determination of applications and section 52(1) provides that an application must be determined within six months. Like section 61(3), section 52 does not state the consequences of a failure to observe this time limit.

38. On the other hand there are also provisions in the Act which do state the consequences of a failure to comply with a time limit. One example is found in sections 183(1) and 184(2). These sections appear in Part XII (sections 178 to 192) of the Act (control over authorised persons). Section 178 imposes an obligation to notify the

Respondent if a person proposes to acquire control over an authorised person (called a notice of control). Section 183(1) provides that the Respondent must, before the end of a period of three months beginning with the date on which it receives a notice of control, determine whether to approve of the person concerned having the control to which the notice relates or to serve a warning notice. Section 184(2) provides that if the Respondent fails to comply with section 183(1) it is to be treated as having given its approval at the end of the period fixed by section 183(1). The fact that section 184(2) treats approval as given where the time limit is breached is an indication that, by not including such a provision in section 61(3), Parliament did not intend the breach of the time limit in section 61(3) to result in the Respondent being treated as having given its approval.

39. Mr Blair QC for the Applicant sought to distinguish section 184(2) from section 61(3) on four grounds. First, he said, section 184 dealt with an outsider notifying the Respondent whereas section 60 dealt with an application for approval by the Respondent as regulator. Secondly, the provisions in section 184 gave rise to criminal offences but those in section 61 were civil matters. Thirdly, there were three possible outcomes to an notification under section 182 (to approve, or to serve a warning notice, or to do nothing) and only two possible outcomes under section 60 (to approve or to serve a warning notice). Fourthly, section 184 dealt with a proposal to acquire shares but section 60 with a proposal to enter into a contract.

40. We accept that there are these differences but in our view they do not explain why Parliament decided to provide a default outcome in section 184(2) but not in section 61(3). Parliament may have deliberately failed to provide in section 61(3) for an automatic approval after three months because that would not have conformed with the whole purpose of section 61 which was to ensure that approval would be given *only* if the Respondent were satisfied that the candidate was fit and proper.

41. Another example of a provision which states the consequences of a failure to comply with a time limit is found in section 270. This section appears in Part XVII (collective investment schemes), Chapter V (recognised overseas schemes). Section 270 applies to schemes authorised in designated countries or territories and section 270(1) provides that a collective investment scheme is a recognised scheme if four conditions are satisfied. The third condition is that the operator of the scheme has given written notice to the Respondent that he wishes it to be recognised. The fourth condition is that either the Respondent has given its approval or two months have expired without the operator receiving a warning notice from the Respondent. In our view, however, the provisions of section 270 are not sufficiently similar to those of section 61 to assist us in reaching a view about section 61.

42. There is yet a third provision which describes the consequence of a failure to follow procedures and that is found in section 395 which appears in Part XXVI (sections 387 to 396). Part XXVI contains the provisions about notices. Section 395 contains provisions about the Respondent's procedures and section 395(11) provides that the Respondent's failure in a particular case to follow its procedure as set out in the latest public statement does not affect the validity of a notice given in that case. In our view, however, this provision is not sufficiently similar to a statutory time limit provision to assist us in reaching a view about the consequences of a failure to comply with the time limit in section 61(3).

43. Our review of the framework of the 2000 Act reveals that there are some time limits where the consequences of a failure to comply are not stated and some where they are. The review indicates to us that, where Parliament intended the failure to comply with a time limit to lead to automatic approval, that was specifically stated. However, none of the provisions is exactly similar to what seems to be the unique wording of section 61(1). Accordingly, we remain of the view that the wording of section 61(1), and the lack of a specific provision, points to the conclusion that it is unlikely that Parliament intended that a failure to comply with the time limits in section 61(3) would lead to approval by default.

44. Before concluding our review of the legislation we record that we were referred to the proceedings of Standing Committee A in the House of Commons on 26 October 1999 when the Bill which became the 2000 Act was being debated. During that debate it was pointed out that, although what became section 61(3) gave the Respondent three months to decide what to do, the clause did not say what happened if the Respondent gave neither approval nor refusal at the end of that three month period. An amendment was, therefore, moved which provided that, if the Respondent had said nothing at the end of the three months, approval would be deemed to have been received. A reference was made to what is now sections 182 to 184 of the 2000 Act and especially to section 184(2) (which provides that if the Respondent failed within three months to determine whether to approve a person or serve a warning notice it was to be treated as having given its approval). The amendment was withdrawn on the basis that a Government view would be offered at Report stage of the Bill; it was stated that there was a need to ensure that any amendment did not create opportunities for abuse and that any proposals were broadly consistent with the rest of the Bill. In fact, no Government view was given and no further amendment was brought forward at Report stage.

45. We are of the view that we can draw no conclusion either way from that debate.

46. Having considered the scheme of the legislation we now turn to consider the authorities cited to us to see what principles they establish. This appears to be a developing area of law with the earlier authorities adopting a more inflexible approach which is then modified and developed in later authorities.

47. The more inflexible approach was adopted in *Petch v Gurney* [1994] 3 ALL ER 731 where a taxpayer failed to transmit his case to the High Court within the period of thirty days specified in the relevant legislation. The High Court found that the time limit was mandatory and struck out the taxpayer's case because of his failure to comply with the time limit. The Court of Appeal dismissed the taxpayer's appeal on the ground that the statutory requirement could not be dispensed with as it was the means by which the taxpayer invoked the jurisdiction of the court. *Petch v Gurney* was followed in *R v Weir* [2001] 2 All ER 216 where the Director of Public Prosecutions lodged an appeal from the Court of Appeal to the House of Lords but it was one day late. The House of Lords held that it had no power to extend the time for an application by the prosecution for leave to appeal. Where a time limit was laid down and no power was given to extend it the ordinary rule was that the time limit should be strictly observed.

48. A somewhat more flexible approach was adopted in the next authority to which we were referred, namely *Bennion on Statutory Interpretation* Fourth Edition (2002) at pages 32 to 39. *Bennion* considers the situation where a statute imposes a requirement which is not complied with and where the intended consequence of the failure to comply

is not prescribed by the legislation. It is stated that in such a case it is necessary to determine whether the requirement was intended by the legislature to be mandatory or merely directory. If the former the failure to comply renders the act invalid; if the latter the failure to comply will not invalidate the act and the law will be applied as nearly as may be as if the requirement had been complied with. In enforcing a statute the court needs to decide what consequence Parliament intended should follow from a breach of a requirement. The court should consider the broad policy of the Act and the principle of fairness to the subject. Policy should not be frustrated by a mere procedural irregularity but on the other hand the subject should not be prejudiced by the neglect of a safeguard inserted for his protection.

49. Applying those principles to the facts of the present reference we have already reached the view that it is unlikely that Parliament intended that a breach of the time limit in section 61(3) should result in an automatic approval bearing in mind the broad policy of the 2000 Act and of section 61(1) in particular. To hold that a breach of the time limit should result in automatic approval would be to frustrate the policy of the Act, and of section 61(1), by a procedural irregularity.

50. Meanwhile another line of authority was developing which began with *Wang v Commissioner of Inland Revenue* [1994] STC 753. In that appeal the issue was whether the Hong Kong Commissioner of Inland Revenue had made assessments "within a reasonable time". The Privy Council held that he had but also held that, even if he had not, that would not have deprived him of jurisdiction or made his determination null and void. In his Opinion Lord Slynn stated:

> "Having reviewed the authorities ... their Lordships consider that when a question like the present one arises - an alleged failure to comply with a time provision - it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void."

51. Our answer to those two questions in this reference is that the legislature did intend the Respondent to make a determination under section 61(3) within three months. Adapting the words of Lord Slynn, at the same time it is no less plain that the legislation imposes on the Respondent the duty of determining applications made under section 60 in the light of the provisions of section 61(1). If the Respondent fails to give a determination within three months it could be compelled to act through judicial review. It does not follow that the jurisdiction to make a determination lapses. From this it would follow that the warning notice and decision notice were validly given.

52. The principle in *Wang* was also adopted by the Privy Council in June 2002 in *Charles v Judicial and Legal Service Commission* [2002] UKPC 34, an appeal from the Court of Appeal of Trinidad and Tobago which concerned the effect of failures to observe time limits laid down in regulations dealing with discipline and misconduct in public service. At paragraphs 16 and 17 of its Opinion the Privy Council stated that a decision on what should be the legal consequences of non-compliance with a statutory provision was seldom black and white. There was a spectrum of possibilities at one end of which would be cases where a fundamental obligation had been outrageously and

flagrantly ignored and at the other end of which would be cases where the procedural defect was so nugatory or trivial that the courts would not interfere. Most cases would fall somewhere in the middle and would be for the courts to assess. Problems arising from breach of time limits were not generally susceptible of rigid classification or black and white *a priori* rules. Relevant factors were: whether the delays were in good faith; whether they were lengthy; whether they were entirely understandable; whether the appellant suffered material prejudice; whether any fair trial considerations were raised; and whether fundamental human rights were in issue.

53. Our views on those factors are that there was no evidence in this reference that the delays were not in good faith; they were for less than a month; the Applicant has suffered no material prejudice by that short delay as he still had time to send written submissions to the Respondent after he received the warning notice and before the decision notice was given; no fair trial considerations are raised because the Tribunal will consider the decision notice which has been referred to it; and, in our view, apart from the delay, no other fundamental human rights are in issue.

54. The Opinion and approach of Lord Slynn in *Wang* was also followed by Lord Bingham in the House of Lords in July 2002 in *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32. At paragraph [13] Lord Bingham stated that the old dichotomy between mandatory and directory provisions was not a helpful analytical tool.

55. Thus these most recent authorities adopt the more flexible approach developed in *Wang* rather than the more inflexible approach of *Petch v Gurney* and *R v Weir*. We therefore adopt the more flexible approach and conclude that the breach of a time limit by itself is not conclusive of the consequences. All relevant factors should be considered and, in this reference, these point to the conclusion that the breach of the time limit by the Respondent should not render the warning notice and the decision notice void.

56. We have also been assisted by the judgment in *Melton Medes Limited v Securities and Investments Board* [1995] 2 WLR 247 where the issue was whether a breach of a statutory requirement to obtain consent to the disclosure of restricted information created a private law right to require that no disclosure be made without consent and a right of action if there were disclosure without consent. The relevant section left open the question whether a right of action was intended to be conferred. At 254F Lightman J said:

> "The task of divining the legislature's intent when not expressly stated often requires sensitive antennae. But the authorities have suggested certain guidelines which may be of assistance. Indications of the conferment of a private right include the absence of any remedy by way of penalty or otherwise in case of breach and the special character of the legislation e.g where it is designed to afford protection to those exposed to risk of personal injury. Contra-indications include the statutory provision of a criminal sanction for breach, the requirement in performance of the duty for the exercise of a subjective judgment or the balancing of competing interests and, in particular the public interest, and the indeterminate or indeterminable nature of the class of individuals on which any such right would be conferred."

57. Applying those principles to the facts of the present reference we first consider whether there is any other remedy for the failure to comply with the time limit; we then look at the special character of the legislation; and finally we consider whether the performance of its duty by the Respondent requires the exercise of a subjective judgment or the balancing of competing interests, in particular the public interest.

58. Dealing first with other remedies the parties suggested that one possible remedy would be for a person interested in the outcome of an application to apply to the Administrative Court for judicial review seeking an order requiring the Respondent to determine the matter. However, for the Appellant Mr Blair argued that such a conclusion would be hard to reconcile with the principle at paragraph 31 of the judgment in *Regina (Davies and Others) v Financial Services Authority* [2003] EWCA Civ 1128; [2004] 1 WLR 185.

59. *Davies* concerned a warning notice under section 57 of the 2000 Act in which the Respondent warned individuals that it proposed to make orders prohibiting them from performing certain functions relating to regulated activities on the ground that they were not fit and proper persons to perform those functions. Section 57 contains provisions similar to those in section 62 about the giving of a warning notice and then a decision notice followed by a reference to the Tribunal. The purpose of the warning notice is to permit an interested person to make representations to the Respondent before the decision notice is given. At paragraph 31 of his judgment Mummery LJ said:

> "The legislative purpose evident from the detailed statutory scheme was that those aggrieved by the decisions and actions of the authority should have recourse to the special procedures and to the specialist tribunal rather than to the general jurisdiction of the Administrative Court. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the authority which are amenable to the procedures for making representations to the authority, for referring matters to the tribunal and for appealing direct from the tribunal to the Court of Appeal."

60. Accordingly the principle is that an interested person should not apply for judicial review of a warning notice but should make representations to the Authority and, if he then disagrees with the resultant decision notice, refer the matter to the Tribunal. That principle cannot apply to the present issue because a failure by the Respondent to determine an application in time (or at all) does not give rise to an action or decision which is amenable to reference to the Tribunal. For that reason we are of the view that one possible remedy for failure to comply with the time limits in section 61(3) would be an application for judicial review.

61. Another possible remedy suggested by Mr Mayhew would be for an interested party to make a complaint under the procedure established pursuant to paragraph 7 of Schedule 1 of the 2000 Act with the possibility of an award of compensation on an *ex gratia* basis. A third possible remedy, suggested by Mr Blair, could be a claim for damages for breach of statutory duty. It would also be possible for the Tribunal, under section 133(8), to make recommendations that the Respondent should amend its procedures to ensure that breaches of time limits did not occur in the future, although this would not, of course, provide a direct remedy for a particular applicant.

62. We therefore conclude that there are other remedies for a failure to comply with time limits. Turning to the other principles established in *Melton Medes*, we have already considered the special characteristics of the legislation and we repeat that we regard as significant that section 61(1) provides that the Respondent may grant approval only if it is satisfied that the person in respect of whom the application is made is fit and proper. Finally, the performance of the duty of approval requires the exercise of a subjective judgment by the Respondent which "must be satisfied" and also requires the balancing of competing interests, that is, the Applicant's rights against, in particular, the public interest in accordance with the statutory objective of the protection of consumers as set out in section 5. All these considerations also point to the conclusion that it was not the intention of Parliament to provide that a failure to comply with the time limit in section 61(3) would result in an automatic approval.

63. Having considered the legislation and the authorities we conclude that, as a matter of law, the consequences of a breach by the Respondent of the time limit in section 61(3) does not render the warning notice and the decision notice void. We now go on to consider whether the breach should have other consequences, bearing in mind the jurisdiction and powers of the Tribunal.

64. For the Applicant Mr Blair argued that section 133(4) gave the Tribunal jurisdiction to determine the "appropriate action" for the Respondent to take in relation to "the matter" (which is not synonymous with the decision notice) referred to it. The Tribunal could direct the Respondent to approve the application of Brook Partners Limited. If the Respondent then considered it necessary for the protection of the public it could withdraw the approval under section 63 or impose a requirement of supervision under section 43. The other individuals under investigation were still approved persons and there was no good reason why the Applicant should not be approved also. Mr Blair also suggested that the Tribunal could direct the Respondent to give an interim approval pending the outcome of the investigations although he accepted that there was no statutory provision for the granting of an interim approval.

65. For the Respondent Mr Mayhew argued that the Respondent had no power under the Act to grant a conditional or interim approval. Although it had power under section 63 to withdraw an approval it would then have to discharge the burden of proving that the candidate was not a fit and proper person and that would be difficult in this reference because the outcome of the investigations was unknown.

66. In considering the suggestions made by the Applicant we bear in mind that we have already decided that there is a valid decision notice which has been referred to the Tribunal and which must therefore be heard on its merits. That means that at this preliminary hearing we are not determining the reference. Accordingly, the powers given to the Tribunal by sections 133(5) and (8) do not yet apply. That means that we cannot at this stage make any directions to the Respondent. Even if we could, we would not at this stage direct the Respondent to approve the application of Brook Partners Limited. It is the intention of section 61(1) that approval should only be given if the Respondent (or the Tribunal) is satisfied that the candidate is fit and proper. The Respondent has said that it is not satisfied and at this stage the Tribunal has received insufficient evidence to enable it to form a view either way. For the same reason we would not direct the Respondent to give a conditional or interim approval. In any event we have very considerable doubts as to whether we could direct the Respondent to take action which it has no statutory power to take.

Conclusion

67. Our conclusion on the second issue is that, as a matter of law, the consequences of a breach by the Respondent of the time limit in section 61(3) is that such breach does not render the warning notice or the decision notice void. There is therefore a valid decision notice which has been referred to the Tribunal and which must be heard on its merits as soon as possible. Other remedies for the breach of the time limit are available for the Applicant but not before the Tribunal. Our conclusion means that the breach of the time limit does not determine the reference and we must go on to consider the other issues, including preliminary issue (3). (This conclusion is based on the circumstances of the case and would not necessarily apply in other circumstances.)

68. Section 133(8) provides that, on determining a reference, the Tribunal may make recommendations as to the Respondent's procedures. As we are not yet determining the reference we do not make any recommendations. However, when we do determine the reference we have in mind to make recommendations that the Respondent should review its procedures for dealing with applications under section 60 and with other applications where the Act provides that the Respondent must make a determination within a stated time limit. The purpose of such review would be to ensure that such determinations are made in the time required by the legislation.

Issue (3) - Did the investigation mean that the Respondent had to conclude that the Applicant was not fit and proper?

69. The third preliminary issue was proposed by the Respondent. In summary it asks whether the fact that the Applicant was subject to investigation meant, without more, that the Respondent could not be satisfied that the Applicant was a fit and proper person to perform the controlled functions. The agreed text of this issue, as amended at the hearing, was:

> "On the assumptions (a) that the firm has discharged its legal burden of establishing that *prima facie* the Applicant is a fit and proper person; (b) that the Respondent has reasonable grounds for considering that the Applicant may have been guilty of misconduct such that he may not be a fit and proper person to perform controlled functions in relation to a regulated activity carried out by an authorised person; and (c) that therefore the Respondent has reasonable grounds for continuing to conduct an investigation into the relevant circumstances pursuant to section 168 of the 2000 Act:
>
> > (i) are such grounds sufficient in themselves for the Tribunal to conclude that it is not satisfied pursuant to section 61 of the 2000 Act that the Applicant is a fit and proper person to perform the functions to which the application for approval relates?
> >
> > (ii) if the answer to (i) is yes, is the Tribunal required by the 2000 Act to direct the Respondent to refuse the application?
> >
> > (iii) if the answer to (i) is no, is the Respondent required, before the application can be determined by the Tribunal, to establish whether in

fact the Applicant has been guilty of misconduct or to establish or rebut some other, and if so what, facts and matters?

(iv) if the answer to (i) is no, but the Respondent is not required to prove misconduct before the Tribunal makes a determination under section 61(3), is it lawful for the Tribunal to direct the Respondent to approve the application pending the outcome of the investigation, or for some other, and if so, what, period on the basis that, subject to that outcome, it is satisfied that the Applicant is a fit and proper person to perform the relevant functions?"

70. In considering this issue we have found it convenient to consider separately each of the sub-issues.

(i) Are the grounds stated in the assumptions sufficient in themselves?

71. The first sub-issue is whether the assumptions (that the Respondent has reasonable grounds for considering that the Applicant may have been guilty of misconduct and for continuing to conduct an investigation under section 168) are sufficient in themselves for the Respondent (or the Tribunal) to conclude that it is not satisfied that the Applicant is a fit and proper person to perform the functions to which the application relates.

The arguments

72. For the Respondent Mr Mayhew argued that it was critical for this issue to bear in mind the provisions of section 61(1) which provided that approval could be granted *only* if the Respondent were satisfied that the Applicant was a fit and proper person. Pending the outcome of the investigation the Respondent was not yet satisfied, nor could it be, that the Applicant was a fit and proper person. Mr Mayhew relied upon the provisions of section 168 and argued that the Respondent must have had reasonable grounds for concluding that the circumstances mentioned in that section existed. When the investigators had concluded their investigation the Respondent would take a decision and, if appropriate, serve a warning notice followed by a decision notice which could then be followed by a reference to the Tribunal and a full hearing of the evidence.

73. For the Applicant Mr Blair QC did not agree with the assumptions of issue (3) which, he argued, were hypothetical and would have to be proved. (Mr Mayhew accepted that that would be necessary.) Next he argued that the Respondent was obliged to take a decision and could not say that it had not yet made up its mind. The decision must be a proper decision capable of being considered by the Tribunal. Mr Blair relied upon Article 6 of the Convention in the Schedule to the Human Rights Act 1998 (the Human Rights Convention).

Reasons for decision

74. In considering the arguments of the parties we start from the fact that we have already decided that the decision notice of 16 January 2004 is a valid decision notice which has been referred to the Tribunal. The decision notice refused the application by Brook Partners Limited for approval of the performance by the Applicant of controlled functions and the reason for the refusal was that the Respondent was not satisfied, within

the meaning of section 61(1), that the Applicant was a fit and proper person to perform those functions. The Tribunal now has to determine that reference. The fact that other decision notices may be issued in the future is not relevant to the determination of this reference. In this reference the Respondent made up its mind in January 2004 that it was not satisfied that the Applicant was fit and proper and the Tribunal must determine the reference of that decision.

75. In determining the reference the Tribunal will need to consider what evidence the Respondent had which led it to decide that it was not satisfied that the Applicant was fit and proper and, under section 133(3), any other evidence relating to the subject-matter of the reference whether or not available to the Respondent at the time it made its decision. The Tribunal will make no assumptions and we agree with both counsel that the assumptions on which the issue is based are hypothetical and will have to be proved. The decision of the Tribunal will be made in the light of all the evidence and argument before it.

76. The sub-issue under consideration asks if the mere fact that investigators have been properly appointed under section 168 means that the Respondent must conclude that it is not satisfied that the Applicant is fit and proper. The conditions in section 168 which are relevant to the Applicant are: that it appeared to the Respondent that there were circumstances suggesting that an offence under section 397 (misleading statements and practices) may have been committed; that it appeared to the Respondent that there were circumstances suggesting that market abuse may have taken place; and that it appeared to the Respondent that there were circumstances suggesting that the Applicant might not be a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.

77. In our view, although these matters may be relevant factors for consideration in deciding whether or not the Respondent was satisfied that the Applicant was fit and proper, they cannot be conclusive, or in the words of the sub-issue, sufficient in themselves. Circumstances may suggest something but such circumstances need not in every case necessarily lead to the conclusion that a decision-maker cannot be satisfied that a person is not fit and proper. All other relevant factors must be taken into account and each case must be decided on its own merits. Having said that it is possible that the circumstances which gave rise to the appointment of the investigators in this case will in fact be sufficient to cause the Tribunal not to be satisfied that the Applicant is fit and proper but the Tribunal could not take any view about that until it has evidence (and not mere assertions) about the nature of those circumstances.

78. In this connection we have referred to the criteria set out in Chapter 2 of the Respondent's Handbook at section 2.1. (which criteria are summarised at paragraph 24 of this Preliminary Decision). That section states that, in determining a person's honesty, integrity and reputation, the Respondent will have regard to a number of factors including whether a person has been subject to an investigation. We support that approach in as much as it leads to the consideration of a number of factors, no one of which is conclusive.

79. We have reached our views relying solely on the statutory provisions in the 2000 Act. However, we are confirmed in our views by the contents of Article 6 of the Human Rights Convention which provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

80. The decision notice of 16 January 2004 affects the civil rights of both Brook Partners Limited and the Applicant each of which, therefore, is entitled to a hearing about that decision notice within a reasonable time by the Tribunal. The Tribunal is independent and impartial, has full jurisdiction, and will reach its own view as to whether it is satisfied that the Applicant is fit and proper.

81. We heard argument from the parties about what was the civil right which would be determined by the Tribunal. Mr Blair for the Applicant argued that the Applicant had the civil right to perform his contract for services with Brook Partners Limited and the civil right to engage in commercial activity. He cited *Lester and Pannick on Human Rights Law and Practice* Second Edition pages 203 to 211 with specific reference to the text dealing with *Konig v Germany* (1978) 2 EHRR 170, ECt HR; *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, ECT HR; and *Tre Traktorer Aktiebolag v Sweden* (1989) 13 EHRR 309, ECt HR. For the Respondent Mr Mayhew argued that the relevant civil right was that of Brook Partners Limited to apply for approval and, as the Applicant was affected by that application, the Applicant was also given a right to refer the matter to the Tribunal. In any event the right to work or to perform a contract of services was not engaged under section 59 although it could be under section 63 (withdrawal). The Applicant's right to work was not affected by section 59 because he could do anything which was not a controlled function.

82. *Lester and Pannick* at page 207, paragraph 4.6.6, states that Article 6 covers all proceedings, including those between the individual and the state, the result of which is decisive for civil rights and obligations. *Le Compte* decided that Article 6 applied to proceedings before a medical disciplinary tribunal which had suspended the applicant doctors, because those proceedings were directly decisive of the applicants' private law right to practise medicine. At paragraph 4.6.10 *Lester and Pannick* states that initially the European Court of Human Rights identified individual rights of a general kind as civil rights attracting the protection of Article 6 where state action was directly decisive of them. Such rights included the right to engage in commercial activity (so that the withdrawal of an alcohol licence from a restaurant (*Tre Tractorer*) or the refusal of a licence to operate a liquid petroleum gas installation were within the scope of Article 6. Such rights also included the right to practise a liberal profession (*Konig*). However, in the Court's recent case law the principle was emerging that in general all rights of a pecuniary nature (except perhaps in relation to taxation) were civil rights within the meaning of Article 6.

83. In our view we do not have to decide whether the right to work or the right to engage in commercial activity is a civil right within the meaning of Article 6. It is enough that we are of the view that the decision notice of 16 January 2004 affects the civil rights of the Applicant (namely the right to perform the controlled function the subject of the application under section 59) and so Article 6 applies to it.

84. We also heard arguments from the parties about Article 14 of the Human Rights Convention which deals with the prohibition of discrimination and which provides:

"14 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. For the Applicant Mr Blair argued that the Applicant had the right to enjoy his Article 6 right without discrimination on the ground that he was not currently in employment whereas other individuals under investigation remained in employment. For the Respondent Mr Mayhew argued that Article 14 could not apply in this case as there had been no discrimination but, even if there had been, there was ample justification for different treatment. Also, applicants under section 59 and 63 were not in analogous situations within the meaning of those words as established in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.

86. The discrimination complained of is that which gives different treatment to an approved person under investigation who remains in employment on the one hand and one, like the Applicant, who moves to a new employment on the other. The latter needs to make a new application under section 59; the former can only have his employment terminated if his approval is withdrawn under section 63. Here it is relevant that the burden of proof on the Respondent under section 63 (to prove that the candidate is not fit and proper) is higher than that under sections 59 to 61 (to prove that the Respondent is not satisfied that the candidate is fit and proper). It is this difference in the burden of proof which explains the disparity between the treatment of an approved person under the same type of investigation as the Applicant but who is still in employment on the one hand and the Applicant on the other. In the former case we were told that the Respondent could not withdraw approval under section 63 because it could not discharge the burden of proving that the candidate was not fit and proper until the outcome of the investigations are known. In the latter case the new employment requires a new approval which can be refused because the Respondent has the lesser burden of proof.

87. In *Michalak* Brooke LJ at 625 stated that a court invited to consider an Article 14 issue should approach its task in a structured way. It should ask itself four questions, namely: (1) do the facts fall within the ambit of one or more Convention rights?; (2) if so, was there different treatment as respects that right between the complainant and other persons put forward for comparison (the chosen comparators); (3) were the chosen comparators in an analogous situation to the situation of the complainant?; and (4) did the difference in treatment have an objective and reasonable justification; in other words did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?

88. We answer those questions in the following way. First, the facts of this reference do fall within the ambit of Article 6. The Applicant's civil rights are affected by the decision notice of 16 January 2004 and he has the right to a fair and public hearing of that decision by the Tribunal. Secondly, there is no different treatment *as respects that right* between the Applicant and the chosen comparators who are still in employment. If a decision under sections 59 to 61 were made in respect of the chosen comparators they also would have the right to refer that matter to the Tribunal.

89. For these reasons we conclude that the Applicant has not suffered discrimination of the type prohibited by Article 14.

Conclusion

90. Our conclusion on this sub-issue is that, assuming that the Respondent had reasonable grounds for considering that the Applicant may have been guilty of misconduct such that he may not be a fit and proper person, and reasonable grounds for conducting an investigation under section 168, such grounds would not necessarily be sufficient in themselves in every case for the Tribunal to conclude that it is not satisfied that the Applicant is fit and proper. The Tribunal must reach its own decision in the light of all the facts of the case. It will itself require evidence (and not mere assertions) of what the grounds were which led the Respondent to conclude that the Applicant may have been guilty of misconduct and what the circumstances were which led to the appointment of investigators, together with any other relevant evidence.

(ii) Must the Tribunal direct the Respondent to refuse the application?

91. The second sub-issue only arises if the answer to the first is in the affirmative. As we have decided that it is not, this sub-issue does not arise.

(iii) What must the Respondent establish before the Tribunal?

92. The third sub-issue arises if the answer to the first is in the negative and is whether the Respondent is required, before the application can be determined by the Tribunal, to establish whether in fact the Applicant has been guilty of misconduct or to establish or rebut some other, and if so what, facts and matters.

93. The arguments of the parties in connection with this sub-issue centred round the questions of the burden of proof; the standard of proof; and the extent of the Tribunal's jurisdiction.

Burden of proof

94. The parties agreed that the burden of proof will be on the Respondent but disagreed about what the Respondent had to prove. The Respondent argued that it had to prove that it was not satisfied that the Applicant was fit and proper. In support of these arguments Mr Mayhew cited *R v Maidstone Crown Court ex parte Olson* The Times 21 May 1992; *McCool v Rushcliffe Borough Council* [1998] 3 All ER 889 at 896b; and *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin). The Applicant argued that the Respondent had to prove that he was not fit and proper. Mr Blair distinguished *Hussain* where there was a charge of a criminal offence and therefore the crime was known. Here the Applicant did not know the case against him. Also he referred to *McCool* and argued that the evidence to be adduced had to have a certain minimum quality.

95. In considering these arguments we first identify the principles in the authorities cited to us. *Olson* concerned an application for the renewal of a hackney carriage licence when the relevant legislation provided that a licensing authority "shall not grant a licence unless they are satisfied that the applicant is a fit and proper person to hold a driver's licence". The applicant had been convicted of indecently assaulting a young passenger but his conviction had been quashed by the Court of Appeal on the ground that there had been misdirections or non-directions in the judge's summing up. The application for a licence was refused and on appeal the justices refused to hear evidence from the young passenger and determined that the applicant was fit and proper. The licensing authority appealed to the Crown Court when the judge ruled that the evidence of the young

passenger could be heard. That decision was taken to judicial review. The Bench Division expressed the view that the onus of establishing on the balance of probabilities that he is a fit and proper person is on the applicant. These were not criminal proceedings and in licensing proceedings generally the civil standard of proof applied. The burden on the licensing authority was to rebut the applicant's contention that he was a fit and proper person to the civil standard of proof even if the substance of what they sought to prove was a criminal offence. Parliament did not intend that licences could be refused only if the authority were sure that an alleged criminal offence had indeed been committed.

96. Thus *Olson* supports the argument of the Respondent that it does not have to prove that the Applicant is not fit and proper but rather that it is not satisfied that the Applicant is fit and proper.

97. The legislation and facts in *McCool* were very similar to those in *Olson* except that on appeal to the justices hearsay evidence of an alleged assault on a passenger was admitted. The High Court held that, in determining whether a person was fit and proper, the justices were entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith and that included hearsay evidence in the absence of direct evidence. They would, however, have to disregard “gossip, speculation and unsubstantiated innuendo”.

98. In *Hussain* the applicant’s private hire driver and vehicle licences were suspended in accordance with the legislation which provided that the licences could be suspended for stated reasons and "any other reasonable cause". The reason given for the suspension was that the applicant had been charged with an offence of violent disorder. The High Court held that the phrase "any other reasonable cause" gave a wide discretion and, in making a decision, account could be taken of all relevant circumstances including the objectives of the licensing regime. Relevant circumstances need not relate to criminal conduct and a licence could be suspended even though the driver had not yet been convicted.

99. From those authorities we derive the principles that in this reference the Respondent does not have to prove that the Applicant is not fit and proper but rather that it is not satisfied that the Applicant is fit and proper; that in determining whether it is or is not satisfied that the Applicant is fit and proper, the Respondent (and the Tribunal) is entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith and that includes hearsay evidence in the absence of direct evidence; and that, in making a decision, account should be taken of all relevant circumstances which need not relate to criminal conduct and that a person could be regarded as not satisfying the Authority that he is fit and proper even though he has not been convicted of a criminal offence. We also derive the principle that it is not necessary to wait until the outcome of the investigations in this reference.

100. We also bear in mind that Rule 19(3) of the Rules provides that evidence may be admitted by the Tribunal whether or not it would be admissible in a court of law and whether or not it was available to the Respondent when taking the referred action.

101. With those principles in mind we return to the words of section 61(1) which are that an application may only be granted if the Respondent is satisfied that the candidate is fit and proper. The decision was that the Respondent was not satisfied that the Applicant was fit and proper. That is the decision which has been referred to the Tribunal.

102. In the absence of section 133(3) it would have been arguable that the task before the Tribunal was to decide whether the decision taken by the Respondent was a reasonable decision within the meaning of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. However, the existence of section 133(3) means that the Tribunal must reach its own view on the matters referred to it and so the issue before the Tribunal will be whether the Tribunal is satisfied that the Applicant is fit and proper. The Tribunal will reach its decision on the evidence and argument presented to it and the burden of proof will be on the Respondent to show that on that evidence the Tribunal cannot be satisfied that the Applicant is fit and proper. The Respondent does not have to prove that the Applicant is not fit and proper.

Standard of proof

103. Turning to the standard of proof Mr Mayhew relied upon *Re H (Minors)* [1996] AC 563 at 586; [1996] 1 All ER 1 at 16-17 to support the argument that the standard of proof was the balance of probability. This was accepted by Mr Blair for the Applicant.

The jurisdiction of the Tribunal

104. Turning to the jurisdiction of the Tribunal Mr Mayhew referred to sections 133(6) and 388(2) and argued that if the Tribunal were satisfied that the Applicant was fit and proper then the Tribunal would have to refer the matter back to the Respondent and direct the Respondent to approve the application of Brook Partners Limited which he stated that the Respondent could and would do. However, the Tribunal had no greater jurisdiction. Mr Blair on the other hand argued that the Tribunal was not shackled to the Respondent's function and many outcomes were possible. The Respondent had no greater power than to grant or refuse the application but, if it did not grant it, the Tribunal was not restricted in the directions it could give to the Respondent.

105. Without reaching a final view on these arguments we are at present minded to agree with Mr Mayhew. If on the evidence before it the Tribunal is not satisfied that the Applicant is fit and proper then the Tribunal would be likely to determine that the appropriate action for the Respondent to take, within the meaning of section 133(4), would be to do nothing further, leaving the decision notice of 16 January 2004 in effect. The Tribunal would remit the matter to the Respondent under section 133(5) but without directions for giving effect to the Tribunal's determination as such directions would be unnecessary. If, on the other hand, on the evidence the Tribunal was satisfied that the Applicant is fit and proper then the Tribunal would be likely to determine that the appropriate action for the Respondent to take would be to approve the application of Brook Partners Limited and would remit the matter to the Respondent with directions to approve the application.

106. Our views about the jurisdiction of the Tribunal are provisional views only as we regard it as premature to express a final view about the outcome of the reference at this stage.

Conclusion

107. Our conclusion on the third sub-issue is that the Respondent is required, before the reference can be determined by the Tribunal in its favour, to adduce sufficient

evidence for the Tribunal to conclude that, on the balance of probabilities, it is not satisfied that the Applicant is fit and proper.

(iv) Should the Tribunal approve the application pending the outcome of the investigation?

108. The fourth sub issue is if the answer to (i) is no, but the Respondent is not required to prove misconduct before the Tribunal makes a determination under section 61(3), is it lawful for the Tribunal to direct the Respondent to approve the application pending the outcome of the investigation, or for some other, and if so, what, period on the basis that, subject to that outcome, it is satisfied that the Applicant is a fit and proper person to perform the relevant functions?

109. As we have already mentioned there is at this stage insufficient evidence before us upon which we could reach a conclusion as to whether or not we are satisfied that the Applicant is fit and proper. This sub-issue does not therefore arise. We have expressed our views about the suggestion for an interim approval in paragraph 66 of this Preliminary Decision.

Conclusion on issue (3)

110. Our conclusion on issue (3) is

(i) that if the Respondent had reasonable grounds for considering that an applicant may have been guilty of misconduct such that he may not be a fit and proper person, and reasonable grounds for conducting an investigation under section 168, such grounds would not necessarily be sufficient in themselves in every case for the Tribunal not to be satisfied that such applicant is fit and proper. The Tribunal must reach its decision in the light of all the facts of the case and would itself require evidence of what the grounds were which led the Respondent to conclude that an applicant may have been guilty of misconduct and what the circumstances were which led to the appointment of investigators together with any other relevant evidence;

(ii) that sub issue (ii) does not arise;

(iii) that the Respondent is required, before the reference can be determined by the Tribunal in its favour, to adduce sufficient evidence for the Tribunal to conclude, on the balance of probabilities that it is not satisfied that the Applicant is fit and proper; and

(iv) that at this stage there is insufficient evidence before us upon which we could reach a conclusion as to whether or not we are satisfied that the Applicant is fit and proper and so the question as to whether we should direct the Respondent to grant an interim approval does not arise.

Decision

111. Our decisions on the preliminary issues are:

(1) that the Respondent was in breach of the time limit of three months in section 61(3);

(2) that such breach does not render the warning notice or the decision notice void; there is therefore a valid decision notice which has been referred to the Tribunal and which must be determined on its merits; and

(3) that the fact that the Respondent has appointed investigators in respect of the Applicant does not of itself mean that the Respondent could not be satisfied that the Applicant was fit and proper; that in hearing the reference the Tribunal must reach its own decision in the light of all the evidence before it including evidence of what the grounds were which led the Respondent to conclude that the Applicant may have been guilty of misconduct and what the circumstances were which led to the appointment of investigators together with any other relevant evidence; and that before the reference can be determined by the Tribunal in favour of the Respondent the Respondent will have to adduce sufficient evidence for the Tribunal to conclude, on the balance of probabilities, that it is not satisfied that the Applicant is fit and proper.

112. This preliminary decision does not determine the reference.

113. In accordance with paragraph 13(2)(a) of Schedule 13 of the 2000 Act we hereby state that this decision is unanimous.

Directions

113. We record that we are concerned that the decision notice of 10 January 2004 should be determined by the Tribunal at the earliest possible date so that the Applicant may plan his future career. There must be no question of waiting until the results of the investigations are known.

114. **WE THEREFORE DIRECT** that, within twenty-eight days of the date of the release of this Preliminary Decision,

(1) both parties shall notify the Secretary of their time estimate, and also of any dates they wish to avoid, for the substantive hearing of the reference in the months of October, November and December 2004; and

(2) either party has liberty to apply for further directions leading to the substantive hearing.

This Decision was released to the parties on 17 September 2004. This version corrects three minor clerical mistakes.

DR A N BRICE

CHAIRMAN

RELEASE DATE:

5 FIN/2004/0006
22.09.04