THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

IAN DOUGLAS COX
Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY
Respondent

Tribunal: DAVID MACKIE QC (Chairman)
NICHOLAS WILLIAM DOUCH
IAN BARRY ABRAMS

Sitting in London on 12th May 2003

The Applicant in person

Mr David Mayhew, instructed by the Respondent, for the Respondent

DECISION

Procedural Background

1. By a reference notice dated 25th September, 2002 the Applicant, Mr Cox referred to the Tribunal a Decision Notice of the Financial Services Authority ("FSA"). This decision refused the application dated 10th April, 2002 by George Baker (Life) ("GBL") for approval of the Applicant by the FSA, as required by Section 60 of the Act, to perform the controlled function of investment adviser with GBL. Following a Directions hearing on 17th March 2003 we heard the reference on Tuesday, 14th May 2003. The Applicant appeared in person assisted by Mr Ross Gumpright of GBL. Mr David Mayhew represented the Respondent. We heard evidence from the Applicant and from Mr Gumpright supplemented by references from a Ms Barker and Mr Nash as to the Applicant's professional and personal capacity. We heard evidence from Mr Lindsay Thomas of the Respondent based on his witness statement of 17th April 2003. We also had before us a bundle of the relevant documents.

Legal Task of Tribunal

2. Before turning to the issues, we first remind ourselves of the statutory background. Under Section 59 of the Act the FSA must approve arrangements made by regulated firms for the performance of controlled functions. Applications for these are made under Section 60 and granted under Section 61 by the authority "only if it is satisfied that the person in respect of whom the application is made is a fit and proper person to perform the function to which the application relates". It follows that the FSA can only grant an application if it is satisfied that the person is fit and proper. It is for the Applicant to establish that he is fit and

proper not for the FSA to show that he is not. The task of the Tribunal is not to review the reasonableness of the FSA's decision but for itself to determine what action the FSA should take over the application (see Section 133(4)). We have to ask ourselves, looking at the application again in light of the evidence now available, whether we are satisfied that Mr Cox is a fit and proper person to perform a controlled function as investment adviser with GBL.

Facts

3. The relevant facts are not in dispute. GBL is a company run principally by Mr Gumpright, a former manager from the Prudential. GBL have found it productive to employ a number of former Prudential people because of the skills and standards of conduct they acquired through their training and experience with that company.

4. Mr Cox joined the Prudential as an agent in 1983 and worked for a number of years building up and looking after the interests of a growing number of clients. He visited clients at home and used to collect premiums, often in cash on a four weekly basis. There was never a suggestion of any lack of integrity on his part. Over time Mr Cox took professional exams, the full Financial Planning Certificate of the Chartered Insurance Institute, not because it was required but because he thought it would be helpful to his clients and his career to do these. In 1989, Mr Cox joined MJB Associates working in partnership with Mr Barber, a former colleague who had been a manager at the Prudential. In the summer of 1993, Mr Cox fell out with Mr Barber amidst some mutual recrimination. In 1993, Mr Cox joined another company, CB Thomas Financial Services, ("CB Thomas") doing business as before in the area of Horley, Surrey. The business carried on by CB Thomas was it seems some 90% mortgage and general life with very little investment work. This arrangement lasted from September, 1993 until September, 1996 when disagreements between Mr Cox and his partner, Mr Martindale came to a head. Mr Cox felt Mr Martindale was imposing unnecessary costs on the business and unfairly restricting Mr Cox's commission. We do not know and are not concerned with Mr Martindale's side of the story. In September, 1996 Mr Cox left CB Thomas and started to work with GBL as an independent financial adviser taking his clients with him. His relations with Mr Martindale continued to deteriorate and in June, 1997 the latter wrote to the Head of Compliance at the Personal Investment Authority to complain about matters which had apparently come to light. These details, which we will use neutral terms to call "the pension transaction" are not in dispute.

5. At the Prudential, Mr Cox had a personal pension plan that by September, 1996 had a transfer value of £15,388.60. By a series of steps that appear to have been carefully calculated, Mr Cox turned that value, which he would not otherwise have been entitled to until retirement, into an immediate payment to himself. We do not have all the relevant documents but the picture is reasonably clear and not disputed:-

(a) Mr Cox arranged for the cheque from Norwich Union to be made out to Standard Life, but the address given was Mr Cox's home address, not that of Standard Life. This allowed him to purport that the cheque did not represent the transfer value of a pension, and was freely available for investment in any instrument.

(b) Mr Cox filled out a form for a Capital Investment Bond to be issued by Standard Life. He signed the form in a way quite different from his usual signature. He put in the date of birth of the lady with whom he was then living

rather than his own. Under "financial adviser's details" he gave the address of CB Thomas but not the name of the company. He gave as the "name of contact" of the financial adviser not himself but "CB Thomas".

(c) A few days later on 20th September, 1996 he completed the Standard Life IFA Certificate to comply with the Money Laundering Regulations certifying that he, Mr Cox was an existing customer. As a result, Standard Life would be able to deal with Mr Cox without making the usual money laundering enquiries. At the foot of the form, the name of the intermediary "CB Thomas Financial Services" was given. Beneath that, is Mr Cox's real signature, not one that clearly shows the name. Beneath "Signed" under "Full Name" appears "CB Thomas".

(d) Soon afterwards, and during the 14 day statutory "cooling-off" period, using the signature on the application form, Mr Cox filled out a Standard Life cancellation form giving notice that he had decided not to proceed with the policy and requiring the return of any money paid. On 21st October, Mr Cox was sent a cheque for £15,388.60 by Standard Life.

6. GBL investigated the allegations as soon as the PIA drew them to its attention. GBL reported back to the PIA on 7th August, 1997 confirming that Mr Cox had, and had admitted, transferring his personal pension fund into an income bond and then surrendering it for its value. GBL asked PIA whether it would be possible to reinstate Mr Cox as a financial adviser. But the matter was not pursued beyond the PIA apparently putting Mr Cox on a "watch" list, as Mr Cox's contract with GBL was terminated with effect from 18th August, 1997. Mr Gumpright agreed that it was a telephone conversation he had with the PIA that led him to terminate Mr Cox's contract.

7. Mr Cox then worked as a mortgage adviser (a non-regulated position) for Hookwood Mortgage Services, but this company was closed sometime prior to his application to the FSA.

8. Mr Cox has since been working since on a commission and self-employed basis as a mortgage administrator for GBL but both he and GBL would like him to take on a role as financial adviser on matters within his controlled function, i.e. "investments, mortgages, life and pensions excluding pensions and transfers" and subject to the supervision of Mr Gumpright in certain ways. (For reasons which will become clear we do not think it necessary to examine the details of the work that Mr Cox would actually be doing or the strengths and weaknesses of the supervision to which he would in fact be subject.) Accordingly GBL applied to the FSA for the approval, refusal of which has led to this application.

Why the FSA seek refusal of the Application

9. The FSA considers that Mr Cox's actions over the pension transaction were part of an intentional plan which he carried out knowing that he was deceiving Norwich Union and Standard Life and that they put his honesty, integrity and reputation in question. In short, they suggested this was a piece of calculated dishonesty. Mr Cox in his evidence before us frankly accepted this.

10. Mr Thomas, who is Director of the Authorisation Division of the FSA, helpfully sets out the authority's approach to the approval process and emphasises the central importance of honesty competence and financial soundness. The FSA see Mr Cox's misconduct as deliberate and pre-meditated, involving the misuse of financial services products, affecting two financial institutions and defrauding the Revenue. Mr Thomas sets out the factors to which the FSA has regard when

considering the impact on an application of the lapse of time after a want of integrity of this kind. It seems to us that the FSA's general approach to these matters is well reasoned and wholly appropriate. The issue lies in the application of the approach to the facts of a case. The FSA does not contend that Mr Cox can never again become an approved person but it reaches the conclusion that he is not a fit and proper person to exercise the function of an investment adviser given the seriousness of the misconduct and what they have seen as Mr Cox's unwillingness to confront the scale of his lapse in integrity or to be open in his dealings with the FSA.

11. The FSA place reliance on how Mr Cox has himself characterised the incident. In a letter dated 5th June, 2002 he wrote "In September 1996, I transferred the policy from Norwich Union to Standard Life. However, when the funds were released from Norwich Union I invested the monies into a Standard Life investment bond. These funds were later en-cashed. This matter was fully investigated by Norwich Union, Standard Life, Inland Revenue and PIA as a conclusion to these investigations it was concluded that no further need to be taken." They suggest that the answers he gave to some part of question 5 in his Application were regrettably short of candour. On this form Mr Cox described the conduct as "contrary to the usual pension rules. This culminated in an investigation – my suspension from George Baker (Life) and then my subsequent resignation." The FSA say that these statements show that Mr Cox has been less than open about the pension transaction and that any applicant showing the requisite degree of candour should have been more forthcoming. The FSA also draw attention to the fact that Mr Cox's recognition of and contrition for what he had done over the pension transaction was not present at the outset and has developed only as he has increasingly perceived that it is in his interests to be candid. Mr Cox responds that the information he supplied in the form held back nothing and put the FSA squarely on inquiry so that they could investigate further if they wished - which of course they did.

12. The FSA also submits that we should not be influenced by Mr Cox's description of the pension transaction as being the only bad incident "in an otherwise unblemished career". They suggest that the Regulatory Decisions Committee was incorrect to record this view of Mr Cox's career as being that of the FSA at paragraph 2.15 of its decision. They rely for this on some written material (which we accept, subject to some views expressed below, came to the attention of those concerned with this case only the afternoon before the hearing) and on various other matters. Although we allowed the FSA to introduce the material after giving Mr Cox an opportunity to consider it, we do not summarise its contents as they are not material to our decision.

Why Mr Cox submits that his Application should be granted

13. Mr Cox submits in essence that the pension transaction was a very regrettable one-off lapse, and that it took place at a time when he was under personal pressures. He points to the facts that the incident concerned his personal affairs not those of any client and to the period of time that has gone by without any complaints about his life. He relies on his "unblemished career" and the fact that the one incident must be seen in that context.

14. Mr Cox says that he has never, since the matter came to light with the PIA in 1997, sought to deny what happened in the pension transaction and that if his contrition has been inadequate before, it was total and unequivocal when he gave evidence before us. Mr Cox also submits that there were several mitigating circumstances at the time of the pension transactions. He was under considerable

financial pressure following the difficulties he was having with his partner in MJB; he was being pressed by creditors, including the Inland Revenue and County Court judgements were obtained against him. There were problems (including financial ones) in his relationship with his partner at home and Mr Cox told us that he had been suffering from clinical depression at the time, although we have seen no other evidence of that. It was a wild and regrettable mistake in an otherwise honourable career. He contends that it occurred almost six and a half years ago and it is time for the matter to be put behind him so that he can proceed with his chosen career. He emphasises that the incident had nothing to do with any client money and no one has ever suggested a lack of trustworthiness in his business dealings.

The Tribunal's Conclusions

15. We like the parties agree that the pension transaction was a calculated piece of dishonesty of which Mr Cox should be, and we accept is, properly ashamed. We accept that the transaction affected Mr Cox's own affairs and that at no time was any client put at possible risk. Against that the pension transaction was not a purely personal one since it involved the use of the name of CB Thomas Financial Services, then regulated by the PIA, as a vehicle. It also involved misuse of Mr Cox's considerable expertise in pensions and insurance matters.

16. We also accept that this incident has to be seen in context of Mr Cox's career which we think it is fair to describe as otherwise "unblemished". We were not assisted by being taken to unresolved allegations which may have been made by others for various motives, some years ago and about unrelated subjects.

17. We consider that the FSA's criticism of the completion of the application form as evidence of lack of openness has some but not great substance. The details Mr Cox gave were sufficient to point to what had happened and to put the FSA on enquiry. Any omissions seemed honest oversight by Mr Cox. Against that, the letter of the 5th June with its implication of full investigation by all concerned and a conclusion that no further action needed to be taken was unfortunate and inaccurate. That letter leads to our point of greatest concern.

18. The victim of the pension transaction was the Inland Revenue, and of course thereby the community. We asked Mr Cox about his contacts with the Inland Revenue over the pensions transaction. It became apparent that his conclusion that the Revenue felt no further action needed to be taken action was simply his inference, drawn from the fact that he had not been pursued. It emerged from Mr Cox' evidence that not only has he made no reparation to the Inland Revenue but, it seems, he has told them nothing of the pension transaction at all. It seems to us that this is very regrettable. If Mr Cox wishes to satisfy the FSA that the pension transaction is behind him and needs to be seen in its context, he must do so after having first fully disclosed matters to the apparent loser, the Inland Revenue, and made whatever reparation may be appropriate. It seems to us, on these grounds standing alone, that with the matter of the pensions transaction thus still outstanding Mr Cox cannot establish that he is fit and proper for the approval which GBL seeks. As and when Mr Cox has dealt with these matters GBL, or someone else, may wish to make some further application for approval on his behalf. We recognise, as does the FSA, that provided it is not of overwhelming gravity, a single incident of dishonesty not affecting a client's affairs may in time enable an applicant to establish that he is fit and proper, subject to appropriate supervision, to perform a controlled function. That day has not yet arrived for Mr Cox. This application is therefore dismissed.

19. We add one further point. The Tribunal, will generally disapprove strongly of the FSA disclosing documents to an applicant late, and in this case the evening before the hearing. Late disclosure makes it difficult for an applicant, particularly one who is representing himself, to deal with a matter satisfactorily and adds unnecessarily to what must inevitably be the stress of a hearing. It is particularly unsatisfactory for the FSA to serve material late because of shortcomings in its own file retrieval systems. The Tribunal may well refuse applications for late disclosure in future as it would have done on this occasion had it felt that the material would in reality prejudice the applicant's position. We emphasise however that we have no criticism of the FSA team conducting the case who seemed as concerned as we were by the late arrival of documents.

20. Finally we are grateful to Mr Cox and Mr Gumpright for the careful and courteous way in which they conducted the case and to Mr Mayhew for the model way in which he explained the law, dealt with the material and examined the witnesses in such a firm but fair way.

DAVID MACKIE QC

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