EXTENSION OF TIME — reference notice filed one day out of time — whether time to be extended — interests of justice — extension granted

SUPERVISORY NOTICE — whether appropriate to suspend effect of notice pending hearing of reference — notice based on conviction for dishonesty — suspension inappropriate and application refused

REGISTER — whether details of reference to be excluded from register — no grounds for exclusion made out — application refused

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

THEOPHILUS FOLAGBADE SONAIKE
trading as F T INSURANCE SERVICES **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondent**

Tribunal: Colin Bishopp (Chairman)
Michael Hanson FCA ACIB
Peter Laing FCIB

Sitting in public in London on 13 July 2005

The Applicant in person

Simon Gerrish, counsel, of and instructed by the Authority, for the Respondent

DECISION

1. On 19 May 2005 the Respondent Authority issued two notices directed to the Applicant, Theophilus Folagbade Sonaike, who hitherto was a sole trader carrying on business in the name of "FT Insurance Services", in Woolwich and Manchester. Mr Sonaike had permission, granted by the Authority in accordance with Part IV of the Financial Services Act 2000 ("the Act") to carry on various regulated activities, in advising on and arranging investments and mortgages. The first notice, a Supervisory Notice given in accordance with section 45 of the Act, removed all of the regulated activities from Mr Sonaike's permission, with immediate effect. The second, a Warning Notice, also given under section 45, indicated an intention to cancel Mr Sonaike's permission altogether. The Warning Notice is no more than the consequence of the Supervisory Notice: if the authorised person is no longer permitted to carry on any regulated activity, the permission is to be cancelled unless there is any good reason to keep it in force (see section 45(3)). The Authority says there is no such good reason. We do not need to deal further with the Warning Notice in this decision.

2. Mr Sonaike referred the notices to the Tribunal, by a Reference Notice dated 20 June 2005 and received by the Tribunal on 22 June 2005. We are not at this stage required to determine the reference, but to deal with three preliminary issues:

(a) whether Mr Sonaike's time for making the reference should be extended;

(b) whether the effect of the Supervisory Notice should be suspended pending the final determination of the reference; and

(c) whether the register should include no particulars about the reference.

Our jurisdiction and powers are set out in paragraphs (d), (e) and (p), respectively, of rule 10(1) of the Financial Services and Markets Tribunal Rules 2001 (SI 2001/2476).

3. We heard the application on 13 July 2005, when Mr Sonaike represented himself and the Authority was represented by Simon Gerrish of counsel. We announced our decision on each of the issues at the conclusion of the hearing; our reasons now follow.

4. It is common ground that the Reference Notices should have been served on the Tribunal on or before 21 June 2005: see section 133 of the Act and rule 4(2). Mr Sonaike explained that the notices had not reached him when they were sent as he was then away, but had come to his attention on 13 June 2005, by email. Simon Gerrish, for the Authority, accepted that the notices had not been received by Mr Sonaike until mid-June and that the Authority would suffer no prejudice if we granted an extension of time. The prejudice to Mr Sonaike if we refused an

extension is obvious. He acted promptly once the notices had come to his attention (although we should add that because of prior communications between him and the Authority he was aware that they would be issued) and his Reference Notice was received only one day out of time. We may extend his time if we are satisfied that it is in the interests of justice to do so. We are so satisfied and extend the time accordingly.

5. The Authority's decision to issue the Supervisory Notice is based on Mr Sonaike's conviction at Manchester Crown Court on 26 January 2004, of five counts of furnishing false information, contrary to section 17(1)(*b*) of the Theft Act 1968 (offences usually referred to as false accounting). He had pleaded not guilty to each count, but was convicted by the jury. He was sentenced to a Community Punishment Order for 150 hours, concurrent on each count, ordered to pay compensation of £11,871, the amount said to have been obtained as a result of the offences (for which a supporting confiscation order was made), and ordered to pay £3,000 towards the costs of the prosecution. We understand that Mr Sonaike did not appeal, and he has served his sentence and paid the sums ordered. The Authority says that the convictions alone are sufficient to warrant the giving of the Supervisory Notice, but it relies also on Mr Sonaike's answer to question 10 on his Annual Questionnaire, furnished by him on 10 January 2005. The question and the answer given are as follows:

> "Are there any outstanding, or have there been at any time during the period any legal proceedings against the firm, its principals or any of its appointed representatives? [The Yes box is ticked]
>
> All legal proceedings against the principal & the firm have been settled. Only one proceeding commenced by Norwich Union remains outstanding due to Norwich Union's reluctance/failure to provide detailed commission statement."

6. In the questionnaire Mr Sonaike furnished in January 2004, a matter of days before his trial began, he had answered the identical question by ticking "No" box and had given to the Authority, neither in the questionnaire nor (the Authority believed) in any other way, the information that he had been charged with, and later convicted of, offences of dishonesty. That failure, and the untruthful and incomplete answers to the questions, the Authority says, demonstrate a breach of Principle 11, that "A firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice". That breach too, the Authority says, is sufficient warrant for the giving of the notice.

7. Mr Sonaike's case is that the convictions do not impact on his ability to give financial advice. He told us that not only he, but his solicitor and barrister, as well as his accountant, had all been surprised at his conviction, which arose not from any true dishonesty on his part but because he had failed to remove his name from the title to two properties (we deduce that his contention is that he was swept up in the misdeeds of others). He accepted that he had not disclosed the pending prosecution when furnishing his annual questionnaire in January 2004 and that he

had not mentioned it specifically in January 2005, though by then he had served the sentence imposed on him and had put the matter behind him. He had, however, told the Authority of his being charged and of his convictions. He produced two letters, addressed to an official of the Authority in Edinburgh, the first advising of his arrest and being charged, and the second of his conviction. He complained that, although the convictions occurred in January 2004, the Authority had taken no action until April 2005. In the meantime, he had continued to trade without incident. He did not handle clients' money and there was no risk to the public. He produced three character references, all attesting to his moral character and continuing high reputation in the community.

8. Mr Sonaike's claim that he had been in touch with a number of the Authority's staff in Edinburgh came as a surprise to Mr Gerrish, and he caused enquiries to be made as the hearing continued. Unfortunately, the enquiries were inconclusive, as the person concerned was on holiday and no other information was readily available. Mr Gerrish told us that the delay between the convictions and the Authority's taking any action was accounted for by the fact that the convictions did not come to its notice until December 2004; it was not its practice to undertake systematic interrogation of criminal records.

9. Our task at this stage in the reference is not to evaluate the evidence with a view to determining the merits of the opposing cases, but to undertake a balancing exercise. We must weigh the protection of the public – the primary focus of the Act – against the burden to the Applicant of his being deprived of his livelihood pending the final determination of the reference, bearing in mind the risk that the temporary closure of a sole trader's business may lead to its demise even if the reference is ultimately decided in his favour. But in carrying out the balancing exercise we must keep very much in mind the fact that the power to suspend a person's authorisation immediately was given to the Authority by the Act for good reason, namely that a delay in withdrawal may itself be prejudicial to the public.

10. If Mr Sonaike's claim to have advised the Authority's Edinburgh office of his arrest and conviction can be taken at face value (we put the matter that way as the Authority did not have the opportunity to test the claim properly at the hearing) his answers on the annual questionnaires must be viewed in a rather different light. Even so, they are lacking in candour and it is difficult to understand why, in January 2004 at least, Mr Sonaike did not mention his pending trial if, as he says, the Authority was already aware of it. However, even if it could be argued that the want of candour was insufficient to warrant the immediate, and continuing, suspension of Mr Sonaike's authorisations, the same cannot be said of the convictions. It is possible that conviction on a technical ground, or for a trivial offence, even of dishonesty, might be insufficient to warrant the Authority's action. We express no view on where any dividing line might lie. It is possible, too, that Mr Sonaike has a sufficient and satisfactory explanation of his own convictions – this is not a matter for our decision at this stage. What is clear is that such information as is available to us now points to the conclusion that these were

serious offences of dishonesty. There were five counts. The offences extended over a period of more than three years. The amount involved is not trivial. The transcript of the judge's remarks when passing sentence which was provided to us shows that Mr Sonaike only narrowly avoided a sentence of immediate imprisonment. There is no hint that Mr Sonaike had been convicted for technical reasons alone.

11. As we have indicated, there may be exceptional cases but in principle we are of the view that a recent conviction for an offence of dishonesty necessarily gives rise to serious doubts about the fitness of the person concerned to be authorised for the purposes of the Act. We do not determine this reference on its merits, but we are in no doubt that the balancing exercise to which we have referred leads inevitably to the conclusion that the Supervisory Notice should not be suspended pending determination of the reference. There must, we think, be some compelling reason in a case of this kind before the tribunal might come to the opposite conclusion. We do, however, consider that the reference should proceed to an early hearing and we made oral directions accordingly, they are set out at the end of this decision.

12. We can deal briefly with the third application since Mr Sonaike agreed that, if we were not to accede to his application for suspension of the Supervisory Notice, which itself requires him to notify his clients that his authorisations have been withdrawn, there is little purpose in excluding details of the reference from the register. We can, in any event, make such a direction only in restricted circumstances, namely when we are:

> "… satisfied that it is necessary, having regard to—
>
> (a) the interests of morals, public order, national security, or the protection of the private lives of the parties; or
>
> (b) any unfairness to the applicant or prejudice to the interests of consumers that might result from the register including particulars about the reference."

See rule 10(9). It may be that, had we suspended the operation of the Supervisory Notice, publication of particulars of Mr Sonaike's reference would embarrass him, and might cause clients and others to ask him questions he would rather not answer. But that will always be the consequence of the inclusion in the register of details of a reference (the included details consist of no more than the applicant's name, the date of the reference, the date of any hearing and, in due course, details of the outcome). Mere embarrassment falls far short of satisfying the criteria set out in the rule. In our view an applicant for such a direction must establish something out of the ordinary if he is to succeed. Even if we had granted Mr Sonaike's second application, we can see no grounds on which we might have made a direction that details of the reference be withheld from the register in this case.

13. The first of the applications is granted, while the remaining two are refused. In these conclusions we are unanimous. The directions we made for the continuation of the reference are as follows:

1. The Authority shall serve its statement of case and list of documents, by 4 pm on 27 July 2005
2. The Applicant shall serve his response by 4 pm on 10 August 2005
3. The Applicant shall serve the statements of those witnesses on whom he intends to rely at the hearing by 4 pm on 31 August 2005
4. The Applicant shall serve his skeleton arguments five days, and the Authority shall serve its skeleton arguments three days, before the day appointed for the hearing of the reference.

COLIN BISHOPP

CHAIRMAN
RELEASE DATE:

FIN/2005/0021