DISCIPLINARY POWERS - amount of penalty determined by Interim Tribunal - whether fresh evidence has come to light about ability to pay - whether determination of Interim Tribunal justified in the light of the fresh evidence - whether penalty should be reduced – public censure in the alternative - matter remitted to Authority with directions - Financial Services and Markets Act 2000 ss 66(3), 133 and 426 - 428 - Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001 SI 2001 No 3592 Art 62

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

GORDON PIGGOTT
Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY
Respondent

Tribunal: DR NUALA BRICE (Chairman)
WILLIAM BLAIR QC
CHRISTOPHER CLAYTON
CATHERINE FARQUHARSON ACA

Sitting in London on 25 March 2003

The Applicant in person

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

DECISION

The reference

1. The question raised in this reference is as to the amount of a financial penalty imposed on Mr Gordon Piggott (the Applicant) by an Interim Tribunal in a decision given on 8 August 2002. As varied by the Tribunal, the penalty was in the sum of £40,000. The Applicant (who appeared before us in person) refers the matter to the Financial Services and Markets Tribunal on the ground that his personal financial circumstances were not adequately taken into account in fixing that penalty. He says that the penalty should be reduced to nil. The Financial Services Authority (FSA) on the other hand, which appears before us through Mr Mayhew, submits that the decision was correct, and invites us to uphold it, though he accepts that this is subject to our view as to recently produced evidence of means. In addition to oral submissions, both parties also lodged written submissions. We should emphasise at the outset that because the disciplinary procedures concerned in this reference straddled the coming into force of the

Financial Services and Markets Act 2000 (FSMA 2000), our powers are prescribed by certain transitional provisions. As we shall explain, in contrast to the position under the FSMA 2000, we do not approach the issue de novo. For the same reason, and because no argument was addressed to us on the subject, this decision should be read as limited to the particular provisions contained in the transitional provisions, and does not contain any wider guidance as to the approach of the Financial Services and Markets Tribunal generally to financial penalties.

The legislation

2. As will become apparent, the issue as regards the powers of this Tribunal revolves around the question of what evidence as to the Applicant's financial means we are entitled to take into account in determining the reference. Outside the transitional provisions, the Tribunal's power to receive evidence under FSMA 2000 is very wide. This is shown by section 133(3), which provides so far as relevant that:

"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.

The section continues:

(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.

(10) The Authority must act in accordance with the determination of, and any direction given by, the Tribunal."

3. Though the last three subsections apply, the position as regards evidence is very different where, as in the present case, the reference is made following disciplinary procedures which were partly completed when FSMA 2000 came into force. The relevant statutory provisions are as follows. Section 426 provides that a Minister may by order make such transitional provisions as he considers necessary for the purposes of the Act. Section 427(2)(e) provides that such an order may make provision for the continuation of disciplinary proceedings begun before the commencement of the Act. Section 427(3)(b) provides that such an order may confer jurisdiction on the Financial Services and Markets Tribunal.

4. The determination of incomplete disciplinary proceedings is governed by Part VI of the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001 SI 2001 No. 3592 (the 2001 Order), which was made under the above provisions, and came into effect on 1 December 2001. Part VI provides for reference of the proceedings to an "interim tribunal". Article 62 provides for an appeal from the determination of the Interim Tribunal to the Financial Services and Markets Tribunal in these terms:

"(1) Where a person in discipline or the Authority is aggrieved by the determination by the interim tribunal of the incomplete disciplinary proceedings to which that person was subject immediately before commencement, that

person or the Authority may refer the matter to the Financial Services and Markets Tribunals.

The Article continues:

(2) Section 133 [ie of FSMA 2000] applies to the [Financial Services and Markets] Tribunal when it is considering a reference made under paragraph (1) with the following modifications:

(a) as if subsection (3) provided that on such a reference, the Tribunal may consider only the evidence that was considered by the interim tribunal unless fresh evidence comes to light which could not reasonably have been made available to the interim tribunal by the party now seeking to adduce it;

(b) as if subsection (4) provided that on determining a reference from an interim tribunal the Tribunal must decide whether the determination of the interim tribunal was unlawful or was not justified by the evidence and must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate having regard to its decision;

(3) as if subsections (6), (7), (8), (9) and (12) did not apply."

Thus in contrast with the procedures now current, the power under the transitional procedures to admit evidence that was not before the interim tribunal is restricted, and this Tribunal is limited in effect to a review function.

The issues

5. In the light of the relevant legislation we have identified the following issues for determination:

(1) whether fresh evidence has come to light which could not reasonably have been made available to the Interim Tribunal within the meaning of Article 62(2)(a) of the 2001 Order;

(2) whether the determination of the Interim Tribunal was unlawful or not justified by the evidence within the meaning of Article 62(2)(b); and

(3) in remitting the matter to the Authority, what directions (if any) we consider appropriate having regard to our decision, as required by Article 62(2)(b).

Before considering these issues, we should summarise the relevant facts.

The facts

6. At the hearing before us, oral evidence was given by the Applicant on his own behalf, but (because of the limited grounds of his reference) only as to his financial means. A joint bundle of documents was produced to us, including the transcript of the hearing before the Interim Tribunal. The complaint made against the Applicant was in essence that he transferred the commission stream from his company, leaving it without assets to meet pension mis-selling obligations, and failing to inform the regulators of the true position. The Interim Tribunal's findings of fact are not challenged in this reference by the Appellant, save as regards the issue of his ability to pay the penalty.

7. The facts are set out in detail in the Interim Tribunal's decision. Chartertrack Financial Services Limited (Chartertrack) was incorporated in November 1981, and acquired by the Applicant in June 1991. He became the company's sole director and principal shareholder, and from 1 October 1998 was individually registered with the Personal Investment Authority (PIA) in his capacity as principal and financial adviser. The PIA was, of course, one of the regulatory bodies replaced by the FSA under the provisions of FSMA 2000.

8. In due course, Chartertrack was required by the PIA to review pensions policies sold prior to the Applicant acquiring the company. In November 1998, the PIA's Pensions Review Monitoring Team visited it, and identified about forty-three policyholders who had been sold policies which may have been inappropriate for their circumstances. There was then thought to be a potential liability of over £200,000.

9. In February 1999, the PIA wrote to Chartertrack asking for details of the company's financial position. It was told that total compensation could amount to £400,000; that there was professional indemnity cover of £270,000; and that an application had been made to the PASS loan scheme to cover the remaining £130,000 (PASS stands for Pension Advisers Support Scheme.) The PIA remained concerned, and on 26 July 1999 notified the Applicant of their intention to visit him on 30 July 1999. The visit was postponed at the Applicant's request until 6 August 1999.

10. By then however, the Applicant had realised that Chartertrack could not meet its liabilities to those of its former clients who were entitled to compensation under the pensions review. As the Interim Tribunal held, "we find it an irresistible inference from the events that followed that the [Applicant] had decided not to tell the Regulator of the intention he had formed to abandon the application for a PASS loan, and to seek an arrangement with another organisation [Carpenter & Associates Ltd], to enable him and his colleagues to carry on their investment work using their connections they had built up when working with the company".

11. By that time, he reached an agreement with Carpenter & Associates Ltd that he would in future continue to carry on his business with that firm as a self-employed person. He also agreed to transfer to it the benefit of Chartertrack's outstanding commission stream. However at the meeting on 6 August 1999, he did not tell the PIA about this agreement, the effect of which was to divest the company of its only remaining asset. It was part of the agreement that all the Chartertrack commissions were, on receipt, to be placed in an escrow account in the name of Carpenters; that firm would charge 10% for servicing the account; and the Applicant personally would receive the remaining 90% of the receipts.

13. Some days after the PIA's visit on 6 August 1999, the Applicant told the Authority that he did not intend to pursue his application for a loan and that Chartertrack was insolvent. On 13 August 1999, the PIA served an Intervention Notice which precluded Chartertrack from continuing to act as independent financial advisers and from carrying on investment business. The notice pointed out that as a result of that prohibition, the company could not dispose of, or deal with, any assets without the written consent of the Regulator. The PIA was unaware of the agreement he had reached with Carpenters. On 4 October 2000, Chartertrack was wound up with a substantial deficit.

14. The value of the commission stream diverted by the Applicant was dealt with in accountancy evidence from Mr Patrick Storey of Grant Thornton proffered by the FSA to the Interim Tribunal. This was an important issue because clearly an

authorised person should not benefit from his own misconduct. Despite Mr Storey's statement, the evidence was by no means clear on the subject, and was complicated by factors such as "clawback" of premium by insurers in the case of discontinued policies. The Applicant's case was that the commission stream really had no value at all, but the Interim Tribunal records when fixing the amount of the penalty that "he did admit when interviewed by the Authority that over two years he had benefited from the receipt of about £40,000 from policies arranged by Chartertrack". We should say that, before us, Mr Mayhew seemed disposed to accept that a figure of about £20,000 for each of two years was as he put it "about right". One further matter of relevance is that some time in mid-2001, the Applicant decided to leave Carpenters. After that date he apparently received no further payments out of the escrow account. He took legal proceedings against Carpenters for the monies due to him, which were settled in January 2003 following which he apparently received £16,500.

The PIA disciplinary proceedings

15. It is now necessary to summarise the course of the PIA disciplinary proceedings that were taken against the Applicant. On 3 October 2001, the Disciplinary Committee of the PIA issued notice of a proposed order to the Applicant. The proposed order stated that it appeared to the Committee that the Applicant was in breach of FSA Principle 1 (to observe high standards of integrity and fair dealing) and of FSA Principle 10 (in failing to deal with the regulator in an open and co-operative manner). The notice also stated that the Disciplinary Committee proposed to order that the Applicant should be reprimanded, that the reprimand be made public, and that the Applicant be fined the sum of £100,000.

16. The proposed order indicated that, in reaching its decision, the Committee had had regard to the criteria for determining sanctions set out in Annex D of the statement of policy made by the PIA in November 1995 entitled "PIA's Approach to Discipline". Annex D sets out a number of matters to be taken into account in determining sanctions. These included among others: the nature and seriousness of any breaches; the regulated firm's response once the breaches had been identified; the regulated firm's regulatory history; the way similar cases had been dealt with in the past; the extent to which as a result of the breaches the member gained a benefit or avoided a loss; and the member's ability to pay. The proposed order stated that, in setting the proposed level of fine, the Committee had had regard in particular to the nature and seriousness of the breaches and the extent to which the Applicant had personally gained a benefit. However as Mr Mayhew pointed out to us, there was no explicit reference in the notice or the proposed order to the Applicant's ability to pay.

17. On 14 November 2001 the Applicant sent to the FSA quite a detailed summary of his financial position asking if it was "in a form that is suitable to the committee". This summary indicated that the Applicant's taxable income was:

1998/99 £43,227.43
1999/00 £23,363.70
2000/01 £ 7,019.41
2001/02
(8 months) £34,250.89

18. The FSA replied on the same day to say that the information was insufficient and asked for full details of all the Applicant's income, including the renewal commission income, together with confirmation that all assets and income had been disclosed. On 15 November 2001, the Applicant sent to the Respondent a

detailed statement of his regular outgoings. He said that he did not know what the income from the escrow account was as money had been withheld since August 2001, and he was in dispute with Carpenters. The statement of outgoings indicated substantial expenditure.

19. On 30 November 2001 (co-incidentally the day before FSMA 2000 came into effect), the Disciplinary Committee issued a notice of intention to make an order. This notice records that the Committee has taken into account the Applicant's representations and the subsequent financial information submitted by him, and decided to reduce the amount of the fine from £100,000 to £50,000. It stated that the Committee was prepared to allow time to pay.

20. On 1 December 2001, the 2001 Order also came into effect. Article 56 provides that certain proceedings brought by the PIA, including those brought against the Applicant, are disciplinary proceedings, that they are treated as being incomplete, and that the person subject to them is described as being "in discipline". Article 58 provides that the FSA may refer the incomplete disciplinary proceedings of a person in discipline to the Interim Tribunal established under Articles 86 to 89. On 20 December 2001, the Applicant was informed by the FSA that the matter had been referred to the Interim Tribunal to determine the issues between the parties.

The decision of the Interim Tribunal

21. Article 58(3) of the 2001 Order provides that the Interim Tribunal had to determine what (if any) was the appropriate action for the FSA to take in the exercise of its powers under FSMA 2000. Section 66(3) of the Act provides that the Respondent may either impose a penalty or publish a statement of misconduct but not both. Thus, although the Disciplinary Committee of the PIA could have imposed both a fine and a reprimand, the Interim Tribunal had (and indeed this Tribunal has) more limited powers. This does not seem to be of much practical consequence, because the FSA asked the Interim Tribunal to impose a penalty on the Applicant of £50,000, while making it clear that it intended to exercise its independent statutory power under section 391(4) to issue a press release publicising the effect of the decision. It is also relevant to note that Article 60(3) of the 2001 Order provides that the FSA must, in giving effect to any direction of the Interim Tribunal by imposing a penalty, have regard to any statement made by the relevant SRO in force when the conduct in question took place.

22. The Interim Tribunal under the distinguished chairmanship of the Rt. Hon Sir Roy Beldam (together with Mr K J Ball and Mr D Beale) sat to determine the Applicant's case on 23 and 24 July 2002. The FSA argued that the Applicant had caused Chartertrack to break Principle 1 by failing at all times to observe high standards of integrity and fair dealing, and that the Applicant had also breached Principle 10 by causing Chartertrack to fail to deal with the Regulator in an open and co-operative manner. Secondly, it argued that the Applicant had failed to inform the Regulator promptly about the proposed transfer of Chartertrack's assets. Thirdly, it argued that the Applicant had ceased to be a fit and proper person to perform controlled functions with an authorised firm. The Interim Tribunal found these charges proved. It then passed to consider what disciplinary action to impose. So as to make sense of our decision, it is necessary to describe what then ensued in a little detail.

23. After hearing the evidence and submissions, the Chairman told the parties that the Interim Tribunal found the charges proved, and went on to consider what action should be taken. The transcript shows that after submissions from Mr Mark Fenhalls representing the FSA to the effect that the £50,000 fine should be upheld, the Chairman asked about the Applicant's ability to pay. Mr Fenhalls agreed that this was an important factor. There was then discussion about the amount which the Applicant had received from the commission stream. The transcript shows that the Chairman also had in mind the fact that the finding that the Applicant was no longer a fit and proper person would obviously have an effect on his financial position, since it in effect precluded him from pursuing his business as a financial adviser. He asked the Applicant about his financial position, and was told that payment of a fine of £50,000 was completely impossible. He then asked about the claim for outstanding commission, and about the Applicant's expenditure, asking specifically whether he had produced a schedule. The Applicant replied that he had produced a schedule previously, but did not have it now. Mr Fenhalls said that he had been looking through the files, and it was correct that a schedule had been produced. However it did not appear to be on the files at that time. Mr Fenhalls said that the recollection of Mr Greenhalgh (one of the FSA officers present at the hearing) was that the schedule demonstrated that the Applicant was in some financial difficulty in November 2001, and that his position might have worsened since then. His argument was that the schedule had been before the Disciplinary Committee, which had taken it into account and "we would invite you to take it into account in much the same way that it has been taken into account before". The result however was that the schedules produced by the Applicant on 14 and 15 November 2001 were not seen by the Interim Tribunal, despite the Chairman's request in this regard.

24. The following is an extract from the decision of the Interim Tribunal as signed on 8 August 2002:

"We have no doubt that in the circumstances of this case a fine is appropriate. What has given us greater difficulty is the proper amount of the fine. Like the Authority we start from the view that a fine must be commensurate with the seriousness of the breaches for which an individual has been found guilty. On the other hand, we also have to take account of the individual's ability to pay. We agree with the Committee's assessment of the Appellant's offences. They were serious offences and merited a substantial fine. Our only anxiety has concerned the Appellant's ability to pay a fine of the amount of £50,000. The Tribunal asked the Appellant to give some indication of his present means but we have to say that the answers he gave were vague; we take into account in deciding the appropriate figure the fact that he did admit when interviewed by the Authority that over two years he had benefited from the receipt of about £40,000 commission from policies arranged by Chartertrack."

There followed in the decision a reference to the proceedings instituted by the Applicant against Carpenters, and the possibility that money that might come from that. In all the circumstances, the Interim Tribunal considered that the penalty of £50,000 proposed by the Disciplinary Committee was too high, but that he was in a position to pay a substantial fine, and that the appropriate fine was £40,000.

Directions given about evidence as to means

25. On 16 December 2002, this Tribunal held a pre-hearing review in this reference so as to give directions under Rule 9(9) of the Financial Services and Markets Tribunal Rules 2001 SI 2001 No 2476. One of the directions given was

that the evidence should include a “detailed summary of the Applicant's assets and income position …such summary to be made up to the end of the calendar year 2002 (there being no objection by the Respondent to up to date evidence of the Applicant's financial means being placed before the Tribunal under Article 62(2)(a) of the Partly Completed Procedures Order or otherwise)”. The latter wording reflects the fact that at the directions hearing the FSA took no objection to up to date details of the Applicant’s financial position being provided on the hearing of the reference. On 10 January 2003, the Applicant sent to the Tribunal a statement of his income and assets, and we consider this material as supplemented by the Applicant’s oral evidence below.

The effect of the transitional provisions

26. As already explained, under the transitional provisions we may consider only the evidence that was considered by the interim tribunal unless fresh evidence comes to light which could not reasonably have been made available to the interim tribunal by the party now seeking to adduce it. As regards our decision, we must decide whether the determination of the interim tribunal was unlawful or was not justified by the evidence.

27. As to the evidence, the Applicant argued that the statements of his financial position which he sent to the FSA on 14 and 15 November 2001 were not placed before the Interim Tribunal and were not taken into account by it. He had thought that the Interim Tribunal would receive copies of all the evidence which was before the PIA Disciplinary Committee, but it had not. Also, he argued that the Interim Tribunal relied upon Exhibit I of the report of Mr Storey (the accountant appointed by the PIA to value the commission stream) which summarised the amounts paid into the escrow account, and assumed that he had received those amounts, but in fact all those amounts had not been paid to him. We should therefore consider the up-to-date financial information which he provided in January 2003.

28. For the FSA, Mr Mayhew sensibly did not seek to object to the new evidence as to the Applicant’s means going in. Although he sought to uphold the decision of the Interim Tribunal, pointing out with some force that the proposed penalty had already been reduced from £100,000 to £50,000 then to £40,000, we did not understand him to contend strongly that if the new evidence led us to the conclusion that the penalty should be varied, we were precluded from doing so. Nevertheless, as he rightly reminded us, the transitional provisions prescribe the jurisdiction of the Tribunal, and we have no jurisdiction beyond such provisions. So how should they be properly applied to the present facts?

29. The justice of the case clearly demands that we take account of the evidence as to the Applicant’s means. Sir Roy Beldam asked to see this evidence, and it should have been made available to him. No criticism can be made of the Applicant (who was unrepresented) in this respect. He not unreasonably assumed that the Interim Tribunal would have been provided with his schedules. No criticism can be made of the FSA either, but whilst Mr Fenhalls fairly mentioned that the schedules showed that the Applicant was in some financial difficulty, this was no substitute for producing the schedules themselves for the Interim Tribunal to form its own view. In the result, the decision of the Interim Tribunal records that the “Tribunal asked the Appellant to give some indication of his present means but we have to say that the answers he gave were vague”. Clearly, matters might have gone differently had the Interim Tribunal been shown the evidence as to his means that the Applicant had produced in November 2001.

30. We have concluded that both the November 2001 schedules and the January 2003 schedules fall within the definition of fresh evidence which could not reasonably have been made available to the Interim Tribunal by the party now seeking to adduce it. As regards the former, the Applicant is not a lawyer, and he assumed that all the evidence before the PIA Disciplinary Committee would be placed before the Interim Tribunal including these schedules. In the very special circumstances of the case, we think that he could not reasonably have made them available to the Interim Tribunal. In any case, the events which have occurred since the date of the hearing before the Interim Tribunal include the deterioration of the Applicant's financial position and the fact that he no longer receives any renewal commissions. In our view this evidence and evidence as to his current financial position could not reasonably have been made available to the Interim Tribunal simply because it did not then exist. Accordingly we conclude that we may consider the current evidence of his means also.

31. On that basis, the second issue is whether the determination of the Interim Tribunal was unlawful or not justified by the evidence within the meaning of Article 62(2)(b). The Applicant's argument was that the decision of the Interim Tribunal imposing a penalty of £40,000 was not justified by the evidence as to his ability to pay such an amount. We should say that we have taken account of all the various points he has made in this regard, including those set out in his reference, his letter of 14 October 2002 to the Tribunal, his outline argument sent on 19 March 2003, and his oral submissions. Mr Mayhew's argument for the FSA can best be summarised by quoting from paragraph 9 of his outline argument dated 18 March 2003: "The Authority contends that the Decision (to impose a financial penalty of £40,000) was both lawful and justified by the evidence before the Interim Tribunal. It is matter for this Tribunal whether the fresh evidence adduced by the Applicant leads the Tribunal to a different conclusion to that reached by the Interim Tribunal about the Applicant's ability to pay a substantial fine such that it would have imposed a different amount. If the difference is significant, the Decision should be varied to that extent".

32. In oral argument, Mr Mayhew made some additional points, arguing that the burden of proof to show inability to pay was on the Applicant and that although he had produced schedules, there were no underlying vouchers. Further, the veracity of the Applicant was in doubt, given that he had not been truthful with the PIA in the first place. Even if his figures were to be accepted, and if the asset and debt position were as stated in the January 2003 schedules, the penalty should not be reduced below £10,000. Mr Mayhew also submitted that ability to pay was only one of the criteria that had to be taken into account in fixing the penalty, and that in the present context inability to pay did not in itself preclude the making of a financial penalty. He did not address any arguments to us to support the latter proposition, but given the applicability of the PIA disciplinary principles (see paragraph 16 above) and the view that we take of the evidence, the issue does not arise directly. In a reference under FSMA 2000, this issue might require further exploration, but we need presently say no more about it. For good measure, he added that it was important in reaching a decision to send the right message to the industry as a whole.

Decision

33. We begin by respectfully repeating the following passage in the decision of the Interim Tribunal:

"The crux of the case is not what might have happened had [the Applicant] acted differently, but whether what he did was in accordance with the duties imposed

on him by the Authority to act with integrity and good faith with everyone and, in particular, to keep the Regulator informed. Thus, although we accept that [the Applicant] was in no way responsible for the original mis-selling, nevertheless we cannot agree with him that there was no consumer protection issue involved. It is, as we have said, of the utmost importance to consumers that Regulators are kept fully in the picture in circumstances of this kind. The purpose of appointing a regulator is that it does not rest solely with a financial adviser to decide what course should be taken in any given circumstances. What the Regulator might have done had he been told is really beside the point. The Regulator had no opportunity to consider what to do because of [the Applicant's] breach of duty."

As the Interim Tribunal said, these were serious matters. In a sentence, the Applicant disposed of his company's assets to defeat pension mis-selling claims, and then sought to conceal the position from the regulators. Whatever his motivation may have been, like the Interim Tribunal, we consider that these matters merited a substantial financial penalty. Again like it, our only anxiety has concerned the Applicant's ability to pay. Unlike it however, we have seen the evidence of his means contained in the Schedules of November 2001, and of course of January 2003.

34. We shall focus on the January 2003 figures. The statement of assets showed amounts for pensions and shares in companies amounting to £27,166. In addition it showed that an amount of £16,500 was imminently expected in settlement of the proceedings against Carpenters. However it also showed debts (mainly to banks and credit card companies) of £47,568.77 and, in addition, amounts of £19,542 due to the solicitors who acted for the Applicant in the disciplinary proceedings before the PIA Disciplinary Committee and in the proceedings against Carpenters to recover amounts from the escrow account. We accept that the credit card debt alone which his analysis shows is very significant.

35. On the other hand, the page entitled "income" states that "I earn fees from clients to whom I provide a broad spectrum of advice which could include computer training, accountancy, tax advice and planning, estate planning and wills, and lending". We have not overlooked the fact that the Applicant is not a young man, and that his ability to earn money must have been considerably inhibited by the disciplinary proceedings against him. However the amount of his income is clearly important, and we note that the page containing details of the Applicant's income is identical to that submitted in November 2001 (see paragraph 17 above) except that it includes the words "the current income position is that I have less income than I require for my modest day-to-day living expenses". Whilst we accept that his day-to-day living expenses show a modest lifestyle, such a statement is not at all satisfactory, particularly bearing in mind that the ground of the reference is inability to pay, and the fact that, to make sure that the matter was properly canvassed before us, we directed on 12 December 2002 a "detailed summary of the Applicant's assets and income position …such summary to be made up to the end of the calendar year 2002". As regards income, the upshot is that he did not supply up to date figures.

36. A further issue is the extent to which the income figures that were produced included the money received from the escrow account, in other words the transferred commission stream. The importance of this to the fair disposition of the matter is obvious. We note that responding to the November 2001 figures, the FSA e-mailed the Applicant on 14 November 2001 saying that "the information supplied has now been reviewed and is viewed as insufficient. Could you please provide full details of all your income including the renewal commission income …". This was not done. His reply the following day was he did

not know what the renewal income from the escrow was, because he had not been provided with a current statement, and money had been withheld since August, and he was in dispute with Carpenters. However that dispute is now over, but the information has not been forthcoming. Most of the Applicant's oral evidence consisted of cross-examination on the issue. We can see that there may be a distinction is this regard between initial commission and renewal commission. At all events, his evidence was that the payments were "paid straight out in office costs" and "paid direct to the company which ran the offices", in other words that he received no direct benefit from them. He said that because the payments were passed straight on to pay expenses, he had not included them in his figures either as income or expenses. But this evidence was not supported by any documents. We have to say that having listened very carefully to the Applicant, we do not think that he was completely frank with us in this regard, and we do not consider his evidence to be wholly reliable. It is probably now impossible to get to the bottom of what happened to this commission money, but we are satisfied that the Applicant received substantial benefit from it.

37. Our conclusion is as follows. The Applicant's case is that the financial penalty imposed by the Interim Tribunal should be set aside altogether on the grounds of inability to pay. The onus of proof is on him in this regard. Having considered the evidence as to his means which the Interim Tribunal asked to see but was not shown, and the recently produced evidence, we are satisfied that a penalty of £40,000 is beyond his means to pay. We conclude that in that respect the determination of the Interim Tribunal was not justified by the evidence within the meaning of Article 62(2)(b) of the transitional provisions in the 2001 Order. However he has not satisfied us that he is unable to pay any financial penalty at all. We also consider that it would be quite wrong to set aside the penalty in toto, considering the seriousness of the disciplinary matters concerned, and the benefit received by him from the diversion of the income stream. In the event, we have concluded that appropriate financial penalty is £10,000.

38. As already mentioned, this reference is made under transitional provisions, under which the powers of the Financial Services and Markets Tribunal are considerably narrower than under FSMA 2000. However we make it clear that where ability to pay a financial penalty is in issue, the party raising the issue will be expected to provide detailed evidence as to means, verified where appropriate, bearing in mind that these issues arise in the context of the financial services industry, in which proper attention to such detail is to be expected.

39. Accordingly, under Article 62(2)(b) of the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001 we remit the matter to the Financial Services Authority directing that the amount of the penalty imposed on the Applicant should be reduced to £10,000.

DR NUALA BRICE

WILLIAM BLAIR QC

13 June 2003

FIN/2002/0007