APPLICATION FOR PERMISSION — application for approval of named officer to perform all controlled functions — named officer considered not to be fit and proper — applications rejected — sole issue whether named officer fit and proper since if not, threshold conditions 4 and 5 not satisfied — named officer's antecedent history — whether indicative that he is not fit and proper — failure to disclose antecedent history — whether indicative of lack of candour — tribunal not satisfied on evidence that named officer fit and proper — Authority's decision upheld

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

PROMINENCE TECHNOLOGY LIMITED **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondent**

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

Sitting in public in London on 12 July 2005

Samson Sonibare, director, for the Appellant

Adrian Berrill-Cox and Sarah Clarke, counsel, of and instructed by the Authority for the Respondent

DECISION

1. The Applicant, Prominence Technology Limited ("PTL") sought permission in accordance with section 40 of the Financial Services and Markets Act 2000 ("the Act") on 30 March 2004 to perform various regulated activities in the course of its proposed mortgage and insurance business, and at the same time sought approval in accordance with section 60 of the Act of its sole director and shareholder, Samson Sonibare, as the person who was to perform the relevant five controlled functions: director; chief executive officer; apportionment and oversight; money laundering and reporting officer; and finance. By a decision notice dated 23 September 2004, the Respondent Authority refused the application for approval of Mr Sonibare's undertaking the controlled functions, on the ground that, it considered, Mr Sonibare was not a fit and proper person. Since no application had been made for approval of anyone else to perform the controlled functions for PTL, the Authority also concluded that PTL could not satisfy the threshold conditions, in particular condition 4 which relates to adequacy of resources. It therefore also refused PTL's application for permission.

2. PTL referred those decisions to the tribunal on 5 October 2004. In a practical sense the only issue before us is whether the Authority was right to conclude that Mr Sonibare is not a fit and proper person. It was not argued for PTL—which was represented at the hearing by Mr Sonibare—that the decision to refuse PTL's application for permission could be wrong even if the decision about his fitness was correct; Mr Sonibare accepted, though after a little hesitation, that if we were not satisfied that he is fit and proper (the onus being on PTL to establish that he is) refusal of PTL's application for permission, as it currently stands, must inevitably fail. Similarly, the Authority—represented before us by Adrian Berrill-Cox and Sarah Clarke of counsel—did not suggest that any factor other than Mr Sonibare's perceived unfitness had led to the decision to refuse PTL's application for permission, and if that application were renewed, with another person proposed for the performance of the controlled functions, that application would be considered on its merits although the Authority takes the view that Mr Sonibare's relationship with PTL, if it were to continue, would be a relevant factor.

3. The Authority's decisions were based primarily on what it had learnt of Mr Sonibare's business dealings in the period 1994 to 1996, although it also relied on PTL's failure to disclose earlier investigations into those dealings. That failure, it says, demonstrates a want of candour which itself is relevant to PTL's application (to what extent it might be relevant to a future, renewed application is not a matter we are required to consider). PTL's case, shortly put, is that Mr Sonibare's history is of little or no significance, and irrelevant to his fitness and propriety, and that there was no want of candour on its part: it had not disclosed the investigations since it did not know, and could not have known, that that is what they were.

4. The nature of the Authority's duty, so far as is material in this case, when it is considering applications such as those made by PTL is to be found by reading together sections 5 and 41 of the Act. They are as follows:

> "**5 The protection of consumers**
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> (1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.
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> (2) In considering what degree of protection may be appropriate, the Authority must have regard to—
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> (a) the differing degrees of risk involved in different kinds of investment or other transaction;
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> (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
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> (c) the needs that consumers may have for advice and accurate information; and
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> (d) the general principle that consumers should take responsibility for their decisions.
>
> (3) 'Consumers' means persons—
>
> (a) who are consumers for the purposes of section 138; or
>
> (b) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons."

> "**41 The threshold conditions**
>
> (1) 'The threshold conditions', in relation to a regulated activity, means the conditions set out in Schedule 6.
>
> (2) In giving or varying permission, or imposing or varying any requirement, under this Part the Authority must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all of the regulated activities for which he has or will have permission.
>
> (3) But the duty imposed by subsection (2) does not prevent the Authority, having due regard to that duty, from taking such steps as it considers are necessary, in relation to a particular authorised person, in order to secure its regulatory objective of the protection of consumers."

5. Thus the Authority has to consider the protection of consumers, carrying out the balancing exercise which section 5 prescribes, and must be satisfied, if it is to grant permission, that the relevant threshold conditions are met. Of the threshold conditions, only Conditions 4 and 5 are currently relevant. Condition 4 reads, so far as material:

> "The resources of the person concerned must, in the opinion of the Authority, be adequate in relation to the regulated activities that he seeks to carry on, or carries on."

In the context of this case, "the person" is PTL. Condition 5 reads:

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

6. The Authority's position (which we do not think is controversial on this point) is that "resources" in Condition 4 include not only financial but also human resources. It says that PTL cannot show that it is fit and proper, within the meaning of condition 5, to carry on the regulated activities for which it has sought permission, mainly because of its connection with Mr Sonibare who (as is common ground) is its sole director and beneficial shareholder, and who is himself not fit and proper. And PTL does not have the resources to satisfy condition 4 because the only person available to ensure that the regulated activities are carried on in an appropriate manner—Mr Sonibare—is not fit and proper to undertake that function.

7. We heard evidence from Robert Gruppetta, the Authority official responsible for processing the application, Andrew Honey, his superior officer, William Beck, formerly an investigating officer of the Department of Trade and Industry ("DTI") and Susan Burness, now with the Authority but at the relevant time an investigator employed by the Bank of England. We had the unchallenged statement of Peter Jones, also an inspector of the DTI. The Authority provided us with a bundle of documentary evidence. Mr Sonibare challenged the Authority's evidence to only a very limited extent and the narrative of the factual background to the reference which follows can be taken as agreed, save where we mention a matter of dispute. Mr Sonibare decided not to give evidence himself and called no witnesses. Although we naturally pay heed to what Mr Sonibare told us, we bear in mind that what he said has not been tested by cross-examination. Inevitably, given its failure to call any evidence, the Applicant's ability to satisfy us that the Authority is wrong and that Mr Sonibare is a fit and proper person is somewhat compromised.

8. The Authority's decision was based primarily upon Mr Sonibare's conduct when managing director of another company controlled by him, Maiden Investments Limited ("MIL"), between 1994 and 1996. MIL ran an investment scheme called the Maiden Optimum Yield Investment, by which investors were offered a (supposedly) guaranteed return of 10 per cent on their funds. We say "supposedly" guaranteed since such documentary evidence as we had indicated that MIL alone provided the guarantee, yet there was no indication of the manner in which, nor of the resources from which, it might honour the guarantee. In

addition, MIL offered to clients to obtain for them a secured credit card issued by a bank. The documentary evidence showed that for some of the relevant time MIL was genuinely negotiating an arrangement with Standard Chartered Bank by which the latter might be willing to issue credit cards to MIL's clients, but that Standard Chartered terminated the discussion before any credit cards were issued. The issue of the cards, if the negotiations had been successful, was to be secured against the client's deposit of funds. There was also some evidence that MIL had, or had sought to make, similar arrangements with other banks but the evidence was equivocal about whether any arrangements had in fact been made, and whether any credit cards had been issued in accordance with them. It was, however, clear that some clients had deposited funds with MIL, intended to be used as security, in anticipation of its being able to procure a credit card for them.

9. Two of MIL's clients were Russian diplomatic staff employed at the Russian Embassy in Addis Ababa. When they learnt that MIL was unable to procure the issue to them of credit cards by a bank, they asked for the return of the money which they had deposited with MIL. The money was, we understand, returned, but not before a considerable delay had occurred. The delay prompted a complaint by the Russian clients to the DTI, which led to an investigation. Mr Beck was appointed as the investigating officer. He first visited MIL's offices, which he found to be an unattended accommodation address. Eventually he managed to obtain the number of Mr Sonibare's mobile telephone, and spoke to him by that means on 27 July 1996. MIL had, it seems, ceased trading, but Mr Beck nevertheless wished to continue his investigation. He asked Mr Sonibare to produce various documents which, and without inordinate delay, Mr Sonibare provided during the course of an interview at the DTI's offices on 16 August 1996. A second interview took place on 18 September 1996. It transpired during the interviews that MIL's activities were not limited to the investment scheme and the procuring of credit cards, but that, in return for fees, it also undertook to obtain mortgages and letters of credit and to set up companies in foreign jurisdictions. Mr Beck ascertained that some sums due to clients had not been paid, or had not been paid promptly, and that some of MIL's cheques had been dishonoured, although it appears that that dishonour occurred because a cheque received by MIL on which it depended for the necessary funds had itself been dishonoured.

10. After the second interview, Mr Beck prepared a report for Mr Jones, his superior officer, which in turn led to the issue by the DTI of a warning letter dated 4 November 1996, addressed to MIL. The letter mentioned only the relevant scheme, and recorded the DTI's conclusion that it was a collective investment scheme falling within section 75(1) of the Financial Services Act 1986. MIL was neither authorised to carry on the business of promoting such schemes, nor exempted from the requirement that it be authorised; thus it appeared to be in breach of sections 3 and 4 of the 1986 Act, and had committed an offence. However, the DTI did not intend to prosecute, and the letter merely warned MIL that prosecution might follow if the scheme were to continue. We understood from Mr Beck that the decision not to prosecute was made mainly because MIL had by then ceased trading. Mr Sonibare told us that he had not received the

warning letter. That contention is clearly true; Mr Jones's evidence was that the letter had been sent to an address in Regent Street, London but the letter had been returned undelivered by the Post Office. That address had been MIL's registered office address; whether it still was the registered office at the time the letter was sent did not become entirely clear, although Mr Sonibare told us it had moved in the relevant period. Evidently the DTI made no further attempt to bring the warning to Mr Sonibare's attention.

11. It is apparent from Mr Beck's investigation—and Mr Sonibare did not challenge the conclusion—that MIL was conducting business which it was not authorised to conduct, and that MIL's affairs were managed by Mr Sonibare in a manner which fell below the standard reasonably to be expected of a company handling clients' funds. There is evidence that clients suffered losses and it is not a sufficient answer that the amounts involved seem to have been fairly small, nor that in some cases the clients suffered a delay in payment rather than a complete loss of their funds. In our view, Mr Sonibare's attempt to excuse his conduct, by contending, as he did before us, that most of the clients who suffered losses were not United Kingdom residents and that the few who were residents were "collateral damage", is rightly categorised by the Authority as a manifestation of Mr Sonibare's failure to appreciate the high standards of probity which are, very properly, demanded of those who wish to offer financial services to the public.

12. It also emerged that Mr Sonibare had been the subject of enquiries by the Bank of England because he had written a book, sold by MIL, advising readers on the means by which they might set up a private bank in an overseas jurisdiction. We had no direct evidence on this issue, and the circumstances which prompted the Bank's enquiries did not become clear, although it was apparent that the Bank seriously doubted the accuracy of the book, and Mr Sonibare's competence to write it. It is clear—since Mr Sonibare agreed that it had occurred—that the Bank warned him that it had concerns about the book and, in consequence, it was withdrawn. Miss Burness's evidence was directed to other enquiries made of Mr Sonibare by the Bank of England, but those enquiries (which involved a requirement that Mr Sonibare or MIL produce documents) related to the activities of another individual, and we find them to be of little relevance.

13. Although the Authority maintains that the fact of the investigations which we have outlined, and the matters they reveal, point to the conclusion that Mr Sonibare is not a fit and proper person, it argues even more strongly that Mr Sonibare's, and through him PTL's, failure to disclose them in the forms completed for the purposes of the applications indicates a want of candour, and a failing by Mr Sonibare to come to terms with his past failings, which can lead only to the conclusion that Mr Sonibare is not fit and proper and that its decisions were right. Question 25 of the application form for the approval of Mr Sonibare asks for details of the person's relevant financial services employment since 1 January 1994. For part of the period since that date, Mr Sonibare, as he now accepts, had been promoting the activities of MIL; he was its sole director from 7 January 1994 to 1 January 2002, although for much of that period the company

seems to have been dormant. The Authority's normal enquiries, made as the application was processed, revealed Mr Sonibare's role at MIL, and he was asked about it. His reply contained an apology for his failure to mention MIL, and a claim that MIL had been engaged only in the marketing of books: he specifically said that during his time as director, MIL did not conduct "any insurance, pension or investment business either in the UK or abroad".

14. Question 35 of the same application form reads "Has the individual ever been found guilty of conducting any unauthorised regulated activities or been investigated for possible conduct of unauthorised regulated activities?"; the answer Mr Sonibare gave is "No". Question 36 is "Is the individual, or has the individual ever been, the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity?"; the answer given is again "No".

15. The Authority's contention is that all three of those replies are manifestly untrue. MIL's activities were not limited to the marketing of books, but included investment business; MIL, controlled by Mr Sonibare, had been found guilty of conducting unauthorised regulated activities; and Mr Sonibare had been subject to investigation.

16. On the first point, the Authority's case seems to us to be unanswerable, and Mr Sonibare, indeed, did not attempt to put any answer forward, save to argue that MIL acted as an intermediary which, in our view, is no answer at all; many financial services businesses act as intermediaries, and PTL, had it received permission, would have done so as well. Mr Sonibare told us that he had overlooked his running of MIL when he completed the application; he was trying to lodge it by 31 March 2004, after which date the fee would double, and in his haste he had made some mistakes. We do not accept that explanation. First, it is no excuse that Mr Sonibare left such an important document to the last moment (nor does it augur well for his competence to complete forms for PTL's clients that he made mistakes of this kind in his own) but, more importantly still, we are satisfied that Mr Sonibare at first failed to disclose his conduct of MIL because he realised that, had he done so, the Authority would have been put on notice of activities which, as he well knew, would put his fitness to conduct investment business in doubt. It is conspicuous that he disclosed other parts of his employment history, despite its being outside the financial services industry, and it is particularly telling that, when he learnt that the Authority was aware of MIL, he claimed that it had not conducted investment business. That claim can only be considered a deliberate untruth.

17. It is, at the least, arguable that Mr Sonibare had not been found guilty of conducting unauthorised regulated activities; neither he nor MIL had been tried by a court, and if there had been such a finding it should probably have been made against MIL rather than Mr Sonibare. It is true also that the warning letter which set out the DTI's conclusion, and which would have made Mr Sonibare realise that it had reached that conclusion, did not come to his notice. While the reply

given to question 35 might be misleading, even if not strictly incorrect, we do not think that Mr Sonibare can, in all the circumstances, be fairly criticised for giving it.

18. Mr Sonibare did not dispute the details of Mr Beck's enquiries as we have described them, but told us that he did not realise that Mr Beck was engaged upon an "investigation" rather than a simple enquiry We do not, however, accept that Mr Sonibare was unaware that Mr Beck was carrying out an investigation, or could reasonably have thought he was engaged in some lesser task. Mr Beck's authority stemmed from section 447 of the Companies Act 1985, and was conferred on him by a formal document provided by a senior DTI official. We accept Mr Beck's evidence that he gave a copy of it to Mr Sonibare and made it clear to him, in terms he could not misunderstand, that he had statutory powers to demand the production of documents. Mr Sonibare produced the documents and attended two interviews at the DTI's offices. We accept that, after the second interview, he heard no more from the DTI (since the warning letter did not reach him, and the DTI made no other attempt to communicate with him) but we nevertheless do not think anyone in his position could reasonably fail to realise that Mr Beck was engaged on an investigation. The suggestion that this was in reality no more than an enquiry is a mere semantic point, without substance. Again, and even if Mr Sonibare reasonably thought the investigation had not been pursued beyond the second interview, we are satisfied that Mr Sonibare's silence about it is the consequence of his wishing to conceal the activities of MIL.

19. Mr Berrill-Cox argued (though it was by no means a major part of his case) that the failure to disclose the Bank of England's warning to Mr Sonibare about the book he had written was also indicative of a lack of candour. We do not agree. It is true that the subject-matter of the book was relevant to the financial services industry, that readers might have been influenced to follow the advice it contained, that Mr Sonibare may have been ill-advised to write it and to sell it, and that his disclosing the episode could not be regarded as excessively zealous. But in our view the misguided writing and selling of a book is not so clearly an activity within the contemplation of question 36 that a failure to mention it amounts to an untruthful reply. We think, therefore, that this omission can be excused.

20. Mr Sonibare made much of his never having been convicted of any kind of offence, and of the fact (as he maintained) that PTL intended to act as a broker or intermediary, so that it would not be handling clients' funds: thus, he said, there would be no risk to the public. Unfortunately for him and for PTL, that is not the test. We must be satisfied, if PTL is to succeed in this reference, that Mr Sonibare is a person who is fit and proper to control a company carrying on the business of advising members of the public on matters relating to mortgages and insurance contracts. As the tribunal said in *Shafquat Rajah v FSA* (2005, Decision 0014), where the applicant had sought the same permission as PTL, "For many members of the public, entry into a mortgage contract is the largest and most important financial transaction in which they ever engage." Such people are entitled to

expect that those who advise them, whether or not they handle their money, subscribe to the highest standards of probity and competence.

21. It will be apparent from the foregoing that, although we do not agree with the Authority in every respect, we do agree with it that Mr Sonibare does not come up to the requisite standard. The Applicant has not satisfied us that he is a fit and proper person to be approved for the performance of the controlled functions in respect of which the application was made; on the contrary, we are satisfied that his conduct of MIL, and his attempts to conceal that conduct, demonstrate that he is not fit and proper. We are unanimous in that conclusion.

22. The Authority was right to refuse the applications, and the reference is therefore dismissed.

COLIN BISHOPP
CHAIRMAN
Release Date:

FIN/2004/0027