SUPERVISORY NOTICE - variation of Part IV permission by removal of all regulated activities with effect from 9 September 2003 - reason for Notice being breach of threshold condition 4 (adequate resources) - Applicant without professional indemnity insurance cover - application for a direction to suspend effect of Notice until reference disposed of - whether Tribunal satisfied that such a direction would not prejudice the interests of consumers - no - whether necessary for Notice to take effect on 9 September 2003 - yes - whether removal of all regulated activities proportionate to the concerns being addressed by the Notice - yes - application dismissed - FS&MT Rules 2001 SI 2001 No. 2476 Rule 10(1)(e) and Rule 10(6)

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

EUROSURE INVESTMENT SERVICES LIMITED
Applicant

- and -

FINANCIAL SERVICES AUTHORITY
Respondents

Tribunal: DR A N BRICE

REASONS FOR DIRECTION

Sitting in public in London on 10 September 2003

Charles Marquand of Counsel, instructed by Messrs Charles Russell Solicitors, for the Applicant

David Mayhew of Counsel for the Respondents

REASONS FOR DIRECTION

The application

1. On 20 August 2003 the Respondents issued to Eurosure Investment Services Limited (the Applicant) a First Supervisory Notice (the Notice) which varied the Applicant's Part IV permission by removing all regulated activities with effect from 9 September 2003. The reasons for the action taken by the Respondents were that the Applicant had failed to effect and maintain adequate professional indemnity insurance cover or to satisfy the Respondents that its financial position was such that it nonetheless had adequate resources to meet threshold condition 4.

2. On 8 September 2003 the Applicant referred the Notice to the Tribunal and, at the same time, applied for a Direction under Rule 10(1)(e) of the Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 (the Rules) suspending the effect of the Notice until the reference had been finally disposed of. The application was heard on 10 September 2003 and a Direction was released early on 11 September 2003 dismissing the application. The Direction stated that reasons would follow and this document contains the reasons for the Direction.

The Rules

3. Rule 10(1) of the Rules describes particular types of direction which may be given by the Tribunal and rule 10(1)(e) provides that a Direction given by the Tribunal may:

"(e) suspend the effect of an Authority notice (or prevent it taking effect) until the reference has been finally disposed of, or until any appeal against the Tribunal's determination of the reference has been finally disposed of, or both … ."

4. Rule 10(6) provides:

"Where an application for a direction is made under paragraph (1)(e), the Tribunal may give such a direction only if it is satisfied that to do so would not prejudice -
(a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice; or
(b) the smooth operation or integrity of any market intended to be protected by that notice."

The statutory framework

5. The following statutory framework is relevant to facts of the application.

6. Part I (sections 1 to 18) of the Financial Services and Markets Act 2000 (the 2000 Act) contains the provisions about the Respondents as Regulator. Section 2(1) provides that, in discharging their general functions, the Respondents must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives. Section 2(2) provides that one of the regulatory objectives is the protection of consumers.

7. Part IV (sections 40 to 55) contains the provisions relating to permission to carry on regulated activities and section 42(2) provides that the Respondents may give permission for an applicant to carry on specified activities. Section 41(2) provides that, in giving or varying permission, the Respondents must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all the regulated activities for which he has, or will have, permission. Section 41(1) provides that the threshold conditions are those set out in Schedule 6. Schedule 6 describes five threshold conditions, the fourth of which is adequate resources. Paragraph 4 of Schedule 6 provides:

"4(1) 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.

(2) In reaching that opinion the Authority may-
(a) take into account the person's membership of a group and any effect which that membership may have; and
(b) have regard to-
(i) the provision he makes and, if he is a member of a group, which the members of the group make, in respect of liabilities (including contingent and future liabilities); and
(ii) the means by which he manages and, if he is a member of a group, which other members of the group manage, the incidence of risk in connection with the business."

8. Section 44 provides that the Respondents may, on the application of an authorised person, vary a Part IV permission in a number of ways, including removing a regulated activity. Section 45(2) gives the Respondents power on their own initiative to vary a Part IV permission in any of the ways mentioned in section 44 and section 45(1) provides:

"45(1) The Authority may exercise its power under this section in relation to an authorised person if it appears to it that:
(a) he is failing, or is likely to fail, to satisfy the threshold conditions; … or
(c) it is desirable to exercise that power in order to protect the interests of consumers or potential consumers."

9. Section 53 contains the provision about the procedure for the exercise of the Respondents' own-initiative power to vary a Part IV permission. It provides that a variation either takes effect immediately or on such a date as may be specified in the notice. Section 53(3) provides:

"53(3) A variation may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its own initiative power, reasonably considers that it is necessary for the variation to take effect immediately (or on that date)."

10. Part X of the 2000 Act (sections 138 to 164) contains provisions about rules and guidance. Section 138 gives the Respondents power to make rules applying to authorised persons, called general rules. Section 148 contains provisions about the modification or waiver of the rules and the relevant parts of section 148 provide:

"148(2) The Authority may, on the application or with the consent of an authorised person, direct that all or any of the rules to which this section applies -
(a) are not to apply to the authorised person; or
(b) are to apply to him with such modifications as may be specified in the direction.

(3) An application must be made in such manner as the Authority may direct.

(4) The Authority may not give a direction unless it is satisfied that-
(a) compliance by the authorised person with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purposes for which the rules were made; and
(b) the direction would not result in undue risk to persons whose interests the rules are intended to protect."

11. The Respondents publish the Interim Prudential Sourcebook for Investment Firms (IPRU(INV)) which is part of the FSA Handbook. Chapter 13 describes the

financial resource requirements for personal investment firms. Rules 13.1.2 and 13.1.3 provide:

"13.1.2 A firm must:
(1) have and maintain at all times financial resources of the kinds and amounts specified in, and calculated in accordance with, the rules of this chapter; and
(2) be able to meet its liabilities as they fall due.

13.1.3 A firm must effect and maintain at all times adequate professional indemnity insurance cover for all the business activities which it carries on or for which it is responsible … ."

12. Chapter 13 goes on to describe the required terms and provisions of adequate professional indemnity insurance cover and also the financial resources tests, including the "own funds" and the "adjusted net current assets" tests. Table 13.10(2) provides how "own funds" should be calculated.

13. Finally, section ENF 3.5.2G(2) of the FSA Handbook provides that a restriction imposed on a firm "should be proportionate to the objectives the FSA is seeking to achieve". Section ENF 3.5.13G(9) provides:

"The FSA will take into account the (sometimes significant) impact that a variation of permission may have on a firm's business and on its customers' interests, including the effect of variation on the firm's reputation and on market confidence. The FSA will need to be satisfied that the impact of any use of the own-initiative power is likely to be proportionate to the concerns being addressed in the context of the overall aim of achieving its regulatory objectives."

The issues

14. Both parties agreed that the question as to whether the Applicant did or did not have adequate resources to meet threshold condition 4 was a matter for the substantive hearing of the reference. In support of its application that the effect of the Notice should be suspended the Applicant argued: (1) that it was not necessary for the Notice to take effect on 9 September 2003 within the meaning of section 53(3) of the 2000 Act; (2) that the removal of all the Applicant's Part IV permissions from 9 September 2003 was not proportionate within the meaning of ENF 3.5.2G(2) and (9); and (3) that the giving of a direction under Rule 10(1)(e) would not prejudice the interests of any persons intended to be protected by the Notice. The Respondents disputed all these arguments and also argued that the Tribunal should apply the principles in HPA Services v Financial Services Authority Tribunal Decision of 30 July 2003.

15. I have therefore identified the following questions for determination in the application:

(1) whether the giving of a direction under Rule 10(1)(e) would prejudice the interests of any persons intended to be protected by the Notice;

(2) whether it was necessary for the Notice to take effect on 9 September 2003 within the meaning of section 53(3) of the 2000 Act;

(3) whether the removal of all the Applicant's Part IV permissions from 9 September 2003 was proportionate within the meaning of ENF 3.5.2G(2) and (9); and

(4) whether the application of the principles in HPA Services would lead to a suspension of the Notice.

The evidence

16. A bundle of documents was produced by the Applicant which bundle contained a witness statement by Mr John Sayers, the Managing Director of the Applicant. Further documents were produced by the Applicant during the course of the hearing. A bundle of documents was produced by the Respondents.

The facts

17. I find the following facts from the evidence before me but only for the purposes of this application.

The Applicant

18 The Applicant is an independent financial adviser network with 109 appointed representative firms which employ over 150 investment advisers. The Applicant was founded in 1994 and provides regulatory services to the representative firms in the network. The Applicant is the authorized person and takes regulatory responsibility for the firms in the network; it very rarely carries on any regulated activity itself. The Applicant instructs compliance representatives to assist it in regulatory matters..

19 . The Applicant charges the members of the network a monthly fee to cover regulatory costs and professional indemnity insurance cover and it also levies a fee of about 10% on the gross commissions charged by the members. (The representative firms do not have any separate professional indemnity insurance cover.) The representative firms deal overwhelmingly with retail financial products such as pensions, endowments and income bonds. Together they have in the region of 30,000 clients and their gross commissions amount to between £6M and £7M. Of total turnover approximately 35% represents unregulated business.

20. I saw a copy of an unsigned balance sheet for the Applicant as at 31 May 2003 which showed a figure for capital and reserves of £303,785. I was told that currently pre-tax profit is in the region of £142,000 each quarter.

The Applicant's regulatory history

21. On 1 December 2001 the Applicant was granted permission by the Respondents under Part IV of the 2000 Act to carry on the following regulated activities:

(1) advising on pension transfers and pension opt outs;
(2) advising on investments (excluding pension transfers and pension opt outs);
(3) agreeing to carry on a regulated activity;
(4) arranging deals in investments; and
(5) making arrangements with a view to transactions in investments.

22. From the time that it started operations until February 2003 the Applicant had professional indemnity insurance cover of £5M. Cover operated on a claims made basis, so that cover applied to claims notified during the year. In the five years ending in February 2000 there were forty-seven complaints (most of which gave

rise to no payment) and the total amount paid in compensation in that period was £57,412. Because there was an excess of £5,000 on the professional indemnity insurance policy (presumably for each and every claim), this amount was paid by the Applicant from its own resources.

23. In March 2002 a supervision visit to the Applicant was carried out by the Respondents' supervision staff who prepared a report in April 2002 (the supervision report). The report described concerns about compliance arrangements and listed a number of recommendations to help address them. The report was stated to be confidential. When the report was received by the Applicant it corresponded with the Respondents who wrote to the Applicant on 2 July 2002 summarising the position. This was: that the supervision visit had identified serious weaknesses in the firm's systems and controls; that the firm had accepted the majority of the shortfalls and had implemented or agreed to implement improvements to its compliance and monitoring systems; that the firm had been asked to review and strengthen its procedures in relation to mortgage related endowment/ISA sales; and that the firm was required to undertake a review by 31 August 2002 of all mortgage related sales transactions since December 1999 and to compensate disadvantaged clients. The letter concluded:

"Upon receipt of your confirmation that you accept the position, the Regulatory Events Department will close the case and your Supervision contact for all issues will be Nigel Baxendale of Relationship Management Department."

24. On 12 July 2002 the Applicant gave the Respondents the confirmation requested. On 6 August 2002 the Respondents wrote to say that the Applicant's detailed report should be sent to Mr Baxendale and that the Regulatory Events Department were closing the case.

25. In common with many other firms in the financial services industry the Applicant was required to undertake a review of all its pensions business. It had 3,200 such cases. On 6 August 2002 the Respondents wrote to the Applicant about thirteen investors asking for further action or information. On 29 January 2003 the Respondents imposed a statement of public censure on the Applicant because it had failed to take reasonable steps to conduct the pensions review in accordance with the prescribed standards and had failed to conduct it in a timely manner. There was no finding that there had been any mis-selling of pensions nor was any fine imposed. It was agreed that the Applicant would re-visit thirteen pensions review cases about which the Respondents had concerns. On 15 March 2003 the Applicant wrote to the Respondents with comments on these cases.

November 2002 - the first application for a waiver of Rule 13.1.3

26. Meanwhile, in November 2002 the Respondents were aware that some personal investment firms were having difficulty in obtaining professional indemnity insurance cover. Prices were rising in insurance markets caused by, among other things, a global shortage of capacity and falls in equity markets and there was also some concern about regulatory actions. From 1 November 2002 a modification to the rules was made amending the detailed requirements governing the terms of professional indemnity insurance policies. Also some individual waivers of Rule 13.1.3 (requiring professional indemnity insurance cover) were granted if the Respondents were satisfied that a firm's financial position was such that it had adequate resources to meet threshold condition 4.

27. The Applicant's professional indemnity insurance was due for renewal on 26 February 2003. On 6 November 2002 the Applicant's compliance representatives

wrote to the Respondents referring to the requirement for firms to carry professional indemnity insurance cover (Rule 13.1.3) and applying for a waiver of this rule. The letter indicated that the Applicant's insurance premiums had increased each year from £26,344 in 1999 to £255,515 in 2002. The number of complaints was small and the amount paid by insurers was nil in most years because of the excess. The premiums were, therefore, a drain on resources and provided no benefit. The letter suggested that, instead of maintaining professional indemnity insurance cover, the Applicant should hold on deposit the sum of £100,000 for the purpose of meeting claims, the sum to be topped up to ensure that it remained at the same figure. The deposit would be increased by a further £100,000 in February 2004 and by a further £50,000 in February 2005. The letter stated that the total deposit would then amount to about 5% of the annual turnover of the firm.

28. The Applicant's compliance representatives did not receive a reply to the letter of 6 November 2002 and on 26 November 2002 a reminder was sent. Again no reply was received. There was some uncertainty as to what happened to these two letters and some doubt as to whether they had ever been received by the Respondents. On 14 January 2003 the Applicant sent a reminder and on 21 January the Applicant faxed to the Respondents copies of the letters of 6 and 26 November.

29. Meanwhile on 17 January 2003 the Applicant sent a proposal form to its insurers, Magian Underwriting Agency Limited (Magian), for the renewal of their professional indemnity insurance cover. An approach was also made to Collegiate Underwriting (Collegiate).

30 On 7 February 2003 Mr Baxendale of the Respondents telephoned the Applicant to discuss the application for a waiver. He said that more information was required and that, although additional capital requirements were calculated on a case by case basis, he thought that the minimum increase in the "own funds" requirement would be £939,000. On the same day Mr Baxendale wrote fully to the Applicant and said that the Respondents could not grant a waiver without first having ensured that it would not result in undue risk to persons whose interests the rules were designed to protect. The letter referred to recent guidance offered by the Respondents to investment firms that were experiencing problems in obtaining professional indemnity insurance cover or in obtaining compliant cover. The guidance read:

"Where a firm is able to obtain cover, but on non-compliant terms, and they wish to continue regulated activities, they are requested to present a reasoned case to the FSA that their financial position is such that it has adequate resources to meet Threshold Condition 4 (despite having non-compliant terms). As part of this, a detailed explanation of the firm's resources should be provided in writing, making reference to the following, which should be supplied to the FSA:

1. a full copy of the completed proposal form submitted to the brokers/insurers;

2. a full copy of the policy document (schedule and full policy wording) highlighting the areas where the policy would be non-compliant;

3. the firm's business volumes in respect of the business types where cover is non-compliant (excluding general insurance);

4. evidence that the firm or their broker have undertaken a full market survey and the policy that has been offered is the closest to being compliant;

5. details of the complaints that the firm has received over the past five years by business lines and their outcomes including redress paid; and

6. details of the other resources that you believe enable your firm to meet Threshold Condition 4, supported by documentary evidence, including financial information (current bank statements, latest accounts or statement of assets and liabilities as appropriate).

Where a firm is unable to obtain PII cover they have two options:

7. stop conducting regulated activities and apply to cancel their Part IV permission (this will be subject to normal checks by the FSA); or

8. stop conducting regulated activities and ask to temporarily suspend their permission by having a requirement placed on it until they have obtained compliant cover. A firm will be given no more than 3 months to obtain cover."

31. The letter of 7 February went on to say that the Applicant's application did not suggest that it would have difficulty in obtaining compliant cover and did not show that the rules would be unduly burdensome or that the waiver would not result in undue risk to persons whose interests the rules were designed to protect. The letter then asked for further information. Mr Baxendale wrote further to the Applicant on 18 February 2003 after a meeting had taken place and referred to Table 13.10(2) which explained how to calculate the "own funds" requirement. The letter stated that, if the Applicant could not identify how it could raise the additional £939,000 of own funds, it was unlikely that the application for a waiver would succeed. The letter concluded by saying that the Respondents would need to consider what action might be appropriate if the Applicant was unable to obtain compliant cover in time to replace the policy which expired on 26 February.

32. At about this time, in February 2003, the Respondents published Consultation Paper 169 about professional indemnity insurance for personal investment firms. This proposed that the modifications introduced in November 2002 might become part of the Rules.

33. On 19 February the Applicant replied to Mr Baxendale's letter of 7 February saying that it had researched numerous providers of professional indemnity insurance without success and was consequently relying on its brokers to renew with the existing insurer or offer an alternative. The letter queried the additional amount of £939,000 of own funds which would be required as that was the amount required of another firm with a turnover of £10M; as the Applicant had a turnover of £6M it was of the view that a lesser figure would be appropriate.

34. Further correspondence followed and on 20 February the Respondents wrote to remind the Applicant that further information was required before the application for a waiver could be considered. That letter referred to the fact that the current professional indemnity insurance policy expired on 26 February and that the Respondents urgently needed to know what was to be done after that date to cover the firm's potential exposures. The letter concluded: "I should remind you that a failure to maintain compliant PII cover will cause your firm to be in breach of Threshold Conditions and as a result, FSA will need to consider what action may be appropriate".

35. On 24 February 2003 the Applicant's insurance brokers wrote to the Applicant to say that the approach to Collegiate had not been successful as Collegiate was

only renewing its current capacity; an approach had been made to Magian but they had exhausted their capacity. However, on 25 February the brokers wrote to say that they were hopeful that Collegiate would write the risk and there could be a decision before the end of the week. Any new policy would have retrospective cover.

36. Also on 25 February the Applicant sent to the Respondents a completed waiver application form and some further information. These documents were, however, not complete and Mr Baxendale spoke to the Applicant on 27 February. During that conversation he mentioned that the additional own funds requirement could be in the region of £700,000. Thereafter there was further correspondence between the Applicant and the Respondents about the funds which the Applicant had to meet any claims. On 6 March 2003 the Applicant mentioned that it might be able to raise a bank loan but later the same day said that that was not viable as it could not offer security for the loan. During this time the Applicant examined the options of: increasing capital by issuing redeemable preference shares; securing an investment from a product provider; and seeking acquisition by a large network. At the same time it pursued the possibility of obtaining compliant cover. Also in March 2003 the Applicant and the Respondents corresponded about the thirteen outstanding pensions review cases.

37. On 21 March 2003 the Applicant told Mr Baxendale that it had received a quote for cover of £5M with an excess of £25,000 per claim at a cost of £241,500. However, the Applicant thought that this amounted to self-insurance while paying a high premium for the privilege. The Applicant concluded by saying that it had a meeting with a bank on 24 March to discuss possible funding.

38. On 26 March 2003 the first application for a waiver was considered by the Investment Firms Decision Case Committee of the Respondents. The Committee was not satisfied that the granting of the waiver would not involve the Applicant's customers in undue risk or that claims could be funded out of the resources of the Applicant and was of the view that the level of additional capital proposed was not sufficient to allow the firm to meet potential claims. The refusal was communicated to the Applicant by letter dated 31 March 2003.

May 2003 - the second application for a waiver

39. On 16 April 2003 the Applicant sent an email to Mr Baxendale to say that, because of the supervision report, the underwriter had withdrawn its previous offer of cover (as mentioned on 21 March 2003). However, the bank had indicated that it would lend up to £500,000 linked to commission owed to the Applicant. That would provide cash for claims and, in addition to an existing sum of £165,000, would give a total of £665,000.

40. On 1 May the Respondents wrote to the Applicant to say that the Respondents were concerned about the risk to consumers posed by lack of professional indemnity insurance cover. As the Applicant did not satisfy threshold condition 4 it was required within ten days to apply for a variation of its Part IV permission that it would not conduct investment business in relation to any regulated activities. If such an application were not received in ten days the matter would be referred to the Enforcement Division to make a recommendation to the Regulatory Decisions Committee that the Applicant's Part IV permission be varied to prevent the firm from conducting regulated activities. However, if the Applicant were able to secure compliant cover the need to apply for a variation would be suspended.

41. On 2 May the Applicant sent an email to Mr Baxendale about its cash reserves and mentioned the raising of £500,000 from the bank and approximately £350,000 from private resources. On the same day the Respondents sent an email to the Applicant about the raising of additional capital. The email said:

"Subject to the capital qualifying as regulatory capital (as per Table 13.10.2 of IPRU(INV)) and this being raised before the expiry of the ten working days referred to within FSA's letter, FSA should be in a position to review the situation and consider whether a further waiver application would be appropriate.

For your information the current guidance on additional capital requirements for firms who cannot secure compliant PII cover are:

? Additional Net Current Assets Requirement - turnover (£M) x 2 x £15,000
? Additional Own Funds requirement - 15% of turnover (subject to a minimum of £150,000).

Based on the turnover figure of £7M, as quoted in Eurosure's waiver application, the additional capital requirements would therefore be:

? Additional Net Current Assets Requirement £210,000
? Additional Own Funds Requirement £1,050,000

Please note that these figures are in addition to the firm's normal capital adequacy requirements."

42. On 7 May the Applicant wrote fully to the Respondents outlining the events since the first application for a waiver on 6 November 2002; asking for the ten-day deadline (from 1 May 2003) not to be adhered to; and also asking for the Respondents' help in re-assuring the underwriters so as to enable cover to be obtained. (This was meant as a request that the Respondents would indicate to underwriters that they had no further concerns arising out of the supervision report). A further letter followed on 15 May in reply to the letter of 1 May saying that the Applicant did not consider that it was in breach of threshold condition 4. It had deposits and was arranging a loan from a bank. Also an offer of professional indemnity insurance cover was expected "within the next few days".

43. In his witness statement Mr Sayers said that at about this time Collegiate was re- approached but would not provide cover until it had seen a copy of the letter of 2 July 2002 from the Respondents about the supervision report.

44. On 16 May the Respondents spoke to the Applicant on the telephone about the proposed bank loan and found that the loan was unlikely to meet the requirements of eligible extra capital. Discussion took place about the cover "expected within the next few days" and the Applicant explained that it was waiting for a quote. The stumbling block had been the supervision report and the insurers had requested that the Respondents should confirm that all actions had been completed to their satisfaction. However, the Respondents made it clear that it was not their policy to provide such comfort. The Respondents however suggested that it might be possible to take out the unregulated business from the turnover figures as that would reduce the amount of additional capital required and, if the loan were eligible extra capital, the Applicant was close to the requirements. On that basis a revised waiver application could be submitted and the time limit for a voluntary application for variation of permission could be extended for one more week. However, the Respondents made it clear that the matter could not go on indefinitely.

45. On 19 May the Applicant's underwriters emphasized the importance of releasing the Respondents' letter of 2 July 2002 and on 21 May 2003 the Applicant wrote again to the Respondents saying that underwriters had been reluctant to offer terms since they had received the supervision report and wanted to see a copy of the Respondents' letter of 2 July 2002. However, the Applicant was reluctant to send this without some helpful explanation from the Respondents as a refusal of cover would be detrimental to future applications for insurance. The letter went on to say that the bank had approved the loan and final documents were to be signed on 28 May and the funds were to be placed in a "trust status" account. Together with existing cash of £168,000, and bearing in mind its claims history, the Applicant was confident that it had adequate resources. The private funding was no longer being pursued. The Respondents replied on 22 May and asked for the revised waiver application before 27 May.

46. In their letter of 22 May the Respondents also referred to action taken by the Applicant following the public censure about the pensions review and said that the response did not satisfy the standards which had been detailed in a letter of 6 August 2002. The letter stated that the matter of the pensions review was being considered for possible referral to the Enforcement Division.

47. On 27 May the Applicant submitted a second application for a waiver which stated that the waiver would not result in undue risk to persons whose interests the rules were designed to protect because the Applicant had an existing cash deposit of £168,000 and expected a bank loan of £500,000 which would adequately protect consumers. The application was acknowledged by the Respondents on 30 May but was considered incomplete as it did not include a draft of the agreement with the bank. Deadlines had already been extended and the matter had to be concluded in an appropriate timescale. All outstanding information had to be supplied by 3 June (later accepted as 4 June) otherwise the matter would be referred to Enforcement with the recommendation that the Part IV permission be varied with immediate effect. The letter concluded by saying that a level of additional own funds of £644,826 might be acceptable to the waiver committee.

48. On 30 May the Applicant wrote asking for "a reasonable period of grace to complete our negotiations" and on 4 June sent further information about the bank loan, possible cover for unregulated activities and a breakdown of turnover. On 9 June the Respondents asked for further information about the loan and other financial matters but on 11 June the Applicant was telephoned to say that the waiver application had been rejected because the lack of cover posed an undue risk to investors without additional capital and the loan did not introduce new capital into the firm.

June 2003 - The third application for a waiver

49. There was a meeting on 11 June 2003 and the Respondents suggested that the Applicant approach its own insurers (Magian) again to see if they would provide cover and also suggested that a loan from the Applicant's holding company might count as own funds. On 12 June 2003 the Applicant was formally informed of the rejection of the waiver application. On the same day the Respondents wrote to explain that the main concern with the bank loan was that it required the Applicant to relinquish all claims to debtors of the firm and therefore no additional capital was being introduced. If a further waiver application were to be made, further information would be needed; also a confirmation that the Applicant had requested a cover quote from its insurers was requested by 16 June and was provided on 16 June.

50. On 20 June 2003 the Respondents wrote to The Rt Hon Kenneth Clarke QC MP about the difficulties which independent financial advisers were having in obtaining compliant professional indemnity insurance cover. The letter contained the following paragraph:

"As at 27 May 2003, 71% of IFAs whose PII expired between 1 September 2002 and 30 April 2003 have told us that they have ether obtained cover or been granted a waiver of the requirement to have PII. An analysis of the information they provided shows that 95% of IFAs due to renew their cover in September have done so. The figure for October is 97%, November 88%, December 76%, January 66%, February 65%, March 44% and April 32%. This does not necessarily mean that the other IFAs have not got cover. We know that IFAs are reluctant to confirm to us that they have cover until they have received a policy document, even though they may have agreed terms with their broker. This means that there is usually a gap between the expiry of an IFA's PII policy and the receipt of confirmation, that the policy has been renewed, by the FSA. We are contacting the remaining firms to establish their position."

51. On 24 and 30 June 2003 the Applicant wrote very fully to the Respondents with the information asked for on 9 and 12 June. Members of the Applicant, the Respondents and the bank met on 2 July at the offices of the Respondents. On 3 July the Respondents wrote to say that any further application for a waiver should be made before 18 July. On 17 July 2003 the Applicant's insurance brokers wrote to say that Collegiate would not offer terms and suggested that the Applicant itself should approach Magian. The brokers also added that a "potentially new market" had agreed to look at the risk.

52. On 18 July a revised application for a waiver was made based on the provision of a facility of £500,000 from the bank and an additional deposit of £200,000. This application was rejected on 5 August 2003 for the same reasons as were given for the rejection of the second application. The letter of rejection contained the following paragraph:

"Following this determination the FSA is seriously concerned about the level of available resources at Eurosure Investment Services Limited. In particular the firm continues to operate without either PII cover or a waiver from the requirement (based upon alternative resources). The firm is in breach of the FSA rules and Threshold Condition 4 and its continuing conduct of regulated activities poses a risk to consumers. The matter has therefore been referred to the FSA's Enforcement Division, to prepare a recommendation that the FSA varies the firm's Part IV permission to prevent it from conducting regulated activities or such other action as appropriate."

53. The Respondents also wrote again on 6 August to say that Enforcement was preparing to take action both in respect of a failure by the Applicant to co-operate with the regulator and of the failure to maintain professional indemnity insurance.

54. Meanwhile in July 2003 the Respondents issued Consultation Paper 193 entitled "Professional Indemnity Insurance for personal investment firms: proposed policy and rules". This paper proposed giving personal investment firms greater flexibility by setting resource requirements which would allow firms to combine professional indemnity insurance and financial resources so that they had adequate resources to meet likely claims and by removing some of the detailed conditions in professional indemnity insurance policies.

18 August 2003 - the fourth application for a waiver

55. On 7 August the Applicant's brokers wrote to say that they were approaching a new market and hoped to have a decision by 8 August. They had also resurrected the previous quote and would have a response by the end of August. On 8 August there was a meeting at the offices of the Respondents when the Applicant was told that the matter would be considered by the Regulatory Decisions Committee on 20 August. If there were evidence of compliant cover before that meeting then there would not be any recommendation for variation of the Applicant's Part IV permission. After the meeting the Applicant approached Magian through a new firm of brokers. On 14 August 2003 the Applicant's compliance representatives wrote with very full representations to be put before the Regulatory Decisions Committee. On 18 August a fourth waiver application was made by the Applicant and on the same day Magian said that it was prepared to quote for cover of £3M excluding the pension review cases and subject to the provision of further information.

56. On 19 August the Applicant wrote to the Respondents to say that it had received an offer of cover from Magian which offered three different options. Option 1 was for cover of £3M including non-regulated business for a premium of £343,943; option 2 was for cover of £3m excluding non-regulated business for a premium of £278,673 and option 3 was for cover of £1M excluding non-regulated business for a premium of £232,339. The letter of 19 August contained the following paragraphs:

"To conclude therefore we would again stress that although we believe that the quotation from Magian will place a financial burden on this company we will have no alternative but to accept it if the waiver application fails. We will be advising Magian in due course that we will accept one of the options. … The offers are open until the 28th August 2003 and provided that offers are acceptable to the FSA we fully intend to accept one of them by that date and of course will do so earlier if the FSA/RDC require this in order to prevent our Part IV permission being varied tomorrow."

57. The letter of 19 August went on to say that the Applicant's usual broker had advised that they should be able to provide an alternative quote by the end of August.

20 August 2003 - The First Supervisory Notice

58. On 20 August the Respondents issued the Notice which is the subject of this reference. It varied the Applicant's Part IV permission by removing all regulated activities with effect from 9 September 2003 (the specified date). It required the Applicant within 14 days of the specified date to advise all its clients in writing that it was no longer permitted to carry on regulated activities. The reasons for the action were stated to be because the Applicant had failed to satisfy the threshold conditions and that its resources were not adequate in relation to the regulated activities it carried on and that it was necessary, in order to protect the interests of consumers, for the action to take effect on the specified date. The Notice stated that the Applicant was failing to make adequate provision in respect of its liabilities, including contingent and future liabilities, and the variation from the specified date addressed the serious concerns that claims for which the Applicant was uninsured might arise from new investment business. The variation was not to take effect until the specified date to allow the Applicant a final opportunity to demonstrate that it had adequate resources.

59. At the hearing Mr Mayhew stated that the Notice did not take immediate effect because the Respondents wished to allow the Applicant time to put in place

the professional indemnity insurance cover quoted by Magian and which the Applicant, in its letter of 19 August, said that it would accept. .

After 20 August 2003 - the fourth application for waiver withdrawn

60. On 22 August 2003 the Respondents wrote to the Applicant about the fourth waiver application sent on 18 August and the professional indemnity insurance quotation sent on 19 August. The letter said that it was for the Applicant to decide how it wished to satisfy threshold condition 4 and the options were either to proceed with the fourth waiver application or to accept the quote and put in place professional indemnity insurance cover. The Applicant should provide information by 26 August after which a meeting would be held. If the Respondents were to recommend that the variation of the Part IV permission should not take effect they had to be satisfied before 9 September. The letter enclosed two requests for information, one relating to the waiver option and the other relating to the insurance option.

61. The Applicant replied on 26 August to say that "subject to receiving a compliant quote which satisfies FSA requirements, we will be proceeding with the … underwriting quote for £1M limit of indemnity". The letter stated that the fourth waiver application was not being pursued. In the event the Applicant did not accept the Magian quote and it lapsed on 28 August 2003. On 3 September 2003 the Respondents indicated to the Applicant by telephone that it required additional financial provision of £310,000 of which £228,000 was to cover the potential liabilities that could arise from the 13 pension review cases and the rest was to cover potential liabilities in respect of income (precipice) bonds. This came as a surprise to the Applicant as the Magian quote did not extend to these liabilities. The Applicant thought that this additional requirement was excessive and that its total potential liability for the pensions review cases was £50,000 and that it had no liability for income bonds.

62. On 3 September 2003 the Applicant's underwriters wrote to say that they had obtained a further quote for cover which did not exclude potential liabilities for the pensions cases and the income bond cases. The Applicant wrote fully to the Respondents on 5 September to say that it had obtained a further insurance quote which it was proceeding with. It was not satisfied with the subjectivities attaching to the previous (Magian) quote including the condition about precipice bonds and was concerned at the fact that Magian was a mutual company which involved an unknown financial commitment. The letter said that the Applicant had decided to accept the alternative quote for which the premium was less. The letter of 5 September also explained the Applicant's financial position and showed that it had a quarterly profit of about £143,000. It also analysed the potential liabilities in respect of pensions and income bonds.

8 September 2003 -The reference

63. On 8 September 2003 the Applicant referred the Notice of 20 August 2003 to the Tribunal. The reasons for the reference were given as: (1) the removal of all the Applicant's Part IV permission from 9 September 2003 and (2) the adequacy of the Applicant's resources in particular those available to meet claims against it arising from its business. The reference notice applied for a direction suspending the effect of the Notice on the ground that it was precipitate, disproportionate and unnecessary.

64. On the same date (8 September 2003) the Applicant's brokers sent to the Applicant a copy of a quotation from a new insurer with a number of terms and

conditions. It quoted for cover of £1M in the aggregate with an excess of £40,000 for each and every claim from each and every claimant at an annual premium of £180,000 with an additional 5% of insurance premium tax. It appears that it was open to the Appellant to increase the cover to £1,250,000.

65. On 9 September 2003 the Respondents wrote to the Applicant to say that they did not have sufficient information about the new policy to be able to confirm its compliance with requirements and gave six reasons why the Respondents were not satisfied that the Applicant had adequate resources, one of which was that the indication of cover did not constitute an offer of insurance. The letter also mentioned that, if the new offer were to be accepted, then the funding of the premium together with other levies would lead to a deficit of £10,846 in the Applicant's expenditure based requirement, using a figure of £84,000 in respect of the pensions review.

66. The application for a direction suspending the effect of the Authority notice was heard by the Tribunal on 10 September 2003. During the hearing Counsel for the Applicant informed the Tribunal that the previous night underwriters had informed the brokers that insurers would be on risk if the Applicant would employ an external consultant to undertake compliance. On 10 September the Applicant wrote to its brokers to say that the Applicant would continue with the monthly monitoring reports provided by its compliance representatives. Counsel also said that there were other conditions but the Applicant did not envisage any problem with satisfying them. It was possible that confirmation might be received that day that insurers were on risk.

Reasons for directions

67. I consider separately each of the questions for determination.

(1)- Would a direction prejudice the interests of consumers?

68. The first question is whether the giving of a direction under Rule 10(1)(e) would prejudice the interests of consumers.

69. For the Applicant Mr Marquand argued that the effect of the Notice had been delayed for nineteen days without cover and so the additional risk while cover was put in place should be permitted. The only risk to consumers was that of a claim made before the new cover was in place. Although the new cover was not retrospective to February 2003 there had been no claims notified since February 2003 and, in the light of the Applicant's claims' history, claims were unlikely. In any event the Applicant could discharge any claim from its own resources. He disputed the Respondents' claim that an additional £228,000 was required to cover pension and income bond liabilities. Although there had been thirteen pension cases with failings, not all of those might involve a loss, and those that did might be covered by insurance in place when the claim was notified. Also, the Applicant was of the view that it had no liabilities for the income bonds whereas the Respondents were of the view that those liabilities could amount to up to £60,000. Accordingly, the amount of £228,000 was excessive and should be £50,000 and the financial resources of the Applicant (including its pre-tax profit) would enable it to meet claims as and when they arose; the balance sheet indicated resources of above £300,000. "Adequate resources" meant cover extending to the risks associated with the business undertaken by the firm which gave a sufficient level of protection; that is, sufficient resources to meet potential claims and the costs of running the business and the regulatory solvency requirements.

70. For the Respondents Mr Mayhew argued that the Tribunal should not conclude that it was inevitable that the Applicant would now obtain professional indemnity insurance cover in view of the long history of the matter. There had been four applications for waivers three of which had been refused and one of which had been withdrawn. There had been many attempts to obtain cover since February 2003 and, although some of the difficulties could be the result of general market factors, some were specific to the Applicant, for example the supervision report. However, the fact was that on 18 August 2003 cover was offered by Magian and the next day the Applicant had written to the Respondents saying that one of the three options would be accepted. However, the offer from Magian had been allowed to lapse. Even after the Notice had been issued the Respondents had tried to accommodate the Applicant and, as late as 5 September 2003, the Applicant said that it was proceeding with another quote. Although a quotation from the other insurer had been received it was subject to a number of conditions and there was no guarantee that they would, or could, be complied with. The present resources of the firm might not continue into the future and there could be some significant claims which the Applicant could not meet. If the present application were to be dismissed then it would be still be open to the Applicant to arrange adequate cover, to satisfy the Respondents that it had adequate resources, and to apply to the Respondents to re-grant the permissions. It might be possible to do that before the expiry of the fourteen day period mentioned in the Notice for notifying clients.

71. In considering the arguments of the parties I start with the statutory principles.

72. The first relevant principle is that the protection of consumers is one of the regulatory objectives (section 2(2) of the 2000 Act) and the Respondents have a statutory duty, when discharging their general functions, to act in a way which is compatible with the regulatory objectives. The protection of consumers, therefore, is given prominence by the 2000 Act.

73. The next relevant section is section 41(2) which provides that, in giving or varying permission to carry on regulated activities, the Respondents must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions. These are set out in Schedule 6, paragraph 4 of which provides that the resources of the person concerned must, in the opinion of the Authority, be adequate in relation to the regulated activities that he carries on. In reaching that opinion the Authority may have regard to the provision he makes in respect of liabilities, including contingent and future liabilities.

74. Pausing there it is relevant that both section 41(2) and paragraph 4 of Schedule 6 contain mandatory provisions which require the Respondents to ensure that the resources of the person concerned are adequate having regard to the regulated activities he carries on. Thus the statutory framework lays great emphasis on adequate resources and mentions contingent and future liabilities.

75. The next relevant provisions are the rules. Rule 13.1.3 provides that a firm must effect and maintain at all times adequate professional indemnity insurance cover. Again this is a mandatory requirement and in this reference the Applicant has been in breach of it since 26 February 2003. There are provisions in section 148 about waivers of the rules but section 148 (4)(b) provides that a rule cannot be waived if that would result in undue risk to persons whose interests the rules are intended to protect and the rules about professional indemnity insurance cover are intended to protect consumers. Although the Applicant had made three applications for a waiver of rule 13.1.3 (and a fourth application which was not

pursued) no waiver has been granted. The reason given in each case for the rejection was that the Respondents were not satisfied that the granting of the waiver would not involve the Applicant's customers in undue risk.

76. In the light of that statutory framework, therefore, it is clear that, in the opinion of the Respondents, the resources of the Applicant are not adequate for the regulated activities which it carries on.

77. The next relevant statutory provision is section 45 which provides that the Respondents may vary a Part IV permission by removing a regulated activity on their own initiative if it appears that the person is failing to satisfy the threshold conditions or if it is desirable to exercise that power in order to protect the interests of consumers or potential consumers. Again there is the emphasis on adequate resources and the interests of consumers.

78. Finally there is Rule 10(6) which provides that the Tribunal may only suspend the effect of a Notice if it is satisfied that to do so would not prejudice the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Notice. The persons intended to be protected by the Notice in this reference are consumers.

79. The Applicant's main arguments were that the suspension of the notice would not prejudice the interests of consumers because professional indemnity insurance cover would be in place in a day or two and because the Applicant's other resources were adequate to meet any claims made by its customers bearing in mind its claims history.

80. Dealing first with the argument that cover would be in place in a day or two it is relevant that, in the past, the Applicant has been on the verge of effecting cover but then failed to do so. A quote was received on 21 March 2003 but not pursued because the Applicant thought it amounted to self-insurance. This offer was subsequently withdrawn when the insurers saw the supervision report. Another quote was received on 18 August 2003 from Magian which the Applicant told the Respondents that it would accept. However, the offer was not taken up by the Applicant and lapsed on 28 August 2003 (which was before the latest offer was received on 3 September 2003).

81. It seems to me that, if the latest offer were to lead to cover being provided within a day or two, then the Applicant could approach the Respondents and ask for the Notice to be varied and for its Part IV permissions to be re-granted. If, on the other hand, the cover were not to be provided in a day or two, or if the conditions of the cover were such as not to satisfy the Respondents, then the risk to consumers would remain.

82. Turning to the argument that the Applicant has sufficient other resources to meet claims the difficulty is that both parties agreed that the issue whether the Applicant had adequate resources was for the substantive hearing of the reference. The Applicant argued that it had the resources to meet the claims already made against it but even here there were disputes between the parties about the size of the claims (for example following the pensions review and for the income bonds) which disputes cannot be resolved by such evidence as was before me. Mr Marquand relied upon the copy balance sheet and the Appellant's quarterly profit figures but did not explain whether these amounts were part of, or in addition to, normal capital adequacy requirements. Even if I were satisfied that the Applicant had the resources to meet claims already incurred and reported I am not able to say from the evidence before me that it has the

resources to meet claims incurred but not yet reported nor claims which could be incurred before the substantive hearing of the reference. Here it is relevant that the Appellant had 109 representative firms with more than 150 advisers. Thus I am not satisfied by the evidence before me that the Applicant has the resources to meet all contingent and future liabilities.

83. Accordingly, I am not satisfied that to suspend the notice would not prejudice the interests of consumers. Under Rule 10(6) therefore I may not suspend the effect of a Notice. That conclusion means that the application must be dismissed but, as arguments were put on the other questions, I briefly express my views.

(2) Was it necessary?

84. The second question is whether it was necessary for the Notice to take effect on 9 September 2003 within the meaning of section 53(3) of the 2000 Act.

85. For the Applicant Mr Marquand argued that it had not been necessary, within the meaning of section 53(3), for the Notice to take effect on 9 September 2003. The difficulties in obtaining insurance cover were general and the letter of 20 June 2003 confirmed that 35% of firms whose insurance was due for renewal in February 2003 had not obtained cover at the end of May 2003. The Applicant's difficulties had been increased by the existence of the supervision report. The Applicant had repeatedly attempted to remedy the situation and had made approaches on to Magian and Collegiate on 17 January 2003 which had been rejected on 24 February; again to Collegiate rejected on 17 July; and again to Magian. Also the Applicant had made three applications for a waiver of Rule 13.1.3 all of which had been rejected. As late as 18 August an offer of cover of £3M had been received from Magian but, before it could be accepted, the Respondents had issued the Notice. Finally, the Applicant had now accepted the offer from the alternative insurers which did not exclude pensions review and income bond liabilities.

86. For the Respondents Mr Mayhew accepted that, if cover were now in place, and if the Applicant had adequate financial resources after paying the premium, then the Notice could be varied by the Respondents.

87. The statutory provisions relevant to this question are in section 53 of the 2000 Act which provides that a variation either takes effect immediately or on such a date as may be specified in the notice. Section 53(3) provides that a variation may be expressed to take effect on a specified date only if the Respondents, having regard to the ground on which it is exercising its own initiative power, reasonably considers that it is necessary for the variation to take effect on that date.

88. When the Notice was issued on 20 August 2003 the Applicant had already been without professional indemnity insurance cover since February 2003. Also, the Respondents had considered the Applicant's financial position in some detail in connection with the three waiver applications and were not satisfied that the Applicant had adequate financial resources. The Applicant had explored a number of ways of raising additional capital but none had met the requirements of the Respondents. In its correspondence from 18 February 2003 onwards the Respondents expressed concern about the possibility of the Applicant failing to obtain cover. On 1 May a ten-day time limit was imposed but subsequently extended. The Respondents' letter of 5 August 2003 gave the Applicant notice that action would be taken. The grounds on which the Respondents were exercising their own-initiative power were because the Applicant had failed to

satisfy the threshold conditions and because it was desirable to protect the interests of consumers. In my view by the time that the Notice was issued it was reasonable, for those reasons, for the Respondents to consider that it was necessary for the variation to take effect urgently. The effect of the Notice was delayed until 9 September 2003 to enable the Applicant to accept the Magian offer which, in the event, it did not do.

89. I conclude that it was necessary for the Notice to take effect on 9 September 2003 within the meaning of section 53(3) of the 2000 Act.

(3) Was it proportionate?

90. The third question is whether the removal of all the Applicant's Part IV permissions from 9 September 2003 was proportionate within the meaning of ENF 3.5.2G(2) and (9).

91. For the Applicant Mr Marquand argued that the Applicant was about to put in place cover which would apply to all its regulated activities. There was only a very small risk of a claim being made before the cover was in place. It was not proportionate to remove all the Applicant's Part IV permissions and thus effectively destroy a financially sound firm, force its 150 advisers to make alternative regulatory arrangements, and cause disruption to its customers who would be forced to re-arrange their financial affairs. The risks in allowing the Applicant to continue to operate were minimal and its previous liabilities were less than was claimed by the Respondents.

92. For the Respondents Mr Mayhew argued that the Notice was a proportionate response to the Applicant's failure to satisfy threshold condition 4 (which was a mandatory requirement) under the 2000 Act . The effect of the Notice had been delayed to enable the Applicant to accept the Magian quote notified on 19 August but that quote had not been accepted and had lapsed on 28 August 2003.

93. Section ENF 3.5.2G(2) of the FSA Handbook provides that a restriction imposed on a firm "should be proportionate to the objectives the FSA is seeking to achieve". Section ENF 3.5.13G(9) provides:

"The FSA will take into account the (sometimes significant) impact that a variation of permission may have on a firm's business and on its customers' interests, including the effect of variation on the firm's reputation and on market confidence. The FSA will need to be satisfied that the impact of any use of the own-initiative power is likely to be proportionate to the concerns being addressed in the context of the overall aim of achieving its regulatory objectives."

94. The objective that the Respondents were seeking to achieve by the Notice is the protection of consumers and, in my view, the restrictions imposed on the Applicant are proportionate to these objectives. I accept that the variation of the Applicant's permission, by removing all regulatory activities, would have a very significant impact on the Applicant's business but here a number of factors are relevant. The first is the mandatory nature of the statutory provisions. Under section 41(2) the Respondents must ensure that the Applicant satisfies the threshold conditions. Under paragraph 4 of Schedule 6 the resources of the Applicant must be adequate in relation to the activities it seeks to carry on. Under Rule 13.1.3 the Applicant must effect and maintain adequate professional indemnity insurance. Although the Applicant may seek a waiver of Rule 13.3.3 such a waiver cannot be given if it would result in undue risk to persons whose interests the rules are intended to protect. Because all these provisions are

mandatory in nature it is proportionate to remove permissions if the provisions are breached. The next relevant factor is the length of time given to the Applicant to remedy the breach. The Applicant was, in effect, given six months to put in place either compliant cover or to persuade the Respondents that it had other adequate resources. The fact that the Applicant did neither means that, in my view, it was proportionate for the Respondents to take the action they did.

95. I conclude that the giving of the Notice was proportionate to the concerns being addressed by the Respondents in the context of the overall aim of achieving their regulatory objectives.

(4) - Would the application of the principles in HPA Services would lead to a suspension of the Notice?

96. The last question is whether the application of the principles in HPA Services would lead to a suspension of the Notice.

97. For the Applicant Mr Marquand argued that HPA Services did not establish a binding precedent but in any event the Applicant had a real chance of success as it was on the point of having cover. The facts of this case were very different from the facts in HPA as there the Applicant had not had cover for three years; had failed to obtain cover; had no other resources and had no chance of success. In this reference the Applicant had only failed to have cover for about six months; it had now obtained cover; it had resources, and therefore it had every chance of success.

98. For the Respondents Mr Mayhew argued that HPA Services at paragraph 15 expressed the view that it was appropriate to examine the circumstances leading to the Supervisory Notice; to examine why the decision to issue the Notice was made in the first place; to look at, without deciding, the Applicant's case in connection with the Notice; to ask whether the Notice had "come out of the blue" or whether it had resulted from a fair amount of correspondence; and the prospect of success might also be relevant. In this reference there was no prospect that the Tribunal would be persuaded that the Applicant had adequate resources bearing in mind the history of the matter.

99. I accept Mr Marquand's arguments that the facts of this application are very different from those in HPA Services. Nevertheless that also was an application to suspend the effect of a Supervisory Notice until the hearing of a reference and so the principles identified by the President of the Tribunal in paragraph 15 of his Decision are also relevant. The relevant circumstances leading to the Supervisory Notice in this reference include the length of time (six months) given by the Respondents to the Applicant to find compliant cover; the fact that the Applicant had explored a number of options for raising finance which were either not pursued or, in the case of the bank loan, not acceptable to the Respondents; and the substantial assistance given by the Respondents to the Applicant throughout the period before the Supervisory Notice. From the facts it is clear that the notice did not come "out of the blue" and came only after a substantial amount of correspondence and discussions which made the position and intentions of the Respondents quite clear. The Applicant's reasons for referring the Notice to the Tribunal were the fact that the permission had been removed and the adequacy of its resources. These matters have already been referred to in this Decision.

100. In paragraph 18 of his Decision in HPA Services the President of the Tribunal also considered whether the Applicant had any real chance of success if a full hearing of the reference were to take place. In this application the parties agreed

that the question whether the Applicant had adequate resources was a matter for the substantive hearing and so the evidence before me was not such as to enable a view to be formed as to whether the Applicant did have a real chance of success.

Conclusions

101. My conclusions on the questions for determination in the application are:

(1) that the giving of a direction under Rule 10(1)(e) would prejudice the interests of consumers who are the persons intended to be protected by the Notice; that conclusion means that the application must be dismissed. However as arguments were put on the other questions I briefly express my views which are:

(2) that it was necessary for the Notice to take effect on 9 September 2003 within the meaning of section 53(3) of the 2000 Act;

(3) that the removal of all the Applicant's Part IV permissions from 9 September 2003 was proportionate within the meaning of ENF 3.5.2G(2) and (9); and

(4) that the application of the principles in HPA Services would not lead to a suspension of the Notice.

102. For the above reasons the application was dismissed.

DR A N BRICE

CHAIRMAN

RELEASE DATE:

FIN/2003/0015
22.09.03/2