WITHDRAWAL OF APPROVAL - fit and proper test - applicants carrying out controlled functions - first applicant the senior executive officer of stockbrokers with controlled functions as investment adviser and manager - second applicant the chief executive officer with controlled function as investment adviser - stockbrokers placing shares in company quoted on AIM - shortfall - public announcement indicating complete placing - non-disclosure of shortfall to SFA or to AIM team -attempted share support by 2nd applicant - FSA investigation - whether lack of due skill, care and diligence in failing to notify AIM team and seek guidance breached SFA Principle 1 (integrity and fair dealing) or Principle 3 (market conduct) - no - whether attempted support of price of shares in client company in breach of Principles 1 and 3 - yes - whether applicants guilty of failing to cooperate with regulator - yes, but only in limited respects - whether applicants' conduct operated to the detriment of consumers and to confidence in the financial system - no - directions that decision notices be read in accordance with the tribunal's findings - FSMA 2000 s 63(1) - FSA Handbook "Fit and Proper Test for Approved Persons" - SFA Statements of Principle

FINANCIAL SERVICES AND MARKETS TRIBUNAL

GEOFFREY ALAN HOODLESS
SEAN MICHAEL BLACKWELL
Applicants
-and-

FINANCIAL SERVICES AUTHORITY
Respondent

Tribunal: Andrew Bartlett QC (Chairman)
Christopher Chapman
Colin Senior

Sitting in public in London on 7-11, 14-17 July 2003
Date of decision: 3 October 2003

For the Applicants Alexander Cranbrook, counsel, instructed by Littman & Co

For the Respondent David Mayhew, solicitor, and David Povall, counsel, of and instructed by the Financial Services Authority

DECISION

INTRODUCTION
1. The applicants in these references are Mr Geoffrey Alan Hoodless and Mr Sean Michael Blackwell. At the material time they were directors and shareholders of Hoodless, Brennan and Partners Plc ("HBP"), stockbrokers. Among other duties, they each performed the controlled function of investment adviser, and Mr Hoodless performed additionally the controlled function of investment management. After a lengthy investigation into HBP's placing of shares in PrimeEnt Plc in March-April 2000, the Financial Services Authority ("FSA") decided to withdraw the applicants' approvals to perform those functions. They were so

informed by Decision Notices dated 20 December 2002 issued under s63(4) of the Financial Services and Markets Act 2000 ("FSMA" or "the Act"). The ground for withdrawal was that FSA considered that they were not fit and proper persons to perform the functions to which the approvals related: see FSMA s63(1).

2. On 17 January 2003 the applicants referred the matter to this Tribunal pursuant to FSMA s63(5). The references were ordered to be heard together.

3. The FSA Handbook sets out the criteria relevant to the assessment of whether the applicants are fit and proper persons to perform the relevant functions and FSA's policy on withdrawal of approvals. We consider the criteria and policy below.

ROLE AND JURISDICTION OF THE TRIBUNAL

4. These references are not a review of the decisions taken by FSA. The role of the Tribunal is to consider the matter afresh in the light of all the evidence made available to us. By FSMA s133(3) the Tribunal may consider any evidence relating to the subject-matter of a reference, whether or not it was available to FSA at the material time. On a reference the Tribunal must determine what (if any) is the appropriate action for FSA to take in relation to the matter referred to it: FSMA s133(4). On determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination: FSMA s133(5).

5. The action to be directed is limited in the present case to actions authorized under Part V of the Act. (This is the practical result of s133(6) and s388(2).) Disciplinary action for misconduct is included in Part V but is not an available action in the present case because of the expiry of the two year time limit in s66(4). If we reach conclusions about the applicants' fitness and propriety which differ from those in the Decision Notices, we have power to direct that those Notices be read subject to our determination in that regard.

6. On 9 January 2003 HBP gave notice to FSA that it had terminated the arrangements with the applicants to which the approvals related. Accordingly, they ceased to be approved persons and FSA did not need to take any further steps to withdraw the approvals. It was only after that date that the applicants referred the matter to the Tribunal. The question arose, therefore, whether the Tribunal had jurisdiction to deal with the references.

7. The Decisions were a record of FSA's conclusions that the applicants were not fit and proper persons to perform the approved functions, and would be relevant to any future application for approval. FSA therefore submitted that the applicants were entitled to make the references pursuant to their rights under FSMA s63(5). The applicants agreed.

8. The reality is that HBP terminated its arrangements with the applicants as a result of pressure from FSA. We do not suggest that FSA's action in that respect was improper. But it would be very unsatisfactory if FSA's action meant that the applicants were effectively deprived of the opportunity to challenge FSA's Decisions. The Decisions have the practical effect that the applicants cannot work in any responsible capacity in the financial services industry.

9. We accept the submission that the applicants were entitled to refer the matter under s63(5) on the basis that the subject-matter of the references is not the withdrawal of the approvals, but the Decisions to withdraw them.

10. The applicants performed other controlled functions than those mentioned above. Both applicants were approved to perform the functions of director and of apportionment and oversight. In addition, Mr Hoodless was approved to perform the functions of chief executive. Those aspects of their duties were terminated in about September 2002, due to pressure from FSA, and are not the subject of these references. They remain factually of some relevance, in so far as the applicants' quality of performance of those functions sheds light on their fitness to hold the approvals which are at issue in the references.

'FIT AND PROPER' UNDER THE REGULATORY REGIME

11. The criteria to be considered by the Authority when assessing whether a person is fit and proper are set out in the Fit and Proper test for Approved Persons (FIT) in the FSA Handbook. Fitness and propriety are not judged in the abstract, but in relation to the particular controlled functions to be performed in a particular firm.

12. The most important considerations include, "honesty, integrity and reputation" and "competence and capability". Matters to which FSA has regard, in this context, include (FIT 2.1.3 G):

"(5) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges ... "
"(13) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards."

13. FSA's policy on withdrawal of approval is set out in Chapter 7 of the Enforcement Manual of the Handbook (ENF). ENF 7.5.2 G states:
"FSA recognises that its decisions to withdraw approval will often have a substantial impact on those concerned. When it considers whether to withdraw approval from a person, it will take account of all relevant factors, including, but not limited to, the matters set out below:
...
(2) the criteria for assessing the fitness and propriety of approved persons. ... The criteria include:
(a) honesty, integrity and reputation; this includes an individual's openness and honesty in dealing with consumers, market participants and regulators, and ability and willingness to comply with the requirements placed on him under the Act as well as with other legal and professional obligations and ethical standards
...
(b) competence and capability; this includes having the necessary skills to carry out the controlled function that he is performing ...
(3) whether, and to what extent, the approved person has:
(a) failed to comply with the Statements of Principle; or
(b) been knowingly concerned in a contravention by a relevant firm of a requirement imposed on the firm by or under the Act (including the Principles and other rules);
(4) the relevance, materiality and length of time since the occurrence of any matters indicating unfitness;
(5) the severity of risk which the person poses to consumers and confidence in the financial system; and

(6) the previous disciplinary record and general compliance history of the person … "

14. While the assessment of fitness and propriety of an approved person takes place within the regulatory framework introduced by the Act (fully effective from December 2001), conduct which gives rise to concerns about possible unfitness and impropriety must be judged against the standards which prevailed at the material time. In the present case, that requires reference to the regulatory standards under the regime which preceded the introduction of the Act. The complaints made against the applicants relate to events in 2000 and 2001. Until December 2001 the applicants were regulated by the Securities and Futures Authority (SFA). The SFA incorporated into its rules (as applicable both to firms and to individuals) the Statements of Principle issued by the Securities and Investment Board. The Principles included:
" Integrity
1. A firm shall observe high standards of integrity and fair dealing.
Skill, care and diligence
2. A firm should act with due skill, care and diligence.
Market practice
3. A firm should observe high standards of market conduct. It should also ... comply with any code or standard as in force from time to time and as it applies to the firm ...
...
Conflicts of interest
6. A firm should either avoid any conflict of interest arising or, where conflicts arise, should ensure fair treatment for its customers by disclosure, internal rules of confidentiality, declining to act, or otherwise. A firm should not unfairly place its interests above those of its customers and, where a properly informed customer would reasonably expect that the firm would place his interests above its own, the firm should live up to that expectation.
...
Relations with regulators
10. A firm should deal with its regulator in an open and co-operative manner and keep the regulator promptly informed of anything concerning the firm which might reasonably be expected to be disclosed to it."

15. On what constitutes dishonesty, Mr Cranbrook, who appeared for the applicants, referred us to the criminal case of R v Ghosh [1982] QB 1053, [1982] 2 All ER 689, where Lord Lane CJ held that in the law of theft a defendant was only dishonest if he must have realised that what he was doing was dishonest by the ordinary standards of reasonable and honest people.

16. To the same effect, Mr Mayhew, who appeared for FSA, referred us to Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 All ER 377. That case defined dishonesty for the purposes of accessory liability for breach of trust, but Mr Mayhew submitted that it was equally applicable in the present circumstances. Before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest (see per Lord Hutton at paras 27 and 36). (This is called the combined test, because it combines an objective and a subjective element.)

17. To be naïve or misguided is not the same as being dishonest. But, where a person's conduct would be regarded as dishonest by honest people, he cannot escape a finding of dishonesty because he sets his own low standards and does

not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.

18. We must therefore decide whether the applicants were dishonest according to the ordinary standards of reasonable and honest people. That is the objective element. If they were not dishonest by those standards, that is an end of that allegation. If they were dishonest by those standards, we must secondly consider whether the applicants were aware that what they were doing was dishonest by those standards. That is the subjective element.

19. It may be asked whether the combined test is really appropriate in the present context, where one of the statutory objectives is the protection of consumers. It might be thought that a purely objective test would be a better protection. But we think it right to adopt the approach urged upon us, since it was not in dispute that we were required, as an additional matter, to consider the applicants' integrity, which both sides accepted involved the application of objective ethical standards. In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)

BURDEN AND STANDARD OF PROOF

20. As indicated above, FSA decided under FSMA s63 to withdraw the applicants' approvals on the ground that they were not fit and proper persons to perform the functions to which the approvals related. Mr Mayhew accepted (in our view, correctly) that the burden of proof lay on FSA to prove that the applicants were not so fit and proper.

21. He further submitted, without opposition from Mr Cranbrook, that the standard of proof that we should apply was the ordinary civil standard of the balance of probabilities, in the manner explained by Lord Nicholls in Re H [1996] 1 All ER 1 at 16-17:

"Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. … …
The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. … … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research [1964] 1 All ER 771 at 773, [1964] 1 WLR 451 at 455:

‘The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.’

This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris LJ in Hornal v Neuberger Products Ltd [1956] 3 All ER 970 at 978, [1957] 1 QB 247 at 266. This approach also provides a means by which the balance of probability standard can accommodate one’s instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.”

THE NATURE OF THE EVIDENCE

22. We were supplied with a large volume of contemporaneous documentation and transcripts of telephone conversations. We indicated that witnesses need not attend and their statements could be read if the other party, while not necessarily accepting every word of the statement, had no challenge to any matter of importance within it. On this basis FSA relied on a letter from Clive Chapman and parts of an interview with him, and the applicants relied on the statement of Nigel Smith. Both Clive Chapman and Nigel Smith were available to be called if required. FSA called as witnesses Graham Webster, Philip Reid, Stuart Robertson, Andrew Smith, Timothy Chandler, Paul Whittaker, David Kenmir, Paul Chapman, Hugh Male, Michael Prange and Gerald Smith. The applicants themselves gave evidence and also called Roy Phillips and Peter Abbey. The applicants served a statement from Stephen Dean, but he was not called and we were left to give his statement such weight, if any, as we thought fit.

23. In our assessment of the evidence we have reminded ourselves of four factors of particular importance in relation to the applicants in the present case. (1) Much of the evidence consisted of transcripts of telephone conversations. It is easy to be misled by such transcripts. Language is often used very loosely on the telephone, with ungrammatical constructions, false starts left uncorrected, figurative usages, and incorrect choices of words. Not everything said is intended to be taken literally or to be taken seriously. As Mr Mayhew agreed, much depends on context, on tone, and on the nature of the relationship between the speakers. We have listened to the more important conversations, where the tapes were still available, and have sought to distinguish between brokers’ banter and things meant more seriously. (2) It was the duty of the applicants to be candid with the regulators. Some of the questioning by FSA investigators was aggressive. It may be unrealistic to expect persons under rigorous questioning to be completely open in their answers and readily to volunteer information that, if misconstrued, may be used as ammunition to be fired back at them. The duty of frankness remains, but the significance of any lack of frankness must depend on the circumstances. (3) Solicitors (not those currently acting for the applicants) were appointed to defend HBP’s position and put forward detailed refutation of FSA’s criticisms. The documents put forward in late 2001 and during 2002 were the product of a collective effort by a number of people. The solicitors had a material influence on the exact wording. Where those documents have subsequently been shown to be incorrect or incomplete, we have to be cautious about attributing responsibility to the applicants themselves. Because of this factor Mr Mayhew did not place strong reliance on them. (4) By the time the applicants came to give evidence to us they had pored over the tape transcripts, documents and arguments many times, both on their own and with lawyers. For anyone in that position it would be superhuman to be able to distinguish precisely, in regard to events that occurred three years ago, between recollection and reconstruction. There was a natural keenness on their part to believe any plausible reconstruction that tended to exonerate them. Where we reject their evidence as untrue, such rejection does not automatically imply a lack of honesty

or integrity on their part. To make findings of dishonesty, more is required. We state our assessment of the applicants later.

24. In general, we considered that the witnesses were doing their honest best to assist us with their recollections. We were impressed by the honesty, but not entirely by the attitude, of Mr David Kenmir, the director of the Investment Firms Division of FSA, who as good as admitted that he had threatened Mr Hoodless, at the time when HBP were applying to be regulated by SFA in place of FIMBRA, that he was going to have the firm closed down (which Mr Kenmir personally had no formal power to do). Mr Andrew Smith of Brown Shipley & Co Ltd (BSL) is evidently highly intelligent and very capable. For that reason he was able during cross-examination to express a polished defence of BSL's conduct, despite the (to us) obvious feature that it was not fully defensible. We were unimpressed by Dr Gerald Smith of Lynch Talbot and MU Nominees in Jersey, who cried off from giving evidence just before he was due to be called, disobeyed a subsequent witness summons, and, when he finally attended, indicated by his demeanour that he regarded the giving of evidence as a source of amusement. He appeared to be familiar with methods of manipulating the market. We consider that we should regard his evidence with caution.

THE MATERIAL EVENTS

25. We find the following facts and where appropriate indicate our conclusions about their significance.

Background to the placing, and the announcement of 30 March 2000

26. HBP was regulated by the SFA and a member of the London Stock Exchange (LSE). PrimeEnt was a public limited company quoted on the Alternative Investment Market (AIM) of the LSE. Rule 31 of the Rules for AIM companies (contained in Chapter 16 of the Rules of the London Stock Exchange) requires an AIM company to retain a broker at all times. From 1999 HBP was the nominated broker for PrimeEnt and a market maker in its stock. One of the responsibilities of the nominated broker is to provide key financial information on the company to the Exchange for dissemination on the segment of the Exchange's electronic trading platform dedicated to the trading of AIM shares, SEATS PLUS. Such financial information helps investors to evaluate the shares.

27. HBP also acted as a retail broker. Mr Hoodless (GH) was the Senior Executive Officer (SEO) of HBP. He had overall responsibility for the PrimeEnt placing. Mr Blackwell (SB) was the Chief Executive Officer (CEO) of HBP and head of corporate broking. Don Nelson (DN) was a senior manager in the corporate broking department and had day-to-day responsibility for the PrimeEnt placing. He was assisted by Fiona Reid. BSL was PrimeEnt's nominated adviser, or 'Nomad'. PrimeEnt's chairman was Philip Reid.

28. In March 2000 there were discussions between PrimeEnt, BSL and HBP concerning the raising of further capital for PrimeEnt. At a meeting on 8 March 2000 Philip Reid met with BSL and HBP, and it was agreed in principle that there would be a placing of 50,000,000 PrimeEnt shares. At a further meeting on 21 March 2000 Mr Reid and Mr Hoodless agreed that HBP would price the placing at 5p per share, and use its reasonable endeavours to place the shares. That would raise capital for PrimeEnt in the amount of £2.5 million. At this time the dotcom boom was near to its highest point and there was an active market in PrimeEnt shares.

29. At this time HBP had limited experience in corporate finance. It had only received authorised for activities in that field in November 1999. Mr Nelson had

been recruited because he had been a director of a corporate finance boutique and was able to offer experience which Mr Hoodless and Mr Blackwell did not possess.

30. The market was ‘flying’ and HBP was extremely busy. Like many other firms, HBP was struggling to keep up with settlements. Mr Hoodless was spending long hours on reconciliation of bargains. At the same time he was liaising with KPMG, who were advising on the quality and integrity of HBP’s systems and making recommendations as a preliminary to a proposed flotation of HBP. As a result, Mr Hoodless was effectively absent from the corporate broking department.

31. On 23 March 2000 HBP’s solicitors, Wedlake Bell, were instructed by Fiona Reid to prepare a placing agreement for PrimeEnt. Fiona Reid was a junior and inexperienced employee. Wedlake Bell misunderstood the instructions and accordingly drafted a placing agreement containing an underwriting clause. It was not HBP’s normal practice to underwrite an issue, nor was that its intention in this particular case.

32. As at Tuesday 28 March 2000 Mr Hoodless understood from Don Nelson that he had found placees for £2.3M of the issue. Because of the buoyancy of the market Mr Hoodless did not regard the outstanding £200,000 of shares as a problem and was happy to take them onto HBP’s ‘back book’. No signed placing letters had by then been received. Mr Hoodless was under the impression that the letters were being sent out. On the afternoon of that day Mr Hoodless spoke on the telephone with Mr Webster of BSL, who said that PrimeEnt was to announce some deals the next morning and wanted the announcement to refer also to the placing. Mr Webster sought and received approval from Mr Hoodless. Mr Hoodless specifically requested BSL to make it clear in the announcement that the placing was complete in that the stock had been placed with HBP who had placed the stock on with its clients. He said that he did not want there to be a market impression that there was an overhang of £2.5 million worth of PrimeEnt shares.

33. HBP (via Fiona Reid) received a draft placing agreement by e-mail from Wedlake Bell that erroneously included an underwriting clause. Some time that afternoon or on the following morning HBP forwarded the draft placing agreement and a draft placing letter to BSL.

34. There was a slight delay. On Wednesday 29 March 2000 Fiona Reid spoke with BSL at 2:34 p.m. about the proposed announcement. BSL advised her that Don Nelson had already been told it would be released the following morning. They arranged to fax to her the latest draft. Within 20 minutes the fax containing a copy of the announcement was received at HBP. After she received the fax, Fiona Reid reported to Don Nelson by voice message that she had just received a copy of the draft announcement. HBP did not provide BSL with any comments on the text of the proposed announcement. Later that afternoon BSL sent the announcement to the exchange, ready for release the following morning. At 7.02am on Thursday 30 March 2000 the announcement was released to the market. The announcement was mainly concerned with corporate activity of PrimeEnt, but it included the following statement:
“In addition, Hoodless Brennan & Partners plc has, subject to allotment and Admission, placed on behalf of PrimeEnt 50,000,000 new ordinary shares of 1p each in the Company at 5p per share. The gross proceeds of the placing is £2,500,000, which shall be used, inter alia, for the working capital purposes of the PrimeEnt group”.

35. The announcement was false and misleading. At the time of the announcement, HBP had not placed the full £2.5 million worth of shares.

36. The arrangements made by Mr Nelson included that HBP's retail broking department would take £500,000 of shares and the market making department would take £50,000. Placing letters were only sent out on or around 31 March 2000. Don Nelson read the announcement and, therefore, was aware that it was false and misleading on the date of its release to the market, but he did not inform anyone, including Mr Hoodless or Mr Blackwell.

37. On 3 April 2000, pursuant to instructions given on 30 and 31 March, all £2.5 million of the placing shares were credited to HBP's Crest Nominee Account. Between 3 and 5 April 2000 HBP received signed placing letters in relation to 29,500,000 shares (£1,475,000), inclusive of HBP's own participation. On 5 April 2000 all the placing shares were admitted to trading on AIM as fully paid up shares.

38. Around this time HBP's Compliance Officer, Mr Whittaker, was asked by Don Nelson to review the draft placing agreement. Mr Whittaker noticed that it contained an underwriting clause, and brought this to the attention of Mr Hoodless, but it seems nothing was done about correcting it and the agreement was not completed.

Discovery of the shortfall

39. On Friday 7 April 2000 Don Nelson asked Mr Tim Chandler, who was the director in charge of the retail broking department of HBP, to take up an additional £500,000 shares over and above the original £500,000. Mr Chandler declined to do so, since it would disrupt arrangements already made (that is, a full schedule of sales to be made of various stocks). He telephoned Mr Blackwell (who was on holiday in Spain) to inform him of Nelson's approach.

40. Discussions ensued over the weekend by telephone between Mr Hoodless and Mr Blackwell, which led Mr Blackwell to return to the UK on Monday 10 April 2000. Mr Blackwell was under the impression that HBP had a commitment to PrimeEnt for the entire placing amount (£2.5 million).

41. By Tuesday 11 April 2000 the applicants had ascertained that a substantial quantity of shares remained unplaced.

Disclosure to client and to Nomad, but not to compliance department, legal advisers, LSE or regulators

42. An internal meeting took place on 11 April 2000, attended by the applicants and Mr Brennan, together with Mr Clive Chapman, who had just joined the firm to take up the position of finance director. Prior to the meeting, Mr Hoodless reviewed the announcement. In doing so, he became aware that the announcement was false and misleading in that the market had been told on 30 March 2000 that HBP had completed the placing. The principal course of action decided on by the meeting was that HBP's Corporate Broking department would seek to complete the placing as soon as possible. Mr Chapman verified that HBP had capital adequacy to support a principal position in PrimeEnt for the whole of the placing shortfall.

43. No corrective announcement was made. The compliance department was not informed of the problem. Legal advice was not sought. No contact was made with the SFA or with the AIM team at the LSE. FSA are critical of these omissions and of the motivation lying behind them.

44. The applicants' case is that they considered there was no need for a corrective announcement, and indeed it was better not to make one, provided that they got the problem sorted out by the following day. They claimed that they effectively did so. We were not persuaded that they were entirely successful in that. While it is true that on 11 April 2000 they set in train a number of actions to resolve the problem, the evidence showed that the necessary placings took some considerable time to complete. We need not recite the details; it is sufficient to observe that as late as 20 April 2000 Mr Blackwell was speaking to various investors and obtaining their agreement to take PrimeEnt shares. Conversely, we were not persuaded by FSA's contention that in any general way the applicants consciously subordinated the interests of their client, their customers or the investing public to the interests of HBP. The applicants' primary focus was to get the placing completed because that was what they had been employed to do and because the incorrectness of the announcement would thereby be cured as far as it could be. They not unreasonably thought that a further announcement at that point would make it more difficult to correct the situation and would cause unnecessary problems both for PrimeEnt and for investors, by creating an impression that the true position was worse than it really was.

45. On 11 April 2000 Mr Reid spoke first to Mr Nelson, then to Mr Hoodless. Mr Hoodless informed Mr Reid that only about £1.7M out of the £2.5M shares had been placed. Mr Reid relayed this information to Mr Webster of BSL on the following day.

46. By 12 April 2000 PrimeEnt had not received any of the placing proceeds. Mr Webster telephoned Mr Hoodless. Mr Webster had already learned from Mr Reid that only £1.7M shares had been placed. Mr Hoodless explained his understanding that two of the placees accounting for fairly substantial amounts withdrew, "effectively leaving us in the position of taking it all up". We interpret that to mean that, because the announcement of a completed placing had been made, HBP considered themselves responsible to take up the shortfall themselves. (It did not reflect any underwriting obligation.) Mr Webster's main concern in the conversation with Mr Hoodless was to obtain reassurance that PrimeEnt would receive the funds from the placing within a reasonably short period of time. Mr Hoodless said he was going to ask Mr Reid to agree to a delay in the payment of the proceeds to PrimeEnt. 50% of the funds would be sent before the end of the week and he hoped all the shares would be sold within two to three weeks. In the course of the conversation Mr Hoodless expressed concern about potential regulatory implications: "Suddenly, huge compliance issues, in one way, form or other, can break out and I'm obviously anxious to avoid that. " From the terms of the conversation, Mr Webster was evidently alive to the risk that the market might be misled, but he did not advise that any further action needed to be taken. He took into account that PrimeEnt already had adequate working capital and was not relying on the proceeds of the placing. His view was that the expected delay in the payment of the proceeds did not mean that the market was being significantly misled; a corrective announcement was not required and indeed could create a false impression. We note that Mr Webster had originally qualified as a solicitor with a well known City firm which handled company transactions. Mr Webster's judgment was approved by his superiors, including Mr Andrew Smith, later that day. BSL were vastly more experienced than HBP.

47. In our judgment the situation was not handled in the way that it should have been. We consider that the applicants ought to have involved their compliance officer promptly. They would have been wise to seek legal advice and should have appraised SFA of the situation. The priority should have been to inform the LSE

AIM team with all possible speed. The notification of the AIM team should have been done via BSL, who as Nomad had the primary relationship with LSE in regard to the placing. In that respect HBP were let down by BSL. We also consider that the applicants were to some extent lulled by their client's relaxed attitude to the question of staging the payments due from the placing (see below).

48. We regard it as significant that the AIM team, when SFA drew the matter to their attention, did not take issue with BSL's decision not to issue a corrective announcement. Moreover BSL actively assisted HBP in completing the placing via their subsidiary Henry Cooke Lumsden (of which we give more details below). BSL ultimately received only a private warning from FSA for their failure to handle the matter correctly, on the basis that they failed to act with due skill, care and diligence.

49. We therefore regard the applicants' failure to notify the various authorities upon discovery of the shortfall as an error of judgment and a failure of skill, care and diligence, but, as evidenced by BSL's behaviour, regard it as a mistake that was capable of being made even by relatively experienced and conscientious persons.

Public relations

50. FSA contended that there was evidence of impropriety in Mr Hoodless's conversation on 12 April 2000 with a public relations consultant, Richard Robinson, who had been engaged to try to obtain favourable publicity for PrimeEnt in Sunday newspapers. Mr Hoodless commented: "I have taken my eye off the ball and not properly followed up on it and now I find myself in a very difficult position …. … basically I need to get it up and then a lot of our problems would disappear as they do when share prices rise … . …I was trying last night without having all the facts … to try and piece the jigsaw together [and] at the same time to make sure I started to get the ball rolling so that something starts happening. But … I've now had a bit more time to reflect on it and I've reflected on what you've said and that's panic off, let's go ahead with what you were suggesting, keep our fingers crossed that we get a lovely bumper article …"

51. This conversation is open to more than one interpretation. The proposed article could be regarded as an attempt to put a floor under the share price by massaging the market rather than a bona fide request to inform readers of a success story. We note, however, that the gist of the conversation was that Mr Hoodless was not pressing for anything more to be done than Mr Robinson had already arranged. The observation by Mr Hoodless about the benefit of a rise in share prices can be seen as a wish or a statement of the obvious rather than an instruction to Mr Robinson to try to manipulate the market. It is well known that favourable media publicity has a tendency to produce price rises. Since HBP considered itself responsible to take the shortfall of shares itself so far as necessary, it was obviously in HBP's interest if the price rose. Mr Hoodless's comment "I need to get it up" can be read in that sense. We are not satisfied that we should regard this conversation as evidence of unfitness or impropriety on the part of Mr Hoodless.

Attempted share support

52. At 3:59 pm on 12 April 2000 Mr Blackwell called a business acquaintance, Gerald Smith and requested him to buy £50,000 shares through any market maker other than HBP. When Dr Smith said "I don't understand how that helps you", Mr Blackwell explained, "behind it I've got about a million five … I need a slightly better price". The significance of this conversation was a matter of

dispute. FSA contended that Mr Blackwell was guilty of an attempted share support scheme. Dr Smith's understanding of it as stated to investigators in September 2001 was that he was being asked to support the share price, as HBP was long of PrimeEnt stock. In interview on 5 February 2002 he said he believed the rationale for the request was to "support the share price of PrimeEnt. So pretty standard for a broker." In evidence before us he said that Mr Blackwell was asking him to do "a trading favour" with "no guarantees, nothing like that". In the event Dr Smith rang back on the following day to say that he had not bought the shares because the price was too high.

53. Mr Blackwell accepted that the conversation was capable of being interpreted as a share support request, but denied that that was his intention. His explanation was that he asked Dr Smith to make a purchase which would be impossible to make because of its size and the time of day, and that Dr Smith's report back to him would enable him to know what was going on in the market and to make an informed guess as to what would happen to the share price over the next day or so. The purpose was to obtain reassurance.

54. In cross-examination Mr Blackwell argued that experienced market makers would not change their price merely because they were asked for a quote for a large quantity. That argument, even if justified, did not answer FSA's concern that Dr Smith was asked to make an actual purchase. Mr Blackwell also stated that an effective share support operation would start first thing in the morning and require the co-operation of a number of people.

55. We do not accept Mr Blackwell's explanation. We are satisfied, having regard to the burden and standard of proof set out above, that the request to Dr Smith was an attempt by Mr Blackwell to give improper support to the share price, albeit a half-hearted and ineffectual one.

MU Nominees

56. FSA also had concerns about further conversations with Dr Gerald Smith on 19-20 April 2000, in which Mr Blackwell was testing Dr Smith's willingness, via MU Nominees, to take up to £500,000 worth of PrimeEnt shares if need be. In the first of the conversations Mr Blackwell said to him: "I need you to tell me what you want for that, because I understand that this has to be probably a business transaction between me and MU and I understand that I have, would have to turn it back into a, a rather large amount of money." In the second conversation Dr Smith asked: "How long do you want me to hold it?" To which Mr Blackwell replied "Couple of months?" In the third conversation Dr Smith indicated that, if he was short of liquidity himself he could place out the £500,000 worth with 3 or 4 people and would just say it was the return of a favour.

57. FSA contended that Mr Blackwell committed HBP to repurchase the shares from MU Nominees. Mr Blackwell claimed in evidence that he was doing no more than lining up Dr Smith as a placee if required, and advising him that a couple of months would be a suitable time to retain the stock.

58. Some of these statements are found in a context of expletives and exaggerations. Dr Smith referred to them as "broker speak", meaning that the conversation was not to be taken too seriously. We consider there is insufficient evidence to conclude that Mr Blackwell had in mind a firm sale and repurchase arrangement or any sort of guarantee to Dr Smith. Nevertheless, we are unable to accept Mr Blackwell's explanations of the proposals. We consider it is clear that Mr Blackwell was proposing a transaction for other than normal commercial motives. Mr Blackwell envisaged a parking operation. Dr Smith was being asked

to purchase not as an investment but to provide accommodation as a favour to HBP. Since this conversation took place prior to the inception of the new regulatory regime in December 2001, we are not required to decide whether such a parking operation would have amounted to market abuse under FSMA s 118. We had misgivings about the propriety of the proposed transaction, but the evidence did not lead us to a firm conclusion on that matter.

59. In the event the transaction did not proceed in the form discussed. MU Nominees purchased £250,000 of PrimeEnt stock on 25 April 2000. The stock was not repurchased by HBP but was still held by MU Nominees at the time of the hearing.

Netvest

60. Mr Blackwell had a conversation with Mr Barry Gold on 28 April 2000 in connection with Netvest taking shares in PrimeEnt. In the course of the conversation Mr Blackwell said: "I have basically underwritten you, yeah? … So you've bought them and it's my obligation to buy them back." FSA contended that this was evidence of a buy back arrangement.

61. We found the evidence very unclear on this aspect. Mr Blackwell had talked to Mr Peter Abbey on 12 April 2000 about the possibility of Netvest taking PrimeEnt shares. Mr Abbey, though called by the applicants, was not cross-examined by Mr Mayhew about the existence of a buy-back arrangement. Mr Blackwell said in cross-examination: "It is very poor wording from my behalf. There is no guarantee given to them that I will get them out of the position." We are unable to draw any adverse conclusions in regard to Netvest.

Innovation Fund

62. A note was found in Mr Nelson's handwriting, addressed to Fiona Reid, stating: "Placed with Innovation Fund £150,000 @ 5p 4/4/2000". The applicants relied on the note as indicating a placement on that date, but could give no further information about it. We are unable to draw any conclusion from the note. Mr Hoodless had difficulty remembering details, but it appeared likely from other evidence that on 11 April 2000 he decided to allocate 3,000,000 (£150,000) PrimeEnt shares to the Innovation Fund, of which he was the discretionary manager. The relevant funds were received via an internal transfer on 13 April 2000 and a signed placing letter was received on 14 April 2000.

63. FSA complained that Mr Hoodless did not disclose to the administrators of the Fund the problems surrounding the placing. In particular, he failed to disclose the false and misleading nature of the announcement of 30 March 2000, the fact that the placing was not yet complete, and the extent of HBP's holding in PrimeEnt. FSA also contended that Mr Hoodless's decision to allocate shares to the Innovation Fund was made in order to reduce HBP's liability to PrimeEnt and not because it was in the Fund's interest to invest in PrimeEnt.

64. Under the terms of the relevant investment management agreement Mr Hoodless was required to have regard to the investment objectives. FSA's contention that the investment was not made in the interests of the Fund was not sustained. It was not disputed that the purchase of PrimeEnt shares was squarely within the Fund's objectives. Under the terms of the agreement Mr Hoodless had absolute discretion to effect purchases using the assets of the Fund, and was expressly entitled to purchase securities in which HBP had a position. There was thus no duty to disclose that HBP had a position in the shares. Similarly, the terms of the agreement acknowledged that HBP could have contractual and other relationships with companies the securities of which were assets of the fund, so

that there was no duty to disclose the terms or status of the placing agreement with PrimeEnt. There was no impropriety in the purchase as such and the sole issue is whether, in view of HBP's difficulties over the placing, Mr Hoodless should have taken some special step by way of disclosure, because of a particular conflict of interest not contemplated in the investment agreement. Mr Mayhew contended that Mr Hoodless should have informed the administrator of the Fund that the sale of the stock to the Fund would not only be in the interests of the Fund but would also be in the interests of HBP because of their need to complete the placing.

65. The SFA Rulebook required fair treatment for the customer. By the terms of the agreement the customer gave Mr Hoodless a free hand and the responsibility to consider all relevant matters. Since it was Mr Hoodless's duty under the agreement to have regard to "any other matter to which a prudent investment advisor should reasonably pay regard", it was his duty to consider the conflict himself (if there was one) and make up his mind whether to make the investment. That Mr Hoodless in fact genuinely considered the interests of the Fund, rather than the interests of HBP, is demonstrated by the size of the transaction (£150,000). We accept Mr Hoodless's evidence that the size of the transaction was appropriate and was not increased to assist with HBP's own difficulties. Had the purpose been to 'bail out' HBP, in view of the amount of funds available for investment he could have caused the Fund to purchase £500,000 of PrimeEnt stock. We would see the force of a contention that in the latter circumstances fair treatment of the customer would have required explicit disclosure of HBP's interest. But where the size of the transaction was in fact determined by the Fund's interests, not HBP's, we have no reason to consider that the Fund administrator had a reasonable expectation of being informed of the extent of HBP's own interest in making the sale. FSA did not dispute that it was genuinely in the Fund's interests to make the investment (judged by the information available to Mr Hoodless at the time). In the circumstances there was a coincidence of interest, rather than a conflict.

66. We do not consider that Mr Hoodless was in breach of his contractual or regulatory duties as investment manager in regard to the Innovation Fund.

Retail sales

67. FSA contended that it was agreed by the applicants on 11 or 12 April 2000 that HBP's retail broking department would take up any stock that the corporate broking department was unable to place. The applicants undoubtedly had retail sales in mind as an avenue of action, but in referring to a definite agreement in the terms suggested FSA are in our view overstating the position. In the internal conversation between the applicants on 12 April at 12.01, Mr Hoodless in seeking to explain to Mr Blackwell what had gone wrong was still unsure of the details, and they discussed contacting Mr Reid again. The picture we get is that as at 12 April 2000 the applicants were still feeling their way.

68. Between 14 and 20 April 2000 over £1M worth of PrimeEnt shares was actively sold to private customers by HBP's Retail Broking department, of which probably £670,000 worth of shares came from the placing, being the £500,000 originally envisaged, plus an additional £170,000. HBP made a profit on the sales.

69. FSA contended that the retail sales were made in the interests of HBP and not because HBP considered that the stock was a good buy for its retail customers. In our judgment the evidence did not support that contention. The sales were made pursuant to a healthy demand for the stock. The extra £170,000 was a relatively

small part of the shortfall. HBP was not pressing upon its customers stock which they would not otherwise have purchased.

70. HBP's research note dated 12 April 2000, which recommended PrimeEnt as a speculative buy, made certain disclosures. It stated HBP "is placing on behalf of PrimeEnt 50,000,000 new ordinary shares at 5p per share", which correctly implied that the placing was not complete as at 12 April. The note included under the heading "Material Interest" a warning that HBP "may be providing or have provided within the previous 12 months significant advice or investment services in relation to the company". Under the heading "Risk Warning Notice" it stated that HBP "may have a position in the above mentioned securities". But HBP did not explicitly disclose to private customers that it had a special reason for selling some of the shares because of its difficulties with the placing, so that its advice was potentially tainted. (We should add that there was no evidence that the analysts who wrote the note were influenced by HBP's own position.)

71. We appreciate that Mr Chandler, as a director of the firm as well as head of retail broking, was in an uncomfortable position, but as a matter of market practice, it seems to us that it was not HBP's duty, in its capacity as retail broker, to inform its customers of the full extent of HBP's position in the stock. The risk warning and other caveats in the research note were sufficient. The research note contained no misrepresentation. FSA did not suggest that anyone had lost money as a result of the allegedly incomplete disclosure. Moreover, the amounts of stock sold to retail customers were no greater than were justified by the level of demand for the stock. The interests of HBP and of their customers therefore coincided. We do not consider that HBP's retail customers were treated unfairly in the particular circumstances.

Henry Cooke Lumsden

72. At some point Mr Hoodless rang BSL to ask if they would take some PrimeEnt shares on their own book. They declined because they already had more than they wanted, but at Mr Andrew Smith's instigation put HBP in touch with their subsidiary in Leeds, Henry Cooke Lumsden, who agreed on 20 April 2000 to take £50,000 of shares for onward sale to private clients and signed a placing letter on 3 May 2000. We note the similarity between that transaction and HBP's sales to retail clients.

Payment to PrimeEnt

73. On 13 April 2000 Mr Hoodless told Mr Reid that he would need to delay payment of part of the proceeds to PrimeEnt. Mr Reid indicated his agreement. On 27 April 2000 HBP wrote to PrimeEnt setting out a schedule of expected payments stretching out to 31 May 2000. In the event the last placing letter was received on 22 May 2000 and the final payment was made to PrimeEnt on 28 June 2000.

Investigations by SFA and FSA

74. On 12 July 2000 the SFA notified HBP of a routine inspection visit to commence on 31 July 2000. In the interim Don Nelson took steps to get a signed placing agreement onto the PrimeEnt file. The evidence concerning Mr Hoodless's signature of this document did not persuade us that he attempted to mislead anyone in regard to it.

75. At the opening meeting with Mr Hoodless, at the corporate finance overview meeting with Mr Blackwell, and when the PrimeEnt file was requested for review, nothing was said about PrimeEnt. In an ideal world, they should have volunteered the information that the placing had been problematic. In reality, they regarded it

as a transaction where the problems had been solved to everyone's satisfaction, so that it was not in any sense a live issue. We regard their failure to volunteer information as a technical breach of SIB Principle 10. It was a mistake made not because of any improper motive but because they regarded the transaction as past history.

76. After study of the PrimeEnt file the investigators raised a concern that the placing agreement was inconsistent with the schedule of payments, and that HBP had not complied with their original payment obligations. In two telephone conversations on 3 August 2000 Mr Hoodless discussed with Mr Reid a comfort letter to be provided by PrimeEnt and what he (Mr Hoodless) would say to the regulators. The letter was faxed over and stated:

"We refer to our telephone conversation today … We confirm that we are satisfied that Hoodless Brennan & Partners have fully complied with its obligations, as understood by this company, in relation to such placing and subscription as agreed with us during the course of the placing and in particular confirm that you have complied with your obligations to account to us for the net proceeds of the placing and subscription by the end of June 2000. …"

77. FSA contend that what Mr Hoodless said in order to procure that letter, and what Mr Hoodless said to the investigators that afternoon, show dishonesty on his part. It appears that Mr Hoodless wanted to allay SFA concerns about the absence of a signed placing agreement, and the failure to pay within a short time of the stock being admitted to AIM, by saying that terms were varied orally between him and Mr Reid. In the first conversation Mr Reid reminded him of the "subsequent" agreement for staged payments and Mr Hoodless responded: "Yeah, but what I'd rather, rather than use the word subsequent, I'd rather say it was agreed at, at, at, at, or at, at the time." Mr Reid asked: "As agreed at, during the course of the placing?" Mr Hoodless concurred.

78. We observe that the phrase "during the course of the placing", which emanated from Mr Reid, found its way into the letter and was factually correct, since the carrying out of the placing was unduly extended.

79. Mr Hoodless continued:

… I'm gonna get interviewed this afternoon, I just want to be able to say that I had a further agreement with you which we would look to place to place those shares at 5p, which I had. What I'm also gonna say too, is that I had a verbal agreement that we would do a schedule of payments and one of the reasons I am going to say that because, this is where I, I will need some help from you in one sense and I, I, I will not say at the moment, is that the announcement was made that the placing had, would, had gone ahead and it was premature because he was doing the placing, putting the placing list together. And, and we had no signed agreement, it hadn't been sent to you and I agreed with you, rather than screw the whole thing up, I agreed with you that there, it, it, would be staged, as we and when we (unclear: find/sign) the placees."

80. Mr Reid answered: "Yeah. But we did."

81. We do not consider that in this part of the conversation Mr Hoodless was making up a false story. Mr Reid's reaction was that what he was saying was true.

82. In regard to the misleading announcement, Mr Hoodless said to Mr Reid: "I'll say there was a miscommunication between us [HBP] and them [BSL]." That was indeed what he did. The notes of the meeting on 3 August 2000 recorded Mr Hoodless as telling the investigators that there must have been a misunderstanding or crossed communication.

83. In evidence before us it became apparent that as at 3 August 2000 Mr Hoodless was unsure what the true facts were concerning the putting out of the announcement. In reality he was casting around for a likely explanation of how it was that the announcement had gone out without being formally approved by HBP. It seems to us that on 3 August 2000, in the hope of satisfying the investigators, he was ready to express speculations as if they were facts and was thereby not taking proper care to be truthful. We regard this as unsatisfactory, and not fully candid, but he may well have believed at the time that what he said was probably true. We are not satisfied to the required standard that he was being dishonest in the legal sense defined above.

84. FSA further complained of follow up letters from HBP dated 25 August and 27 September 2000, and of what was said in interviews by Mr Hoodless and Mr Blackwell in March and April 2001.

85. The letter of 25 August 2000, written and signed by Mr Whittaker, contained several incorrect statements, but the evidence did not show that Mr Hoodless (against whom this complaint was made) approved its precise terms before it was sent.

86. The letter of 27 September 2000, signed by Mr Hoodless, was a response to an outline of SFA's findings on their visit. SFA's main concern was that the firm's internal controls had not kept pace with its expansion. The letter contained only preliminary comments on the PrimeEnt matter. The firm was given 21 days in which to respond on 31 topics. SFA observed that the firm was exposed to considerable legal risk because the placing agreement was unsigned. Mr Hoodless's reply included the statement: "The draft agreement remained unsigned under my instructions as I felt that the terms were constantly changing and the release of the PrimeEnt announcement changed the nature of the placing without our formal approval." (This was a repetition of what he had said in the meeting of 3 August 2000, which was summarised as "No agreement was formally signed as the terms of the issue kept changing".) FSA contended before us that this reply was indicative of dishonesty on the part of Mr Hoodless.

87. Mr Hoodless admitted in cross-examination that the statement was inaccurate. We consider it is a misleading conflation of a number of facts. The terms of the placing did keep changing in the sense that it was some time before the payment schedule was finally settled. But the principal reason the draft agreement remained unsigned was that it incorrectly stipulated that HBP were underwriting the issue (as indeed Mr Hoodless explained to the investigators at his subsequent interview in March 2001). The meaning of the final phrase, about the changing nature of the issue, is obscure. In our view Mr Hoodless did not take sufficient care to be truthful in his reply. If he was unsure of the correct answer, he would have done better to say so. As before, we are not satisfied that he was being dishonest in the legal sense. We regard these two instances as isolated lapses which are not indicative of a characteristic lack of integrity.

88. SFA also raised questions about the placing of shares with the Innovation Fund: whether the placing was before or after the initial closing date, when the decision was made to place them with the Innovation Fund, and what was the

rationale. The reply of 27 September 2000 merely stated: “There was no closing date as such for the placing. In addition, we have a degree of discretion as to what is invested in the Innovation Fund.” FSA criticised this answer as evasive. We are unable to regard this answer as dishonest in any way. It was very obvious that it did not fully answer SFA’s question.

89. FSA referred us to various passages in Mr Hoodless’s interview of March 2001, but we did not consider that they added anything to the matters already reviewed.

90. Mr Blackwell in his interview in April 2001 gave the explanation of the share support conversation with Dr Smith on 12 April 2000 that we have referred to above, and which he repeated in his evidence before us. We have already indicated that we regard that explanation as untruthful.

Evidence to the Tribunal

91. FSA relied on the applicants’ evidence before us as involving further dishonesty. With one exception, we do not consider that the applicants’ evidence was dishonest. We consider that, in general, they were doing their honest best to assist us, labouring under the difficulties which we have set out above. The exception was Mr Blackwell’s maintenance of his explanation of his attempted share support via Dr Smith.

The applicants’ general approach to matters of compliance

92. Mr Nigel Smith was employed for 6 years as senior inspector in the surveillance division at SFA and in the investment firms division at FSA. He also assisted the corporate authorisation department of SFA and in the course of that work became acquainted with the directors of HBP. In December 1999 Mr Blackwell first attempted to recruit him. That was because HBP already recognised, prior to the regulatory visit in July 2000, that its internal controls and compliance resources needed to be strengthened. Mr Smith ultimately agreed in May 2000 to join HBP as compliance director, and took up his position in September 2000.

93. Mr Smith gave written evidence that he considered that the applicants were trustworthy and well intentioned, and willing to accept guidance on regulatory matters. He did not believe that they lacked honesty or integrity. FSA declined the opportunity to cross-examine Mr Smith. This evidence reinforced our view of Mr Hoodless, but we are not able to accept Mr Smith’s assessment of Mr Blackwell.

94. In the course of the investigation into the present matters, FSA were given unrestricted access to HBP’s records, procedures and telephone calls. HBP and the applicants provided all material requested and volunteered additional material that had not been requested. Some of the evidence relied on by FSA against the applicants was from one or more transcripts of telephone calls (in particular that between Mr Blackwell and Dr Gerald Smith on 19 April 2000) freely volunteered by HBP without specific request.

The Decision Notices

95. The Decision Notices relating to the applicants were issued on 20 December 2002.

96. We do not find that the Decision Notices were improperly influenced in any way by Mr Kenmir’s attitude to the applicants. But it did seem to us that the allegations made in the Decision Notices went substantially beyond what was

justified by the evidence that we had heard. Before the close of the hearing we requested Mr Mayhew to prepare annotations to show to what extent FSA maintained that the allegations contained in the Decision Notices had been supported by the evidence and to what extent FSA accepted that they had not been established. He declined to do so. The reason he gave was that the Decision Notices simply represented FSA's administrative decision-making process at a particular point in time, which had not been through the heat of the adversarial process. He correctly reminded us that it was our duty to consider the matter afresh in the light of the case pleaded by FSA. We were nonetheless puzzled by the position which he adopted. It was instructive for us to see the basis upon which FSA had made its decisions to withdraw the approvals. We were inclined to think that Mr Mayhew's reluctance was influenced by the magnitude of the discrepancy between the allegations made in the Notices and the allegations established by the evidence.

Other disciplinary cases

97. The applicants had a clean record.

98. We were shown details of numerous cases as illustrations of how SFA or FSA had dealt with other persons guilty of various kinds of wrongdoing. While in principle we think such material is helpful, in this particular case it was of limited assistance since the only decision we are required to make is whether the applicants are fit and proper persons to be approved for the function of investment advice and, in the case of Mr Hoodless, investment management.

OUR ASSESSMENT OF THE APPLICANTS IN RELATION TO THE REGULATORY REQUIREMENTS

99. In assessing the applicants we have kept in mind the regulatory requirements which we have set out above.

100. Mr Hoodless accepted that he exercised inadequate supervision of Mr Nelson and failed to exercise day to day control to ensure that matters proceeded smoothly and correctly. In our view the onerous responsibilities which he bore at the time exceeded his abilities. Those inadequacies are not material to the present proceedings except as background information, since Mr Hoodless's capacity to carry out supervisory functions is not under consideration.

101. Mr Hoodless and Mr Blackwell were guilty of a misjudgment in failing to ensure that the AIM team was promptly notified of the incorrect announcement and the shortfall in the placing, and in failing to seek authoritative guidance in order to either confirm or contradict their and BSL's view that the best course was to continue the placing. That was a failure of due skill, care and diligence in breach of SFA Principle 2, which merited only a private warning and no further action. In our view FSA has not established in this respect a material breach of SFA Principle 1 (integrity and fair dealing) or Principle 3 (market conduct).

102. Mr Blackwell's attempt to support the price of PrimeEnt shares was a failure to observe high standards of integrity, fair dealing and market conduct, in breach of SFA Principles 1 and 3. The attempt was half-hearted and ineffectual, rather than skilful or determined, but it was nevertheless improper.

103. We reject all FSA's allegations regarding retail sales and the Innovation Fund.

104. We reject FSA's allegation that the applicants are guilty of a general failing to be candid and co-operative with their regulators. They co-operated and

provided pertinent information to a very considerable extent. They were, however, guilty of failings in certain limited respects: (1) At the time of the routine inspection visit the applicants ought to have volunteered information to SFA about the difficulties with the placing. We attribute that failure to a lack of perception, not to any improper motive or lack of integrity. (2) In August and September 2000, to the limited extent which we have set out, Mr Hoodless took insufficient care to be truthful in making representations to the regulator. He was thereby guilty of an isolated lack of candour, but not of dishonesty. (3) Mr Blackwell dishonestly maintained to the investigators and to us that the share support conversation with Dr Smith had an innocent explanation. In the above respects the applicants were in breach of SFA Principle 10 and Mr Blackwell was in breach of Principle 1.

105. We reject FSA's allegation that the applicants' conduct operated to the detriment of consumers and to confidence in the financial system.

106. Mr Hoodless appeared to us to be generally conscientious and hard-working. We consider that he has learned much from his mistakes and from the disciplinary process. Bearing in mind the very limited extent to which the allegations made against him succeeded, we do not consider that he poses a significant risk to consumers or to confidence in the financial system and we conclude that he is fit and proper to perform the controlled functions of investment adviser and investment management. We direct that any application by him for approvals be determined by FSA in the light of that conclusion and that the relevant Decision Notice be read in the light of our findings, which substantially contradict most of the matters relied on by FSA in it. We would add, however, that his relinquishment of his supervisory duties was in our view an appropriate step, having regard to our impression of his general capabilities.

107. In regard to Mr Blackwell, in view of the attempted share support we uphold the conclusion of the Decision Notice that he is not fit and proper to perform the controlled function of investment adviser. But we direct that the relevant Decision Notice be read in the light of our findings, which uphold only certain of the matters relied on by FSA in the notice.

108. Our decision is unanimous.

Andrew Bartlett QC, CHAIRMAN