REGULATED ACTIVITIES – performance of - prohibition order - whether Applicant a fit and proper person to perform functions in relation to regulated activities carried on by an authorised person – no – whether the Authority had power to make a prohibition order – yes - reference determined in favour of the Authority – Financial Services and Markets Act 2000 s 56

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

ALLEN PHILLIP ELLIOTT

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: DR A N BRICE (Chairman)
MR I B ABRAMS
MR P V BURDON

Sitting in public in London on 20 and 21 October 2005 and 19 December 2005

Graham Platford of Counsel for the Applicant in respect of the second issue only; otherwise the Applicant appeared in person

Timothy Dutton QC and Dermot Lynch for the Respondent

DECISION

The reference

1. Mr Allen Phillip Elliott (the Applicant) referred to the Tribunal a Decision Notice issued by the Financial Services Authority (the Authority) on 15 December 2003. The Decision Notice stated that the Authority had decided to prohibit the Applicant from performing any function in relation to any regulated activity carried on by an authorised person because it appeared to the Authority that the Applicant was not a fit and proper person to perform any such function.

The legislation

2. The Decision Notice was given under the provisions of section 56 of the Financial Services and Markets Act 2000 (the 2000 Act) the relevant parts of which provide:

> "(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ("a prohibition order") prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to-
>
> (a) a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities;
>
> (b) authorised persons generally or any person within a specified class of authorised person.
>
> (4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence … ."
>
> …
>
> (8) This section applies to the performance of functions in relation to a regulated activity carried on by –
>
> (a) a person who is an exempt person in relation to that activity, and
>
> (b) a person to whom, as a result of Part XX, the general prohibition does not apply in relation to that activity,
>
> as it applies to the performance of functions in relation to a regulated activity carried on by an authorised person.

The issues

3. At a hearing held on 11 July 2005 the Tribunal heard a preliminary issue. In 2001 the Solicitors Disciplinary Tribunal found the Applicant guilty of conduct unbefitting a solicitor and ordered that he be struck off the Roll of Solicitors. The preliminary issue was whether the Findings and Order of the Solicitors Disciplinary Tribunal were admissible evidence of the Applicant's fitness and propriety and whether the Authority could reply upon the Findings and Order without the need to prove each and every allegation which the Solicitors Disciplinary Tribunal had found to be proved.

4. In its preliminary Decision dated 28 July 2005 the Tribunal decided that the Findings and Order of the Solicitors Disciplinary Tribunal were admissible evidence of the Applicant's lack of fitness and propriety and that the Respondent could rely upon the Findings and Order without the need to re-prove each and every allegation which the Solicitors Disciplinary Tribunal had found to be proved. However, the Tribunal also stated that it would consider any other evidence which either party wished to put before it after which the Tribunal would make its own decision as to whether the Applicant was a fit and proper person within the meaning of section 56.

5. After the release of the preliminary Decision the issue remaining for determination in the reference was whether the Applicant was a fit and proper person within the meaning of section 56. At a very late stage, namely on 10 October 2005 which was ten days before this hearing, the Applicant sought to raise another issue, namely, whether the Authority had exceeded its powers by the issue of the prohibition order. This issue had not been raised in the reference notice nor in the Applicant's reply to the Authority's statement of case. However, as the Authority was prepared to deal with the issue at this hearing, we considered it also.

6. Thus the issues for determination are:

(1) whether the Applicant is a fit and proper person within the meaning of section 56; and,

(2) whether the Authority exceeded its powers by the issue of the prohibition order.

The evidence

7. Two bundles of documents were produced by the Applicant. Six (blue) bundles of documents were produced by the Authority. Not all the documents were referred to at the hearing. The Applicant gave oral evidence on his own behalf. Oral evidence was given on behalf of the Authority by Mr Stephen Kemp, an investigator in the Enforcement Division of the Authority, and by Mr John Gould, Solicitor of Messrs Russell-Cooke Potter & Chapman, Solicitors.

The facts

8. From the evidence before us we find the following facts.

9. The Applicant was born in 1949 and is still an Australian national. In 1973 he qualified as a solicitor in the state of Queensland, Australia. He was there involved in arranging loans secured by mortgage. These loans were usually short term loans made by the Applicant's private lending clients to borrowers who mortgaged real property as security for the repayment of capital with interest. The loans were used by the borrowers to finance property development or property speculation.

1988 – the Australian disciplinary proceedings

10. In June 1988 the Statutory Committee of the Queensland Law Society considered eleven allegations about the Applicant made by the Council of the Queensland Law Society Incorporated. One allegation was that the Applicant, as solicitor for two clients (who were husband and wife), was in breach of his duties as a solicitor because he mixed the affairs of his clients with his own. The Applicant and

his wife had borrowed A$78,500 from his lending clients in order to buy a house and, in the same transaction, the Applicant had acted for his lending clients in connection with the loan to his wife and himself and the provision of security. Another two allegations were that the Applicant, as the solicitor for another client, was in breach of his duties as a solicitor because he mixed the affairs of that client with his own. That second client lent the sums of A$38,000 and A$65,000 to a company; the Applicant acted as the solicitor for both the client and the company; the Applicant was a director of, and a shareholder in, the company; and the company acted as the trustee of a discretionary trust of which the Applicant was a beneficiary. The other allegations were of a similar nature. The dates of the events giving rise to the allegations and the amount of money at issue in each were:

1	3 March 1986	A$ 78,500
2	18 December 1985	A$ 38,000
3.	30 April 1986	A$ 65,000
4.	27 August 1985	A$120,000
5	10 October 1985	A$ 80,000
6.	23 June 1983	A$ 65,000
7.	2 December 1985	A$103,500
8	7 March 1986	A$ 8,500
9.	4 September 1985	A$ 20,000
10.	14 January 1986	A$ 65,000
11	8 January 1986	A$ 65,000

11. Thus the allegations covered a course of conduct from June 1983 to April 1986 and involved sums amounting to A$708,500.

12. On 1 and 2 June 1988 there was a hearing before the Statutory Committee of the Queensland Law Society at which the Applicant was represented by Leading and Junior Counsel. On 2 June 1988 the Statutory Committee found the above eleven allegations to be proved. In connection with the first allegation the Statutory Committee also found that the bill of mortgage had not been stamped or registered within a reasonable time and so, in that case, the Applicant had failed to take reasonable steps to protect the interests of his clients. The Statutory Committee found the Applicant guilty of unprofessional conduct and ordered that he be fined the sum of A$5,000 and that he should pay 75% of the costs of the proceedings before the Committee.

1991 - 1999- the Australian insolvency proceedings

13. In the late 1980's or the early 1990's the Applicant purchased a freehold island (Turtle Island) on the Barrier Reef and borrowed money for the purchase; some of the money was borrowed from lending clients. He then applied for it to be re-zoned so that he could get planning permission to build a resort on the island. He engaged a consultant on a success fee and the consultant obtained the re-zoning and the planning approval. The consultant asked for his fee (which was in the region of A$300,000) but by then the Applicant had borrowed heavily and was unable to pay. The consultant sued the Applicant and obtained judgment.

14. On 12 November 1991 a statement of the Applicant's affairs was prepared. The Applicant had total liabilities of A$871,028 and total assets of A$358,986 leaving a deficiency of A$512,042. In evidence which we accept the Applicant told us that

most, if not all, of the clients in respect of whom allegations had been made to the Queensland Law Society appeared in the statement of affairs and he regretted that they had lost their money. There followed a meeting of creditors and on 11 December 1991 a Deed of Arrangement under Part X of the Australian Bankruptcy Act 1966 was entered into between the Applicant of the one part and Mr P G Jefferson as trustee of the other part. (The Deed of Arrangement was later referred to as an individual voluntary arrangement (IVA) which is its English equivalent.) Under the Deed of Arrangement the Applicant covenanted and agreed to pay to the trustee the sum of A$75,000 over three years by way of annual instalments of A$25,000 each.

15. The Applicant made one payment of A$25,000 under the Deed of Arrangement and a further payment of A$1,000 but no more. A Notice to Creditors was sent by the trustee on 24 March 1995 which stated that the Applicant had asked for an extension of time to pay because litigation had been instituted against him by an apparent creditor and this had to be resolved before the Applicant could discharge his obligations under the Deed of Arrangement. This litigation concerned alleged negligent legal advice given to a client by the Applicant.

16. In 1995 the Applicant applied to the Federal Court of Australia to terminate the Deed of Arrangement and for leave to file a debtor's petition in bankruptcy. That application was refused on 27 March 1995. Mr Jefferson, the trustee, applied for the Deed of Arrangement to be terminated and also sought a sequestration order against the Applicant's estate and this was made on 27 March 1995. On 29 March 1995 a letter was forwarded to the Applicant informing him of his bankruptcy and his duty to complete and file a statement of affairs.

17. On 27 June 1995 the Applicant completed a form of proposal to his creditors for the composition of his debts by the payment of the sum of A$15,000. On 3 October 1995 Mr Jefferson sent a lengthy report to the creditors of the Applicant. By this time the client who had claimed for negligent advice was included as a creditor in the bankruptcy. Mr Jefferson referred to the fact that the Applicant had sold certain shares after the date of bankruptcy for the sum of A$4,720 and had spent the sale proceeds on living expenses. Mr Jefferson had informed the Applicant that he (Mr Jefferson) considered the sale of the shares and the retention of the proceeds to have been to the detriment of the creditors. Mr Jefferson asked the Applicant to pay the amount of A$4,720 to the estate but the Applicant did not have the funds to do so. Mr Jefferson did not consider the Applicant's conduct to be satisfactory. By this time known unsecured debts totalled approximately A$2,373,939 and Mr Jefferson reported that he would expect that creditors might receive a first and final dividend of 0.140 cents in the dollar.

18. A further report to creditors was made on 26 October 1995 giving notice of a meeting on 2 November 1995. At that meeting no resolution was passed in respect of the Applicant's proposal for a composition. The Applicant was ultimately discharged from his bankruptcy on 3 June 1998.

19. In his final report to creditors dated 12 February 1999 Mr Jefferson stated that he did not then consider that any dividend would be paid to ordinary unsecured creditors of the estate; he also mentioned that on two occasions he had objected to the Applicant's discharge because of the failure by the Applicant to provide information.

On 13 June 2000 a list of fifty creditors was compiled showing that the Applicant owed those creditors a total of A$3,190,649.06. The creditors included the husband and wife clients who had been the subject of the first allegation in the Australian disciplinary proceedings and the Applicant was then shown as owing them A$122,000.

1994-1995 - the three applications to The Law Society

20. Meanwhile, in late 1994 the Applicant came to England and sought to be admitted as a solicitor in England and Wales. To do that he applied for a certificate of fitness from the Queensland Law Society.

21. We saw a copy of a certificate (the first certificate) dated 27 September 1994 from the Secretary of the Queensland Law Society. This stated that the Applicant held a non-practising certificate until 30 June 1995 and that his name was on the Roll of Solicitors and had never been removed from it. The certificate also stated that the Queensland Law Society had no record of any complaint being received requiring disciplinary proceedings against the Applicant and no order had ever been made directing him to be suspended from practising and no charge was pending against him for professional or other misconduct. The certificate concluded by stating that the Applicant had advised the Society of the arrangement with his creditors of 11 December 1991.

22. On 28 September 1994 the Applicant completed Law Society Form 1 which was an application for qualified lawyers applying for a certificate of eligibility to sit the Qualified Lawyers Transfer Test. The Applicant signed Form 1 as a statutory declaration. With Form 1 was sent the first certificate from the Queensland Law society dated 27 September 1994. Form 1 was received by The Law Society on 21 December 1994. (December 1994 was after the June 1988 finding of unprofessional conduct and three years after the 11 December 1991 Deed of Arrangement which had not been complied with. However it was before the 29 March 1995 bankruptcy.) On Form 1 the Applicant answered questions 13, 14 and 16 in the following way:

> "Q13 Have you ever been made bankrupt or insolvent or are any such proceedings pending against you?
> A13 No
>
> Q14 Have you ever entered into an arrangement or composition with creditors?
> A14 Yes
>
> Q16 Have you at any time been found guilty of professional misconduct by a disciplinary tribunal or are any proceedings before a disciplinary tribunal still pending?
> A16 No."

23. At the end of Form 1 appeared the statement:

> "I understand that the Society must be advised if, prior to my admission to the Roll of Solicitors I am convicted of an offence in any Court of the UK or elsewhere… I therefore undertake that I will notify the Society of any such conviction after the time of this application. I also undertake to advise the Society if I become bankrupt or if I am found guilty of professional misconduct or if any proceedings are taken against me."

24. The Applicant did not inform the Law Society of his bankruptcy when it occurred in March 1995 nor at any time thereafter. However, on 20 March 1995 he

did inform the Queensland Law Society and on 29 March 1995 they wrote to say that the Society was prepared to allow him to retain an employee-level certificate.

25. On 5 July 1995 the Applicant signed Law Society Form 2 which was an application for admission as a solicitor to the Supreme Court. 5 July 1995 was after the March 1995 bankruptcy and before the discharge on 3 June 1998. At the end of this Form the Applicant stated:

> "I have ["have not" being deleted] been adjudged bankrupt by any court in the UK or elsewhere and I ["do" being deleted] do not have to obtain a discharge…. I also understand that I must bring the Society's attention to any other matter which questions my fitness to become a solicitor."

26. At the date of Form 2 the Applicant had not obtained his discharge. No mention was made about the finding of unprofessional conduct by the Queensland Law Society. Neither was any mention made of the fact that one of the Applicant's clients had previously sued him for negligence and had become an admitted creditor in his bankruptcy. Form 2 was signed by the Applicant as a statutory declaration.

27. The Applicant was admitted to the Roll of Solicitors on 15 August 1995. On 17 October 1995 he sent to the Law Society an application to enable him to establish himself as a sole practitioner even though he had been admitted for less than three years. Question 16 asked: "Please state any other information which you wish to be taken into account when your application is considered". There was no reply to this question. The replies to the other questions did not mention the June 1988 Australian disciplinary proceedings, nor the March 1995 bankruptcy, nor the professional negligence claim, nor the fact that the Queensland Law Society had limited the Applicant's practising certificate to an employee-level certificate. This latter would have been very relevant to the Applicant's application to establish himself as a sole practitioner.

1996 – 2000 – the Applicant practises in London

28. From 1 July 1996 the Applicant practised as a solicitor on his own account in London. From about July 1997 the Applicant practised as "Elliott's Solicitors" from his home address in Chiswick.

29. At that time the Applicant's practice consisted almost exclusively of the operation of what was called in its marketing literature "The First Mortgage Debenture Monthly Income Plan". This scheme was later referred to as "The FMD Monthly Income Plan" and we refer to it as the mortgage investment scheme. Under the mortgage investment scheme the Applicant recruited lending clients through advertisements in local and national newspapers. The lending clients would provide funds to the Applicant's firm to be used in making loans to borrowers who were mainly limited companies. The loans were secured by a first charge on real property owned by the borrowers. It was common for the funds of several lending clients to be pooled to make a single loan. In relation to most loans the borrowers paid a higher interest rate to the Applicant's firm (at one time 15%) than the firm paid to the lending clients (at one time 12%). The borrowers also paid administration fees and facility fees to the Applicant. The Applicant, therefore, not only retained the difference between the rate of interest paid by the borrowers and the rate paid to the

lenders but also retained the administration fees and the facility fees paid by the borrowers to the Applicant.

30. In evidence to us the Applicant stated that the fact that he was earning administration and facility fees (in addition to legal fees) was set out very clearly in his terms of business but he accepted that he did not make clear to his lending clients the amount of the administration and facility fees and that that was a breach of Law Society Rules.

31. Earlier, in 1995 or 1996, the Applicant had been involved with a Mr R in connection with a scheme that Mr R was running through a company called Dominion Securities Limited. In June 1997 Mr R was investigated by the Bank of England because it was possible that some unlawful deposits were being taken which would have been a criminal offence under the Banking Act 1987. That matter was then rectified and the Applicant continued to accept referrals from Mr R and Mr R's companies were borrowers under the Applicant's mortgage investment scheme. The Applicant's brochure stated that he never acted for borrowers, only for lenders, but Mr R was a significant borrower under the mortgage investment scheme and was also connected with many borrowers. At one stage two-thirds of the borrowers under the Applicant's mortgage investment scheme were introduced by Mr R. The arrangement (or facility) fees under the mortgage investment scheme were split between companies belonging to the Applicant and companies belonging to Mr R and these companies were located in the Isle of Man for tax planning purposes.

32. As an example, we saw a "disbursement authority" dated 10 March 2000 addressed to the Applicant's firm in respect of a loan to a borrower and signed by a director of the borrower. The document authorised the Applicant's firm to disburse a loan of £1,375,000 by sending £1,237,157 to the borrower's solicitor. The remaining amounts were to be paid for disbursements and, in addition, administration fees were to be paid to Elliotts Mortgage Administration Limited and a facility fee of £57,400 was to be paid to a company called Cityline International Limited. The Applicant told us that Cityline was an offshore company owned by Mr R and from Cityline the Applicant's half share of the facility fee would be paid to another off-shore company controlled by the Applicant's wife. The Applicant also accepted that his lending clients would not see the disbursement authority sent to the borrower.

1998 – 2000 – The Office for the Supervision of Solicitors

33. In June 1998 an enquiry was made of the Law Society as to whether the Applicant's mortgage investment scheme was regulated by the Law Society and in September 1998 two representatives of the Office for the Supervision of Solicitors visited the Applicant's practice and stayed for two weeks. They inspected the Applicant's records and accounts. One of the issues raised was whether the Applicant was running a collective investment scheme within the meaning of what was then section 75 of the Financial Services Act 1986; if he was then he was operating in a regulated market beyond the scope of what he was permitted to do. Although, as a solicitor, the Applicant was permitted to conduct non-discrete investment business he did not have approval to operate a collective investment scheme. Another issue raised was whether the Applicant was deposit taking in breach of the Banking Act 1987.

34. In October 1998 the Applicant took the advice of counsel on two matters. First, he asked if the mortgage investment scheme infringed section 3 of the Banking Act 1997. Secondly, he asked whether the mortgage investment scheme was a collective investment scheme within the meaning of section 75 of the Financial Services Act 1986. Counsel advised that the Applicant was not carrying on a deposit taking business within the meaning of the 1987 Act and that the mortgage investment scheme was not a collective investment scheme.

35. By March 1999 the Applicant had expanded his practice and he took office premises in Chiswick High Street. In August 1999 the Applicant's practice was incorporated as an unlisted public company known as Elliotts Solicitors Plc which was recognised by the Law Society as a recognised body under the Solicitors Incorporated Practice Rules 1988. In early November 1999 the Applicant received another visit from the Office for the Supervision of Solicitors and a number of further visits were made ending in March 2000. As at 31 January 2000 lending clients had invested £14.8M in the mortgage investment scheme.

36. At about this time the Applicant formed the view that he would prefer to remove himself from supervision by the Law Society and be regulated by the Personal Investment Authority. In February 2000 he had a meeting with the Personal Investment Authority to see if the mortgage investment scheme could be made into a regulated product. The Applicant informed the Office for the Supervision of Solicitors of his intentions and on 9 March 2000 he was interviewed by them for most of the day.

March 2000 - the intervention

37. On 15 March 2000 the Law Society resolved to intervene in the Applicant's practice on the grounds of reasonable suspicion of dishonesty. An inspection of the Applicant's firm was made and Mr Gould of Messrs Russell-Cooke, Potter & Chapman, Solicitors was appointed to be the Law Society's agent. On 31 March 2000 the High Court substituted Russell-Cooke Trust Company as trustee to act on behalf of the Applicant's lending clients under the mortgage investment scheme. In 2000 an action was also commenced in the High Court to determine whether the mortgage investment scheme was a collective investment scheme.

38. At about this time the Applicant decided to amend his product so that it did not constitute a collective investment scheme. Details were sent by his solicitors to the Authority and on 7 November 2000 the Authority wrote to say that it was apparent that the plan had been structured with a view to ensuring that it did not satisfy the terms of section 75(2) of the Financial Services Act 1986 but that whether or not the plan achieved that objective would clearly depend upon precisely how the arrangements were operated, and continued to be operated, in practice.

March 2001 – the Law Society's allegations

39. On 1 March 2001 The Law Society applied to the Solicitors Disciplinary Tribunal that the Applicant be required to answer fifteen allegations contained in a statement which accompanied the application. The allegations were that the Applicant had been guilty of conduct unbefitting a solicitor and had breached the provisions of a number of professional rules including The Solicitors Investment Business Rules 1995. The detailed allegations included allegations that the Applicant had acted when

conflicts of interest existed; that he had failed to account to his clients for commission; that he had failed to disclose material information to investing clients; that he had made misleading or inaccurate representations in advertisements; that he had conducted discrete investment business when not authorised to do so; that he had made recommendations and/or effected transactions for clients without assessing the suitability of such recommendations or transactions for each client; that he had made recommendations to clients without taking reasonable steps to enable the client to understand the nature of the risks involved; and that he had improperly purported to witness a signature where the signatory had not signed in his presence.

40. At about the same time (on 9 March 2001) Russell-Cooke Trust Company brought proceedings against the Applicant for an account and for payment of all monies received as commissions under the mortgage investment scheme. On the same day Laddie J in the High Court made a world wide freezing order for fourteen days. The freezing order was made against the Applicant and his wife and was in favour of Russell-Cooke Trust Company. The freezing order was made because the Law Society had discovered that the Applicant had paid the facility fees into a bank account in the Isle of Man; in the view of the Law Society the Applicant was bound to account to his lender clients for the facility fees and any other commissions or payments made to him under the mortgage investment scheme. On 26 March 2001 Laddie J refused to discharge the freezing order; in his judgment he mentioned that large sums of clients' money had been channelled through various companies which were associated with the Applicant and his wife and, on the basis of the information then before him, much of that money was unaccounted for. The money referred to was money which came from borrowers and which should have been paid to lenders who were clients of the Applicant. Thereafter those proceedings continued and in July 2001 Laddie J held that each loan by more than one client on a single security was a separate collective investment scheme. That meant that if the mortgage investment scheme were to continue it would require authorisation and could only be run by a regulated person under the 2000 Act.

May- November 2001 – the application to IMRO

41. In early 2001 the Applicant approached a number of authorised investment firms with a view to their operating a mortgage investment scheme similar to the FMD Monthly Income Plan. One Firm (Firm P) responded to the approach and in May 2001 sent to IMRO the form of application for individual registration completed by the Applicant. The form of application mentioned the substitution of Russell-Cooke Trust Company as trustee to act on behalf of the lenders under the mortgage investment scheme; the action by Russell-Cooke Trust Company to recover monies paid to the Applicant's firm during the term of the scheme; and the action to determine whether the Applicant's scheme was a collective investment scheme. However, it did not refer to the freezing order which had been made on the basis that the Applicant had paid fees and commissions that were due to his lender clients into an off-shore bank account. In the form of application the Applicant also mentioned that he had declared himself bankrupt in 1995 whereas, of course, in 1995 he had applied for leave to file a debtor's petition in bankruptcy which application was refused; it was the trustee's application which had then been successful.

42. In this connection it is relevant that we also saw a copy of another certificate (the second certificate) dated 27 June 2000 from the Secretary of the Queensland Law

Society. The second certificate stated that the Applicant did not then hold a current practising certificate although he had held practising certificates from February 1974 to June 1995. The Applicant's name had not been removed from the Roll of Solicitors. The Applicant had been found guilty of unprofessional conduct by the Statutory Committee on 2 June 1988 and had been fined the sum of A$5,000 and had been ordered to pay some costs. It was the second certificate that was sent to IMRO.

43. On 4 July 2001 IMRO wrote to firm P and asked:

> "Can Mr Elliott provide evidence that when he applied to the UK Law Society in 1996 for admission to the Roll of Solicitors, he fully disclosed the facts that he had been disciplined by the Queensland Law Society, had entered into an IVA with his creditors in 1992 and, at the time he made his application, he was an undischarged bankrupt in Australia?"

44. On 8 August 2001 the Applicant replied by sending to IMRO a copy of the Sole Practitioner Application Form of October 1995. On 9 August 2001 the Applicant clarified this information and explained that the Sole Practitioner Application Form was only to waive the three year requirement before he could practise as a sole practitioner; all the issues regarding fitness had been answered previously. The letter continued:

> "You are aware that the arrangement with my creditors and subsequent bankruptcy had nothing at all to do with my solicitor's practice or my ability as a solicitor but resulted from a failed property development in 1991. Please note that at no stage was I asked questions by the Law Society as you have done in your forms. As far as I can ascertain the Law Society and I have both relied on the Certificate of Fitness from the Queensland Law Society."

45. Later, on 16 October 2001 the Applicant wrote to IMRO about his failure to disclose the fine imposed by the Queensland Law Society and said:

> "When making the application to the Law Society for my admission in 1995 I was asked for a certificate of fitness from the Queensland Law Society. This was duly issued. The event to which you refer had taken place some seven years prior to the issue of the certificate and was not highlighted by the Queensland Law Society as a significant event."

46. The certificate of fitness sent to the Law Society was no doubt the first certificate of 1994 which made no reference to the finding of unprofessional conduct. It was the second certificate of June 2000 which was sent to IMRO and that did refer to the finding of unprofessional conduct.

47. On 4 October 2001 IMRO wrote to the Applicant to say that the Admissions Committee had been unable to make a determination on his application and wished to give him an opportunity of making representations. They had four areas of concern. First, that in applying to be admitted to the Roll of Solicitors in England and Wales the Applicant had failed to disclose the finding of unprofessional conduct in 1988; secondly that the Applicant had been made bankrupt in 1995; thirdly, that in March 2000 the Law Society had intervened in the Applicant's firm; and finally that in July 2001 the High Court had determined that the Applicant's firm had been running a series of collective investment schemes.

48. On 24 October 2001 the Applicant was interviewed by the IMRO Admissions Committee and he confirmed that he was making full, frank and unambiguous

disclosure. The Applicant stated that all his clients' money had been properly balanced and accounted for but no mention was made at the interview of the freezing order which had been imposed in March 2001 because of the possibility that money belonging to clients had not been properly accounted for.

49. On 8 November 2001 the IMRO Admissions Committee informed firm P that it had decided to register the Applicant subject to the condition that his role would be restricted to certain functions and that the registration would be reviewed if adverse findings emerged from the then current investigation by the Law Society.

2001 – October 2003 - the proceedings before the Solicitors Disciplinary Tribunal

50. Meanwhile, on 18 June 2001 the hearing of the disciplinary action before the Solicitors Disciplinary Tribunal was fixed for ten days beginning on 3 December 2001. On 5 November 2001 The Law Society served a sixteenth allegation, namely that the Applicant had provided a misleading representation to The Law Society on his application for admission as a Solicitor of the Supreme Court of England and Wales. On that application the Applicant had denied that he had been found guilty of professional misconduct whereas he had, in fact, been convicted of unprofessional conduct. Later in November 2001 the Applicant filed a response to all the allegations; as far as the sixteenth allegation was concerned he argued that he did not lie on his application to The Law Society because he had never been guilty of professional misconduct but of unprofessional conduct which was different in Australia.

51. On 3 December 2001 Russell-Cooke Trust Company submitted an application to the High Court for summary judgment in respect of the proceedings commenced on 9 March 2001 and a continuation of the freezing order and the application was heard on 17 December 2001.

52. Meanwhile, there was a hearing before the Solicitors Disciplinary Tribunal on 3 and 4 December 2001. The Applicant appeared in person and he claimed that Russell-Cooke had declined to allow him to pay for legal representation from the frozen assets. However, prior to the hearing he had received the advice of solicitors who had advised him to ask for an adjournment and not to attend if his request was refused. At the opening of that hearing the Applicant, representing himself, applied for an adjournment. The Tribunal noted that the Applicant's solicitors had written to the Tribunal on 23 November 2001 asking for an adjournment of the hearing. The adjournment applied for by the Applicant was refused by the Tribunal whereupon the Applicant withdrew from the proceedings and was not therefore physically present at the substantive hearing which followed immediately. The Applicant had previously lodged detailed written submissions which were taken into account by the Solicitors Disciplinary Tribunal in making their decision. Three volumes of evidence were before that Tribunal and oral evidence was given by two witnesses. At the end of the substantive hearing the Solicitors Disciplinary Tribunal ordered that the Applicant should be struck off the Roll of Solicitors and should pay the costs of The Law Society.

2002 – The Findings and Order of the Solicitors Disciplinary Tribunal

53. On 27 February 2002 the Solicitors Disciplinary Tribunal gave its Findings in a lengthy document of thirty pages. It upheld all but one of the sixteen allegations. It found all the other fifteen allegations substantiated (including all the allegations

mentioned above) and further found that the Applicant had been guilty of dishonesty and conscious impropriety in his conduct. The Tribunal stated that it had no difficulty in concluding that the Applicant did not act as an honest solicitor should. Among the many other findings of the Tribunal were the following:

> "The [Applicant] demonstrated the clearest possible dishonesty when he did not make an accurate disclosure of his gross fees in his Gross Fee Certificate for the purposes of calculating the contribution to be made by him to the Solicitors Indemnity Fund for the year 6 April 1998. He disclosed such part of his income as he chose, the effect of which was to ensure that the contribution due from him was calculated at the lowest possible level and to conceal the fact that he was taking very large sums of money indeed out of the investment scheme. The Tribunal concluded that the [Applicant] was a stranger to the truth when he did not make full disclosure of his disciplinary history and his bankruptcy in Australia when he made his application to The Law Society of England and Wales for admission to the Roll. His failures in that respect simply did not demonstrate the qualities of probity, integrity and trustworthiness essential in a practising solicitor. …
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> The [Applicant's] behaviour compromised his independence and integrity and clearly [he] had been guilty of the most serious failure in his duty to act in the clients' best interests. There was no doubt that the [Applicant] had ill served the good reputation of the solicitors' profession.
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> In summary, the [Applicant] had begun his career as a solicitor in this country following his provision of a misleading representation to The Law Society on his application for admission by not disclosing that he had been guilty of unprofessional conduct in Australia. He had been admitted here following such misleading information, and also following his bankruptcy in Australia, he embarked on a scheme of obtaining significant funds from clients for the purpose of mortgage lending to borrowers, which activity comprised virtually his whole practice. In operating the scheme the [Applicant] acted in a systematically dishonest manner, involving conflict of interest of a most serious nature, secret profits and fees not disclosed to lender clients aggregating some hundreds of thousands of pounds over a period of three years prior to the intervention. In addition he committed a number of other failures, including failure to disclose material information, misleading advertisements, acting contrary to the Solicitors Investment Business Rules and generally acting with conscious impropriety."

54. The written Findings of the Solicitors Disciplinary Tribunal were filed at The Law Society on 7 March 2002. Under section 49 of the Solicitors Act 1974 the Applicant then had the right to appeal to the High Court within fourteen days of that date. On an appeal the High Court had the power to make such order as it saw fit, including the power to order a re-hearing. The Applicant chose not to appeal under section 49 but on 5 April 2002 he applied to the Solicitors Disciplinary Tribunal for a re-hearing under Rule 25 of the Rules. The grounds of the application were that he had not attended the original hearing and was not represented. On 24 July 2002 the Applicant's solicitors supported the application for a re-hearing and stated that the Applicant unequivocally accepted all the allegations in full save where they formed findings of criminal dishonesty, conscious impropriety or civil dishonesty and so the scope of the dispute at a re-hearing would be very narrow. The letter went on to say that the Applicant wished to operate in a regulated market. On 23 October 2003 the Solicitors Disciplinary Tribunal dismissed the application for a re-hearing.

2002 - FMD Trustees Plc

55. Thereafter the Applicant modified the mortgage investment scheme and in or about 2001 the Applicant's solicitors wrote to the Authority and asked for guidance about the operation of the scheme by a company called FMD Trustees Plc. The Applicant and his wife were the beneficial owners of the shares in FMD Trustees Plc and also its two directors; the Applicant was the managing director.

56. On 12 March 2002 Mr Kemp of the Authority met the Applicant at the offices of his solicitors. At that meeting Mr Kemp learnt certain details of the then operation of the mortgage investment scheme.

Mr Kemp learnt that the Applicant worked from home and that FMD Trustees Plc had only one bank account. The Applicant obtained lending clients for his mortgage investment scheme from independent financial advisers. The Applicant had written to about six such advisers in March 2001 and about 90% of the Applicant's lending clients were then referred through such advisers; he also recruited some borrowers through finance brokers. FMD Trustees Plc had a telephone number which independent financial advisers could give to prospective lenders. If a call was made it was answered by an individual who worked from home. The caller's details were taken and a brochure despatched. Interested callers were also asked to complete a "Private Mortgage Authority Lender Form". Details of the caller were then passed to the Applicant.

The Applicant carried out company searches and credit checks on prospective borrowers. He also arranged for the real property upon which the mortgage would be secured to be valued by a professional surveyor (being ARICS or FRICS). In general the amount of a loan did not exceed 70% of the valuation. About half of the loans were secured on property purchased with the loan proceeds and half on property already owned by the borrower.

Once the checks had been carried out and the valuation completed the Applicant would send the documents to the lender with copies to the independent financial adviser. If a lender then decided to proceed the Applicant would refer him to one of a panel of two firms of solicitors and would write to the firm to advise them of the referral. The same firm would act for all the lenders making loans to a single borrower. The lenders sent cheques for the amount of the loans to their solicitors; the loan money did not pass through the account of FMD Trustees Plc.

The solicitors for the lender would then examine the title of the borrower to the property to be secured and would prepare the mortgage deed. The name of FMD Trustees Plc would not appear on the mortgage deed. When the mortgage deed had been executed the money would pass from the lender's solicitors to the borrower or his solicitors after deduction of a facility fee of 3% payable to FMD Trustees Plc. All loans were initially for six months but were renewable by consent.

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After the loan was made FMD Trustees Plc would write to lenders asking them to say if the interest was not received on the due dates. It would also write to the borrower reminding him of the amounts of interest due to each lender and the dates upon which the interest was due. Payments were made to lenders direct by the borrowers and did not pass through the bank account of FMD Trustees Plc.

In addition to the 3% facility fee, a fee of 0.25% of the loan advance each month was payable to FMD Trustees Plc for monitoring the loan. This could be payable in advance and was deducted from the funds forwarded to the borrowers. Alternatively the borrowers would pay the fee monthly to FMD Trustees Plc.

57. A copy of the Applicant's amended brochure was produced at the hearing. This made it clear that the borrower would pay to FMD Trustees Plc an amount equal to 0.25% of the loan advance per month to cover the costs of the monitoring service. It also made it clear that certain preliminary work, including credit checks, was undertaken by FMD Trustees Plc and that the costs of this work, like the other costs of establishing a mortgage, were paid by the borrower to FMD Trustees Plc by way of a facility fee of not more than 3% of the loan advance and, in some cases, an establishment fee of no more than 2% of the loan. The brochure contained an extensive risk warning.

58. On 18 April 2002 Mr Kemp wrote to the Applicant's solicitors to say that a concern was that a scheme under which individual loans were to be sourced from funds made available by more than one person could constitute a collective investment scheme for the purposes of section 235 of the 2000 Act and any person who established, operated or wound up a collective investment scheme had to be authorised or exempt. Also, if the mortgage investment scheme were operated in such a way as to constitute a collective investment scheme the Authority would be likely to have concerns about the promotion and operation of the scheme. The Applicant's solicitors replied on 8 May 2002 and referred to the letter from the Authority dated 7 November 2000 which stated that it was apparent that the plan had been structured with a view to ensuring that it did not satisfy the terms of section 75(2) of the Financial Services Act 1986 but that whether or not the plan achieved that objective would clearly depend upon precisely how the arrangements were operated, and continued to be operated, in practice.

2003 – the termination of the legal proceedings

59. On 11 June 2003 Laddie J heard an application from Russell-Cooke Trust Company seeking guidance about what should be done with the assets created during the operation of the Applicant's mortgage investment scheme while he was a solicitor. By 11 June 2003 there was a shortfall of about £1M and the best estimate of losses was then £2.1M. The Applicant and his wife had offered the sum of £100,000 to settle all the litigation against them. Laddie J said, at paragraph 18 of his judgment, that the proposed settlement was in the best interests of the beneficiaries and represented the best settlement that could reasonably be obtained at that stage. (We were told that the £100,000 was the amount which had been frozen in the Applicant's bank account). On the same date Laddie J found that the Applicant and his wife had acted in contempt of court because they had breached the freezing order of 26 March 2001 by spending approximately £70,000 on personal expenditure at a time when they were permitted to spend a maximum total sum of £30,000 only. At about the same time the freezing order obtained in March 2001 was discharged.

October 2003 - the Authority's notices

60. On 9 October 2003 the Authority sent to the Applicant a warning notice saying that it proposed to make a prohibition order prohibiting the Applicant from performing any function in relation to a regulated activity carried on by an authorised person. The warning notice stated that the Authority had concluded, having regard to its regulatory objectives which included the protection of consumers, that it was desirable for a prohibition order to be made.

61. On 15 December 2003 the Authority gave the Decision Notice which is the subject of this reference. In January 2004 the Applicant referred the matter to this Tribunal. By consent the matter was stayed to enable the Applicant to challenge the Findings and Order of the Solicitors Disciplinary Tribunal in the higher courts.

2003-2005 - the two challenges

62. The Applicant then made an application for judicial review to quash the decision of the Solicitors Disciplinary Tribunal given on 23 October 2003 to dismiss his application for a re-hearing. The matter was before Leveson J in the Administrative Court on 29 April 2004 ([2004] EWHC 1176 (Admin)) where the Applicant was represented by solicitors and counsel. His application for judicial review failed and Leveson J remarked that the case had not been unfairly presented on behalf of The Law Society.

63. On 23 June 2004 the Applicant applied to the Administrative Court for an extension of time in which to appeal against the Findings and Order of the Solicitors Disciplinary Tribunal dated 27 February 2002. In a statement made in support of that application the Applicant referred to the letter written by his solicitors on 24 July 2002 and added:

> "I accept that the contravention of the Rules that I admit, justified preventing me continuing to market the scheme or any similar scheme as a solicitor, but the findings of the Tribunal effectively bar me from being re-admitted to the Roll and are a stain on my record which I contend is unjustified and grossly unfair and prevents me from ever being approved or licensed by the Financial Services Authority to be employed or conduct business in the financial services industry ever again."

64. The matter was heard on 10 March 2005 ([2005] EWHC 502 (Admin)) when the Applicant was represented by solicitors and counsel. Maurice Kay LJ held that the appeal was two years and six months late and concluded, at paragraph 30, that no good or reasonable explanation had been given for the very long delay. The application for an extension of time in which to appeal was refused and the appeal was dismissed. At paragraphs 9 and 10 of his judgment Maurice Kay LJ referred to the advice given to the Applicant before the hearing of the Solicitors Disciplinary Tribunal that if he were unsuccessful in his application for an adjournment he should withdraw from the proceedings so that he could subsequently make an application under rule 25 of the Solicitors Disciplinary Proceedings Rules 1995 for a re-hearing because the appeal had been heard in his absence. Maurice Kay LJ remarked that this was advice of a tactical kind and it was wrong advice.

2005 – the progress of the reference

65. As the Applicant had failed to overturn his striking off the Roll of Solicitors the stay of the reference was lifted. The Authority filed its statement of case on 1 June 2005 from which it appears that the Authority relied upon the Findings of the Solicitors Disciplinary Tribunal and other relevant matters when making its decision of 15 December 2003. The Applicant filed his Reply on 6 July 2005. In that Reply he denied the matters found against him by the Solicitors Disciplinary Tribunal and sought to withdraw admissions made to the Solicitors Disciplinary Tribunal by the solicitors instructed on his behalf in connection with the application for a re-hearing before the Solicitors Disciplinary Tribunal.

66. At a hearing held on 11 July 2005 the Tribunal heard the preliminary issue which was whether the Findings and Order of the Solicitors Disciplinary Tribunal were admissible evidence of the Applicant's fitness and propriety and whether the Authority could rely upon the Findings and Order without the need to re-prove each and every allegation which the Solicitors Disciplinary Tribunal had found to be proved. In its preliminary Decision dated 28 July 2005 the Tribunal decided that the Findings and Order of the Solicitors Disciplinary Tribunal were admissible evidence of the Applicant's lack of fitness and propriety and that the Authority could rely upon the Findings and Order without the need to re-prove each and every allegation which the Solicitors Disciplinary Tribunal had found to be proved. However, the Tribunal also stated that it would consider any other evidence which either party wished to put before it after which the Tribunal would make its own decision as to whether the Applicant was a fit and proper person within the meaning of section 56.

The new evidence

67. We heard new evidence on a number of matters, namely the views of the Queensland Law Society; the Applicant's Office Manual; the progress of the loans which were made while the Applicant was in practice as a solicitor; the rolling over of loans; the Applicant's failure to account to his lending clients for the facility fees; the sharing of the facility fees with Mr R; and credit checks.

New evidence - the Queensland Law Society

68. The evidence from the Queensland Law Society consisted of the two certificates and a letter of 12 October 2005. The first certificate of 27 September 1994 (produced to the Law Society) did not mention the finding of unprofessional conduct and also stated that no complaint had been received requiring disciplinary proceedings against the Applicant. The second certificate dated 27 June 2000 (produced to IMRO) did refer to the finding of unprofessional conduct on 2 June 1988. We also saw a letter dated 12 October 2005 from the Queensland Law Society which confirmed that in 1988 the Applicant had been found guilty of unprofessional conduct. It also stated that the term "unprofessional conduct or practice" had not been defined in 1988 but the generally accepted view was that unprofessional conduct was not limited to conduct which was disgraceful or dishonourable but also included conduct which might reasonably be held to violate the standard of professional conduct observed or approved by members of the profession of good repute and competency. The phrase "professional misconduct" had never been defined but was generally regarded as any conduct by a lawyer in his or her professional capacity that would reasonable be regarded as disgraceful or dishonourable by fellow lawyers of good repute.

New evidence - the office manual

69. We saw the draft of an Office Manual for Elliotts Solicitors Plc dated October 1999. This was about sixty pages long and contained detailed instructions for handling transactions and for recording details in the computer. This ensured that all the details of the progress of each loan were recorded. We also saw a schedule of credit balances on the Applicant's client accounts as at 20 March 2000 (the time of the intervention) which identified, in respect of each client, the amount of money which was waiting to be invested in a loan. The total amounted to £2,027,593.34.

70 We accept that the Applicant took the management of clients' money seriously and maintained accurate records. The records dealt with all payments made and

received. However, the Applicant held separate accounts for each client and also a client account for Elliott Mortgage Administration. He made regular payments of interest to his lending clients but did not always receive the interest from the borrowers on time. If the Applicant made a payment to a lender when he had not received a payment from the borrower, that client account would be overdrawn. At a later date the Applicant would transfer money to that client account from the account of Elliott Mortgage Administration. At the date of the intervention, in March 2000, there were debit entries on individual client ledgers which was a breach of the Solicitors Client Account Rules; the sum of £23,000 had to be transferred by the Applicant personally to restore the client accounts to a regular position. However, we accept the evidence of Mr Gould that this was not regarded as a significant issue in the wider context and the Applicant was co-operative in sorting things out fairly quickly. However, the Applicant accepted that the facility fees paid to him by the borrowers had not been treated as clients' money and had not been paid into his client account.

New evidence - the progress of the loans while the Applicant was a solicitor

71. We accept the evidence of the Applicant that some of the loans performed well and that some lenders were fully repaid both capital and interest. However, overall there was a deficit. The Applicant argued that, in respect of three loans, the deficits were caused by defective valuations.

72. We were shown a schedule prepared in August 2005 by Russell-Cooke Trust Company which listed all the loans in respect of which Russell-Cooke Trust Company had been appointed trustee on 31 March 2000. There were forty-three such loans and nearly 500 lenders and the amount lent totalled £14,301,500. By August 2005 all but three of the loans had been redeemed. However, only three loans had been redeemed on time (two were secured on the same property) and the rest had been redeemed after their due date. In total, either by way of redemption or by way of realising the security, Russell-Cooke Trust Company recovered capital of £13,312,751.77; interest of £1,734,250.65; and £121,871.81 from the Applicant's client account. Thus, on these figures alone, the sum of £15,168,874.23 was recovered by way of both capital, interest and the balance at the bank. That was more than the total amount of the capital of the original loans. However, in arranging the redemption of the loans Russell-Cooke Trust Company found that the borrowers and guarantors were overwhelmingly not credit-worthy and they further found that the redemption of the loans was a complex matter. When the costs of Russell-Cooke Trust Company in connection with the redemptions, and the tax due on the interest received, had been taken into account the total amount recovered was £1,592,494.18 less than the capital amount of the original loans without taking into account interest due.

73. We accept the evidence of Mr Gould that the costs of Russell-Cooke Trust Company did not include the costs of the trustee but did include the costs of realising the security for the loans, the costs of pursuing guarantors, the costs of pursuing borrowers (which costs were small because where there was a default the borrowers were not credit-worthy) and the payment of tax on interest received both before and after the intervention. The costs also included the costs of solicitors, counsel, administrative receivers, estate agents, and chartered surveyors etc. The costs were only the costs of dealing with each loan. We also accept the evidence of Mr Gould that the mortgage investment scheme could not have survived because the loans were

not to credit- worthy borrowers; and because there were no credit-worthy underlying guarantors. The scheme would have survived until the number of bad loans had accumulated or the property market ceased to be rising and healthy and then would have collapsed.

New evidence - the rolling over of loans

74. In his evidence to us the Applicant accepted that, in his practice as a solicitor, loans had been "rolled over". In one example, the lenders were advised to extend the terms of a loan and were informed that interest payments had been made promptly when in fact the borrower had not paid any interest and the Applicant was paying the interest to the lenders. The Applicant accepted that this was done in connection with some loans where a borrower was unable to pay and where giving the borrower more time to pay could solve the problem of his inability to pay. The Applicant's argument was that all the loans which were rolled over were not problem loans and that, if he had time to analyse all the loans made before the intervention, his success rate would have shown that the use of rolling over was beneficial. However, he agreed that some of his practices in connection with the rolling-over of loans were not satisfactory.

New evidence – the failure to account for the facility fees

75. Before us the Applicant accepted that there was an inherent or potential conflict of interest between himself and his lending clients because of his interest in the borrowing side of the business but denied that there was an actual conflict. He also accepted that he had failed to account to his lending clients for commissions received (the administration fees and facility fees paid by the borrowers) but also stated that if he had had the time he could have sought the consent of his lending clients retrospectively. He also accepted that he had failed to disclose the information about the fees to his lending clients. The amount of facility fees and arrangement fees that had gone to his Isle of Man bank account was in the order of £700,000 after the fees had been split with Mr R who introduced the borrowers.

New evidence - the sharing of fees with Mr R

76. We heard evidence about some of the matters before the Solicitors Disciplinary Tribunal. One of the allegations was that the Applicant had acted as a solicitor for Mr R and his companies as borrowers as well as for lending clients. The Applicant denied this before us and we accept his evidence. However, the Applicant accepted that he had taken arrangement fees from borrowers introduced by Mr R and had shared these fees with Mr R or his companies but denied that his clients had been compromised because of that arrangement.

New evidence- credit checks

77. Another allegation before the Solicitors Disciplinary Tribunal concerned credit checks. A letter from the Applicant to a prospective lender in January 1997 stated that all borrowers were high quality applicants and that stringent checks were made of borrowers before loans were made. In the Applicant's brochure it was stated that credit checks were made. However, the Office for the Supervision of Solicitors had carried out credit checks in 1999 and 2000 against Mr R and some borrowers; Mr R had five county court judgments and a voluntary arrangement in 1999. A number of other borrowers had poor credit ratings, some had judgments against them and some had negative assets. Others had been incorporated so recently that there were no filed accounts. Before us the Applicant accepted that he had been careless and perhaps

negligent not to do updated credit checks especially against Mr R but he did say that he was surprised at the information about Mr R in the light of the amount that he (Mr R) was earning.

78. In the light of the facts we have found we now consider separately each of the issues for determination in the reference.

Issue (1) -Is the Applicant a fit and proper person?

79. The first issue is whether the Applicant is a fit and proper person within the meaning of section 56, that is a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.

The arguments

80. The Applicant accepted that there were certain things which he did as a solicitor of which he was not proud. Being totally consumed by his mortgage business he had lost sight of the fact that he was also a practising solicitor. He accepted that he had compromised his clients and his own principles but at the time it had appeared to him that the end justified the means; he had seen no reason why his lending clients should not get their money back. However, the Applicant also argued that if he had had legal representation before the Solicitors Disciplinary Tribunal he would not have been struck off the Roll of Solicitors. He accepted that he had deserved something but he had not deserved what he got. On the first date of the hearing before the Solicitors Disciplinary Tribunal, on 3 December 2001, the application was made for summary judgment against him and a continuation of the freezing order; he had not been shown the application on 3 December and, if he had been, that might have supported the request for an adjournment.. He also argued that no client had ever complained about him. He also argued that the law about collective investment schemes was complex and he had done all he could; he had not intended to break the collective investment scheme rules; he had not intended to break the Solicitors Practice Rules; and, as far as the Solicitors Indemnity Rules were concerned he still believed he had returned the right amount because he regarded his lending business as a separate business.

81. For the Authority Mr Dutton QC referred to two sections of the FSA Handbook, namely, ENF at Chapter 8 (prohibition of individuals) and FIT (the fit and proper test for approved persons). He argued that the Applicant was not fit and proper because he had a long history of failure, or refusal, to comply with regulatory requirements and standards and because there had been serious findings made against him by other regulatory and disciplinary bodies. The Applicant had been the subject of adverse findings in civil proceedings in connection with investment and financial business; he had been the subject of disciplinary proceedings by two professional bodies; he had contravened numerous requirements and standards of the regulatory system and his professional bodies; he had been struck off the Roll of Solicitors and, as a result, could not practise as a solicitor; his practice in Queensland had gone into insolvency and liquidation while he had been connected with it; and he had not been candid and truthful in his dealings with regulatory bodies because he had failed to disclose to the Law Society of England and Wales that he had previously been found guilty of unprofessional conduct and that he was an undischarged bankrupt. Finally, the Applicant had pursued a course of misconduct over a period of time which had exposed investor clients to the risk of financial loss and/or to actual financial loss. These factors meant that the Applicant posed a serious risk to consumers and/or to the

financial system. Further the Applicant was operating on the fringes of the regulated market. Although his mortgage investment scheme would not constitute a collective investment scheme if he was conducting it in the way he told the Authority, the Applicant was seeking introductions from independent financial advisers and in any event the regulated market had to protect its reputation.

82. In considering the arguments of the parties we first set out the relevant provisions of the FSA Handbook referred to by Mr Dutton. Next we express our views on the evidence before us. We then apply our findings to the principles in the Handbook in order to reach our conclusions.

The provisions of the Handbook

83. ENF 8 deals with the prohibition of individuals and ENF 8.8 deals with prohibition orders against individuals who are neither approved persons, nor individuals employed or formerly employed by firms, nor exempt persons. Thus ENF 8.8 concerns the Applicant. The relevant extracts read:

> "8.8.1 The FSA will consider exercising its powers to make a prohibition order against such individuals where they have shown themselves to be unfit to carry out functions in relation to regulated activities.
>
> 8.8.2 The FSA will consider the individual's fitness or propriety where, for example, it appears that:
>
> (1) the individual has been involved in conducting regulated activities in breach of the general prohibition; or
>
> (2) the individual has been involved in other misconduct or offences under the Act which call into question his honesty, integrity or competence; or
>
> (3) he appears likely to pose a serious risk to consumers or confidence in the financial system in the future.
>
> 8.8.2A In cases where it is considering whether to exercise its power to make a prohibition order against [such] individuals … the FSA will not have the option of considering whether other enforcement action may adequately deal with the misconduct in question. In these cases, the FSA will consider the severity of the risk posed by the individual. It may prohibit the individual where it considers this is necessary to achieve the FSA regulatory objectives of maintaining confidence in the financial system, promoting public awareness, protecting consumers and reducing financial crime.
>
> 8.8.3 When determining the fitness and propriety of [such] an individual … the FSA will consider the criteria set out in ENF 8.5.2G(1), ENF 8.5.2G(3) and ENF 8.5.2G(5)."

84. The criteria set out in ENF 8.5.2(G)(1) apply to the making of a prohibition order against an approved person but, by virtue of ENF 8.8.3, also apply to the making of a prohibition order against individuals who are not approved persons. The criteria set out in ENF 8.5.2(G)(1), (3) and (5) are:

> "(1) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria of assessing the fitness and propriety of approved persons are contained in FIT 2.1 (honesty, integrity and reputation); FIT 2.2 (competence and capability); and FIT 2.3 (financial soundness). 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 requirements placed on him by or under the Act as well as with other legal and professional obligations and ethical standards;

(b) competence and capability; this includes an assessment of the individual's skills to carry out the controlled function that he is performing; and

(c) financial soundness; this includes whether the individual has been the subject of any judgment debts or awards in the United Kingdom or elsewhere that are continuing or were not satisfied within a reasonable period. …

(3) the relevance, materiality and length of time since the occurrence of any matters indicating unfitness …

(5) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

85. The criteria of assessing fitness and propriety are more fully set out in FIT 2.1, 2.2 and 2.3. FIT 2.1 provides that, in determining a person's honesty, integrity and reputation the FSA will have regard to matters including, but not limited to, the thirteen matters listed in FIT 2.1.3. The matters relevant in this reference are:

"(2) whether the person has been the subject of any adverse finding, or any settlement in civil proceedings, particularly in connection with investment or other financial business, misconduct …

(3) whether the person has been the subject of, or interviewed in the course of, any existing or previous investigation or disciplinary proceedings, by the FSA, by other regulatory authorities, (including a previous regulator) … professional bodies, or government bodies or agencies;

(4) whether the person has been the subject of any proceedings of a disciplinary … nature …

(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) … professional bodies or government bodies or agencies; …

(7) whether the person has been involved with a company, partnership or other organisation that has been refused registration, authorisation, membership or a licence to carry out a … profession … or has had that registration, authorisation, membership or licence to trade revoked, withdrawn or terminated, or has been expelled by a regulatory or government body;

(8) whether, as a result of the removal of the relevant licence, registration or other authority, the person has been refused the right to carry on a … profession requiring a licence, registration or other authority;

(9) whether the person has been a director, partner, or concerned in the management, of a business which has gone into insolvency, liquidation or administration while the person has been connected with that organisation or within one year of that connection;

(10) whether the person, or any business with which the person has been involved, has been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body , a court or Tribunal, whether publicly or privately;

(11) whether the person has been dismissed, or asked to resign and resigned, from employment or from a position of trusts, fiduciary appointment or similar;…

(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 a willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards."

86. FIT 2.2 concerns competence and capability and FIT 2.3 concerns financial soundness.

Our views on the evidence

87. In the light of those provisions in the Handbook we now express our views on the evidence before us dealing separately with:

(1) the Australian disciplinary proceedings;
(2) the Australian insolvency proceedings;
(3) the three applications to the Law Society;
(4) the application to IMRO;
(5) the operation of the mortgage investment scheme;
(6) the operation of collective investment schemes;
(7) the Findings and Order of the Solicitors Disciplinary Tribunal; and
(8) the legal proceedings

(1) The Australian disciplinary proceedings

88. These were disciplinary proceedings by a professional body which concerned investment and financial business. In our view they were serious proceedings concerning financial matters in which the Applicant mixed the affairs of his clients with his own. He was, therefore, in a situation of conflict of interest. The sums involved in 1988 were not small. In favour of the Applicant it could be said that the Queensland Law Society made a finding of unprofessional conduct which, from their letter of 12 October 2005, could be a lesser finding than that of professional misconduct. However, we still regard the finding of the Queensland Law Society to be a serious finding against the Applicant. If it had been the only adverse finding then the lapse of time since 1988 might have enabled us to regard it as less significant but it has to be taken into consideration in conjunction with all the other matters about which we heard evidence.

(2) The Australian insolvency proceedings

89 These were insolvency proceedings against the Applicant. Most of the clients in respect of whom allegations had been made to the Queensland Law Society appeared in the statement of affairs from which it follows that the insolvency arose, at least in part, in connection with his solicitor's practice. The Applicant initially failed to keep to his covenant to pay annual instalments under the Deed of Arrangement which resulted in a formal bankruptcy order being made against him. The bankruptcy proceedings revealed that he had been successfully sued by a former client for negligent advice. Ultimately the amount owed to unsecured creditors was A$3,190,649.06 and it is unlikely that they received any dividend. The Applicant's behaviour in these proceedings was adversely commented upon by the trustee.

(3) The three applications to the Law Society

90. Form 1 was signed as a statutory declaration. It was sent to the Law Society in December 1994 after the 1988 finding of unprofessional conduct and three years after the Deed of Arrangement which had not been complied with. However it was before the March 1995 bankruptcy. The Applicant stated that he had not been found guilty of professional misconduct by a disciplinary tribunal when he had been found guilty of unprofessional conduct by the Queensland Law Society in 1988. In the light of the letter dated 12 October 2005 from the Queensland Law Society we accept that there might be a difference between professional misconduct on the one hand and unprofessional conduct on the other but in our view full candour would require that a question about one should have been answered with a reference to all. Also in Form 1 the Applicant undertook to advise the Law Society if he were to become bankrupt. When he became bankrupt in 1995 the Applicant did not advise the Law Society. However, he did advise the Queensland Law Society which allowed him to retain an employee level practising certificate only which indicated that the information was relevant.

91. In Form 2 the Applicant stated that he did not have to obtain a discharge from bankruptcy. However, at the date of that form, namely on 5 July 1995, the Applicant had been made bankrupt in March 1995 and was not discharged until 3 June 1998. Form 2 was signed on 5 July 1995 and on 27 June 1995 the Applicant had proposed the composition of his debts by the payment of £15,000. This was not accepted and on 3 October 1995 the Applicant's trustee in bankruptcy reported that unsecured debts totalled A$2,373,939 and that creditors might receive a dividend of 0.140 cents in the dollar. In Form 2 the Applicant also signed a statement that he understood that he must bring to the Society's attention any matter which questioned his fitness to become a solicitor but he did not mention the finding of unprofessional conduct by the Queensland Law Society.

92. In the Form of Application to enable the Applicant to establish himself as a sole practitioner no mention was made of the Australian disciplinary proceedings, of the 1995 bankruptcy, nor of the fact that the Queensland Law Society had limited the Applicant's practising certificate to an employee-level certificate. This latter fact was of the greatest relevance in that context. Section 15 of the Solicitors Act 1974 provides that an adjudication in bankruptcy of a solicitor shall operate to suspend any practising certificate of that solicitor immediately. In a letter dated 12 July 2001 to the Authority the Law Society stated that bankruptcy was not a bar to admission as a solicitor as solicitors can practise when bankrupt; although bankruptcy suspended a solicitor's practising certificate it was usually returned provided that the solicitor practised in employment. Thus if the Law Society had been informed about the 1995 bankruptcy it is very possible that the Applicant would not have been permitted to establish himself as a sole practitioner.

93. In our view all these matters call into question the honesty and integrity of the Applicant.

(4) The application to IMRO

94. The form of application for individual registration completed by the Applicant did not refer to the freezing order. The Applicant also mentioned that he had declared

himself bankrupt in 1995 whereas, of course, in 1995 he had applied for leave to file a debtor's petition in bankruptcy which application was refused; it was the trustee's application which had then been successful. We do not regard the Applicant's replies to IMRO's questions about the Australian disciplinary proceedings and the bankruptcy as being full, frank and unambiguous. Neither do we regard his failure to mention the freezing order as candid.

(5) The operation of the mortgage investment scheme

95. The Applicant argued that the loans he had made for his clients were not, as suggested to the Solicitors Disciplinary Tribunal, a "house of cards" and that some of the lending clients had been repaid in full. The Applicant accepted that there had been a capital loss in respect of three loans but argued that that had been the fault of the professional valuers and they were being sued; £750,000 would be recovered from their professional negligence policies and that almost made up the deficit. Also, it had to be borne in mind that loans made and repaid before the intervention, and loans made to foreign borrowers which were not in the schedule, had all been repaid as well.

96. However, on the evidence before us we find that some if not most of the loans were risky loans; that not all the borrowers and guarantors were credit-worthy; that credit checks on borrowers had not always been made; and that the unravelling of loans took a great deal of time and so the expenses incurred resulted in an overall deficit on the scheme. We have accepted the evidence of Mr Gould that the scheme would only have survived until the number of bad loans had accumulated or the property market had ceased to rise after which the scheme would have collapsed.

97. In our view the mortgage investment scheme as operated by the Applicant when he was a solicitor posed a risk to the Applicant's lending clients who were consumers.

98. In addition the Applicant obtained from the scheme the difference between the amount of interest paid by the borrowers (at one time 15%) and the amount he paid to the lenders (at one time 12%). Although the lending clients knew that some fee would be paid they were not informed of the amounts and that was a breach of the Law Society's rules. Also the facility fees were split with Mr R and paid into an account in the name of the Applicant's wife. That was the obtaining of a secret profit the amount of which was not disclosed to the lending clients and that also was a breach of The Law Society's rules. These are serious matters for any person operating in regulated financial markets.

(6) The operation of collective investment schemes

99. Under the mortgage investment scheme as operated by the Applicant while he was in practice as a solicitor the funds of a number of lenders would be used to provide a loan to a single borrower. There was an issue as to whether this amounted to the operation of collective investment schemes first under the provisions of section 75(2) of the 1986 Act and later under the provisions of the 2000 Act. If the loans were collective investment schemes then the Applicant had no authority to act in connection with them; if they were not then the Applicant would have been regulated by the Law Society in connection with those loans.

100. Ultimately loans by a number of borrowers to a single lender were held to be collective investment schemes, which meant that for the three years from 1997 to 2000 the Applicant had operated in a regulated market in an unapproved fashion. That is a serious finding. However, we also take into account that in October 1998 the Applicant took the advice of counsel who advised that his mortgage investment scheme was not a collective investment scheme. In 2000 an action was commenced in the High Court to determine whether the mortgage investment scheme was a collective investment scheme and the Applicant amended his product and asked the advice of the Authority who advised on 7 November 2000 that it was apparent that the plan had been structured with a view to ensuring that it did not satisfy the terms of section 75(2) of the Financial Services Act 1986 but that whether or not the plan achieved that objective would clearly depend upon precisely how the arrangements were operated, and continued to be operated, in practice. It was not until July 2001 that the High Court held that each loan by more than one client on a single security was a separate collective investment scheme and could only be run by a regulated person under the 2000 Act.

101. Thus we find that from 1997 to 2000 the Applicant was carrying out a regulated activity while unregulated but we are of the view that, in this respect, the Applicant did all that he reasonably could do to ensure that he acted within the law.

(7) The Findings and Order of the Solicitors Disciplinary Tribunal

102. In our view the Findings and Order of the Solicitors Disciplinary Tribunal constitute very serious adverse findings against the Applicant. The evidence before us would not lead us to reach a different view from the Solicitors Disciplinary Tribunal save that we would consider that, in his operation of the collective investment schemes, the Applicant had done all that he reasonably could.

(8) The legal proceedings

103. Finally, we have considered the series of legal proceedings against the Applicant. The substitution in March 2000 of Russell-Cooke Trust Company as trustee for the Applicants lending clients indicated the possibility of risk to consumers. The imposition of the freezing order in March 2001 indicated the possibility of serious risk to consumers. The termination of the proceedings in June 2003 indicated that a shortfall of about £1M was to be settled by an offer of £100,000. and that also indicates a serious risk to consumers. Finally, the finding of contempt of court in June 2003 is a serious and adverse finding against the Applicant.

Applying our findings to the principles

104. We now turn to apply our findings to the principles in the Handbook and we begin with ENF 8.8.2. In the light of our findings, and in the light of the history of the mortgage investment scheme, in our view the Applicant appears likely to pose a risk to consumers and to confidence in the financial system in the future. Turning to ENF 8.5.2(1) we are of the view that the Applicant does not meet the criteria of fitness and propriety because he has not been open and honest in his dealings with regulators, including the Law Society. His history shows that he is not able and willing to comply with requirements placed on him by professional rules and obligations nor by the legal rules relating to his bankruptcy and he has been found to have acted in contempt of court by breaching the freezing order. Also, the Applicant's financial soundness is

in question because he has been made bankrupt in Australia and the requirements of that bankruptcy were not satisfied within a reasonable period.

105. Turning to the matters mentioned in FIT 2.1.3 we find that the Applicant has been the subject of adverse findings by both the Queensland Law Society and the Law Society and in both cases the adverse findings were connected with financial business. The Applicant has been the subject of disciplinary proceedings by both the Queensland Law Society and the Law Society and adverse findings have been made against him by both bodies. The Queensland Law Society has placed restrictions on the Applicant's right to practise as a solicitor in Queensland; the Solicitors Disciplinary Tribunal has ordered that he be struck off the Roll of Solicitors in England and Wales; and IMRO restricted him to certain functions. The Applicant's insolvency in Australia was connected with his business as a solicitor. The Applicant has been investigated, disciplined and censured by both the Queensland Law Society and The Law Society and suspended by the latter. The Applicant was removed as trustee on 31 March 2000 when Russell-Cooke Trust Company was appointed to act as trustee under the mortgage investment scheme. And in our view the Applicant has not been candid and truthful in all his dealings with regulatory bodies.

106. We also conclude that the prohibition order was necessary in order to protect consumers from risk and also because of the need to maintain market confidence.

107. In the light of those findings we conclude that the Applicant is not a fit and proper person within the meaning of section 56.

Issue (2) -Did the Authority exceed its powers?

108. The second issue is whether the Authority exceeded its powers by the issue of the prohibition order.

109. For the Applicant Mr Platford referred to section 2(2) of the 2000 Act and to the regulatory objectives and argued that the power to issue a prohibition order given by section 56 had to be used to further those objectives. He argued that there was no risk to financial markets which made a prohibition order necessary because the Applicant did not perform, or seek to perform, any function in relation to a regulated activity carried on by an authorised person. The issue of the prohibition order was offensive and, under section 56(4), its breach would be a criminal offence. If there were any risk that could be dealt with by refusing any future application by an authorised person for the approval of the Applicant to perform controlled functions. Mr Platford distinguished *Regina (Davis and others) v Financial Services Authority* [2002] EWHC 2997 (Admin); [2003] 1 WLR 1284 appealed as *Vivian John Davies and Others v Financial Services Authority* [2003] EWCA Civ 1128 and argued that although proof of intention to carry on a regulated activity was not critical, proof of risk was fundamental. The Authority had to establish a risk that the Applicant would carry out a function relating to a regulated activity carried on by an authorised person and then ask what prohibition was necessary to remove that risk.

110. For the Authority Mr Dutton argued that the relevant regulatory objectives were market confidence and the protection of consumers. There was no justification for drawing a distinction between intention and risk. The only relevant question was

whether the Applicant was a fit and proper person; if he was not then the Authority had the power to make the prohibition order.

111. In considering the arguments of the parties we start with the relevant legislation. Section 2 of the 2000 Act sets out the general duties of the Authority and provides that, in discharging its general functions, the Authority must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives. These are defined in section 2(2) and include the protection of consumers. Section 56 of the 2000 Act provides that the Authority may make a prohibition order if it appears to them that an individual is not a fit and proper person

112. Arguments about the power of the Authority to issue a prohibition order were put in *Davis* where the recipients of warning notices argued that the issue of the warning notices was *ultra vires* and an abuse of process because the Authority had not established that the applicants intended to participate in any of the activities which it was proposed to prohibit and that the warning notices were an abuse of process because the Authority was unable to show the necessary risk to confidence in the market from past activities of the applicants. These arguments were rejected by Lightman J (at paragraphs 10 and 11) where he held that the Authority was not required to establish, before issuing a warning notice, that an individual who was the subject of a proposed prohibition order intended to carry on the functions to be prohibited by the order. In the Court of Appeal Mummery LJ agreed with the reasons of Lightman J and added, in paragraph 22, that section 56 was available in cases of past misconduct, enabling the Authority to take prohibition proceedings in respect of it in order to afford the necessary future protection of the public. Mummery LJ continued:

> "23. The Authority's proposal to the use of section 56 was not barred by the applicants' protestations that they do not intend to carry out the functions which the prohibition order might forbid. The fact that the applicants appeared to the Authority to be unfit persons was sufficient to justify the giving of the warning notice setting out the proposed prohibition order. There was no requirement that, in order to be legally entitled to give a warning notice, the Authority had to satisfy itself that the applicants had a present or future intention to work in the financial services industry. The applicant's assertions that they have no present plans is not an adequate substitute for, or alternative to, a prohibition order. Present plans and future intentions are factual points on which the applicants would be entitled to make representations to the Authority, or failing that, to the Tribunal on a reference to it.
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> 24. Lightman J rightly rejected the submission that the Authority was acting incompatibly with its own published guidance in the Handbook, because it could not show the necessary risk to confidence in the market."

113. In the light of that authority we conclude that the Authority did not exceed its powers by the issue of the prohibition order. We add that we are of the view that the Applicant poses a risk to the protection of consumers and a risk to the reputation of the market (market confidence) and that the prohibition notice advances those statutory objectives. We recall that the Applicant mentioned his wish to work in a regulated market both in the letter written on his behalf in 24 July 2002 and also in the statement of 23 June 2004 to the Administrative Court and for that reason also the prohibition order is justified. Finally, the Applicant currently obtains work from independent financial advisers.

Decision

114. Our unanimous decisions on the issues for determination in the reference are

(1) that the Applicant is not a fit and proper person within the meaning of section 56; and.

(2) that the Authority did not exceed its powers by the issue of the prohibition order.

115. That means that the reference is determined in favour of the Authority.

116. Section 133(5) of the 2000 Act provides that, 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. We therefore now remit the matter to the Authority with a direction that the Authority make an Order prohibiting Mr Elliott from performing any function in relation to regulated activities carried on by any authorised person, exempt person, or exempt professional firm; and that a Final Notice be issued in those terms.

This Decision was released to the parties on 16 March 2006
This version has been amended under Rule 28(3)

DR A N BRICE

CHAIRMAN

RELEASE DATE:

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30.03.06