



Reference number FIN/2009/0025

***REGULATED ACTIVITIES – application for approval to carry out controlled
function as director – whether applicant fit and proper***

**UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES**

MANDEEP PANESAR

Appellant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondents

**TRIBUNAL: ANDREW BARTLETT QC
JO NEILL ACA
CATHERINE FARQUHARSON ACA**

Sitting in public in London on 13 and 14 September 2010

The Appellant appeared in person

Sarah Clarke for the Respondents

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DECISION

INTRODUCTION

- 5 1. This reference concerns the refusal of the Financial Services Authority to approve the applicant, Mr Panesar, to perform the controlled function of director of Burlington Associates Ltd (“BAL”).
- 10 2. The application procedure requires the ‘authorised person’, in this case, BAL, to make the application for approval. By s61 the Authority may only grant an application for approval if it is satisfied that the candidate is a fit and proper person to perform the function to which the application relates. BAL’s application in regard to Mr Panesar was made in early September 2008. The Authority issued a warning notice indicating likely refusal on 8 July 2009. After further representations and a hearing before FSA’s Regulatory Decisions Committee (“RDC”), the application was refused by 15 a Decision Notice dated 27 November 2009.
- 20 3. The decision was made because the Authority was not satisfied that he was a fit and proper person to carry out that function. Mr Panesar contends that he is a fit and proper person for that purpose.
- 25 4. The role of the Tribunal is to consider the matter afresh in the light of all the evidence made available to us. By the Financial Services and Markets Act s133 the Tribunal may consider any evidence relating to the subject-matter of a reference, whether or not it was available to FSA at the time of the decision. On a reference the Tribunal must determine what (if any) is the appropriate action for FSA to take in relation to the matter referred to it. 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.

THE AUTHORITY’S CASE

- 30 5. The ground for refusal stated in the Decision Notice was that Mr Panesar lacked the competence and capability to understand and comply with the requirements and standards of the regulatory system. The basis for this finding was that he acted as Managing Director of BAL from September 2008 without the prior approval of FSA and in breach of FSA rules, during the period when his application was under consideration by the Authority. He should not have so acted. Because of the contents of the notes for 35 completing the application form, and because of his seniority and experience, he ought to have appreciated that he should not commence carrying out the controlled function of managing director prior to the grant of approval.
- 40 6. The case advanced by the Authority on this reference has been considerably broader than the matters which formed the basis of refusal in

the decision notice. The Authority questions Mr Panesar's integrity, in addition to his competence, and has pursued two allegations of misconduct which the Regulatory Decisions Committee (RDC) did not accept, and which relate to periods of time before September 2008. It alleges that he has not been frank about the timing and extent of his knowledge of the financial affairs of Lamensdorf IFA Ltd ("LIFAL") in 2001-2003. He was a director of that company, which went into liquidation in 2003. The authority also alleges that Mr Panesar's actions during his time as operations manager at BAL in 2005-2008, prior to his appointment as managing director, were such that he acted as a shadow director and was therefore carrying out controlled functions without approval.

7. The Authority's case in regard to LIFAL depended upon drawing inferences from certain executive or board minutes of LIFAL or of the group of which it was part. The case in regard to acting as a shadow director of BAL depended on the oral evidence of two employees, Ms Jemma and Ms Boughtwood, and on the interpretation of some contemporary documents.

THE EVIDENCE

8. The Authority called three witnesses:
- a. Ms Reed was the Authority's case officer. We found her evidence reliable, but it contributed little to the substantive case, being mainly of a procedural nature. It revealed some shortcomings in the Authority's processes which prolonged the time taken to deal with the application for approval.
 - b. Ms Jemma worked at BAL from 21 July 2008 to 26 June 2009 as a compliance assistant and paraplanner. She was at the office for only 4 weeks before Mr Panesar was appointed director. We had reservations about her testimony and did not find it to be reliable. It was apparent that she had forgotten elements of her own involvement in the application process, which were proved partly by contemporaneous written evidence and partly by the testimony of other witnesses whom we found to be reliable. In addition she was unhappy at BAL and there was friction between her and others in the office, which may have influenced her perceptions and recollections of how things were run.
 - c. Ms Boughtwood worked at BAL for a very short time from 26 August to 8 October 2008. Her written statement contained some apparently sweeping assertions about how business was conducted at BAL and about Mr Panesar's role, which she acknowledged in cross-examination were overstated and incorrect. We did not derive anything useful from her evidence.

9. The FSA also relied on the written statement of Ms Knox, which explained the importance rightly attached by the FSA to CF1, the controlled function of director, and which was not challenged by Mr Panesar.

5 10. Mr Panesar gave evidence himself and also relied on the evidence of numerous other witnesses. Under the pressure of the forensic process, including searching cross-examination by Ms Clarke on behalf of the Authority, we found him to be intelligent, articulate, fair-minded, and honest. He called five further witnesses:

10 a. Mr Bennett was a director of BAL throughout the period of interest, and responsible for compliance.

b. Ms De Nobrega was a senior administrator at BAL from May 2003 and had known Mr Panesar since 2001.

c. Mr Ian Chapman was an adviser at BAL from May 2003, and had also known Mr Panesar since 2001.

15 d. Mr Robert Morton was at BAL until May 2008.

e. Ms Celia Smith was a mortgage adviser at BAL throughout the relevant period.

20 11. We found no reason to doubt the evidence of these witnesses; on the contrary we found their evidence to be consistent with other evidence, truthful and reliable.

25 12. Mr Panesar also relied on written evidence from Gary Lucas, Dale Pilkington, Philip John, Daniel Shayler, Gautam Banerjee, Ian Smith, Lynsey Bell, Louise Gundry, Lucy Hards, Martin Caller, Michael Monitz, Sarah Foreman and Sutish Sharma. Much of this was character evidence, which spoke of Mr Panesar in glowing terms, both in the professional context and in relation to his charity work. Some of it related to the particular facts in dispute. Given the other evidence before the Tribunal, on proportionality grounds the FSA did not insist on these witnesses being called and tested in cross-examination.

30 13. We were also assisted by a significant quantity of contemporary documentary evidence.

FACTS AND FINDINGS

LIFAL

35 14. Mr Panesar became a director at LIFAL on 29 August 2001 and was approved by FSA for the controlled function of director as from 1 December 2001. The approval ceased on 7 May 2003. Throughout 2002

and early 2003 the Authority was in correspondence with LIFAL concerning its financial position.

- 5 15. Mr Panesar said in evidence that his particular remit at LIFAL was operations and IT. From 2002 when the administration operations were moved out of London, he worked out of an office in Egham, while the other directors were in the London office. Although he knew that there were financial problems, he was given to understand that they were being resolved by the directors who took executive responsibility for the financial aspects of the business and who were in contact with the parent company concerning the group's financing as a whole. There was no evidence that Mr Panesar was involved at the group level in relation to the financing. He was not aware of the communications with the FSA until quite late in the day.
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- 15 16. Having considered Mr Panesar's oral evidence and compared it with the contemporaneous documentation that was made available to us and deployed by Ms Clarke in cross-examination, we concluded that there were no real grounds for criticising his conduct as a director of LIFAL. We were not surprised that the RDC did not include any reference to LIFAL in the Decision Notice.
- 20 17. After its investigation of LIFAL, the Authority concluded internally: 'It would be impossible to demonstrate that, given the financial circumstances facing LIFA[L], the statements made to FSA were not based on genuinely held beliefs and hopes and a desire to try and save LIFA'. The Authority wrote to Mr Panesar on 9 January 2004 stating that its investigation had been discontinued. The letter ended: 'Please note that should you make any future application to be an Approved Person the FSA will consider, amongst other matters, the circumstances surrounding the liquidation of [LIFAL].'
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Whether shadow director

- 30 18. Mr Panesar's relationship with BAL began in about May 2003. He provided consultancy services. From October 2007 he was directly employed by BAL as operations manager. His appointment as managing director of BAL was on 1 September 2008.
- 35 19. He told us that prior to his appointment as a director of BAL he did not act as if he were a director. He acted under instruction from Mr Bennett. This picture was confirmed by Ms De Nobrega, Mr Bennett, and Mr Morton.
- 40 20. Ms Jemma's evidence concerning Mr Panesar's role before 1 September 2008 related to a very short period; we did not find it of assistance. FSA relied on records showing that on a number of occasions Mr Panesar contacted FSA on BAL's behalf, and on a report of Sesame, a compliance firm, of a visit to BAL in November 2007. The adverse inferences which

FSA sought to draw from these documents were not consistent with the witness evidence called on Mr Panesar's behalf, and in our judgment were not justified.

- 5 21. Our finding is that Mr Panesar did not act as a shadow director of BAL in the period leading up to 1 September 2008.

Acting as director while unapproved

- 10 22. To apply for approval for Mr Panesar to perform the controlled function of director, BAL had to fill in a Long Form A. This contained at the head of the first page a clear warning that the applicant (BAL) and the candidate (Mr Panesar) should read the notes to the Form on the FSA's website. The form used in the present case (14 pages in length) was in evidence before us.

- 15 23. We heard Mr Panesar's and various witnesses' accounts of who dealt with the form. Mr Panesar's and Mr Bennett's evidence was corroborated by Mr Chapman, who said: "Mandeep partially filled in the form, ... he was guided by Karen Jemma, I remember it distinctly, her poring over the form for a considerable time before and after Mandeep having filled it in". Ms Smith also remembered Ms Jemma's involvement with the form. Ms Jemma's involvement was corroborated by her own email of 3 September 2008, by which she sent the Long Form A to Mr Panesar, accompanied by the wrong set of notes (being the notes for Form D).

- 25 24. On the evidence we conclude that the Long Form A was filled in partly by Mr Panesar on his own behalf and partly by Ms Jemma in her role as compliance assistant on BAL's behalf, that it was signed by Mr Bennett where appropriate, and that it was checked by Ms Jemma before it was sent to the Authority. Mr Bennett and Mr Panesar relied on her to advise them that the proper process was being followed. FSA received it on 5 September 2008.

- 30 25. FSA pursued a contention that Mr Panesar (and indeed Mr Bennett) only thought of blaming Ms Jemma (in the sense that they said they had relied on her advice on procedure) after they discovered that she had contacted FSA as a whistleblower. The suggestion seemed to be that Mr Panesar had made up a false excuse, and that this showed a lack of integrity on his part. We reject this submission, which in our judgment had no justification in the facts of what occurred.

- 40 26. Question 3.03 was 'Effective date of controlled functions'. The date filled in was 1 September 2008. The candidate was required to sign a declaration near the end of the form, some 18 lines long, which included the statement 'I confirm that the information in this Form is accurate and complete to the best of my knowledge and belief and that I have read the notes to this Form.' Mr Panesar signed this declaration.

27. The Form A Notes on the website stated on their first page ‘PLEASE NOTE: A CANDIDATE MUST NOT BEGIN PERFORMING ANY CONTROLLED FUNCTION UNTIL THE FSA HAS GRANTED APPROVAL.’ This note reflected the regulatory requirement.
- 5 28. In relation to Question 3.03 the notes stated: ‘The effective date is the date on which the firm wishes the candidate to begin performing controlled functions (subject to approval). This should be left blank unless there is a reason for the effective date to be beyond the FSA’s published standard response times.’
- 10 29. The notes gave no guidance on the response times. They were to be found elsewhere on the website. Ms Knox’s evidence was that in the case of a standard application for a significant influence function the response time was four to seven days. The note therefore seems to mean that Question 3.03 should not be answered unless the firm particularly wants the start date to be more than 7 days after the date of the application. This seems to imply that a start date (subject to approval) sooner than 7 days may be in order, provided the date is not filled in on the form, but it is possible we have misunderstood the intent.
- 15 30. Mr Panesar ought not to have signed the declaration when, as he admitted, he had not in fact read the Form A notes. We find that he relied on Ms Jemma to guide him instead of making sure that he had the correct notes and reading them himself. Irrespective of the notes, and irrespective of his reliance on Ms Jemma, Mr Panesar ought to have known that he should not start exercising a controlled function before receiving approval. These are material failings, and we have to consider their significance in the context of the application in the present case.
- 20 31. Anyone carefully reading the form as filled in and submitted to the Authority would have concluded (1) that Mr Panesar commenced acting as managing director of BAL on 1 September 2008, and (2) that both he and the firm had either failed to read the Form A notes at all, or had failed to read them with sufficient care.
- 25 32. FSA raised a number of inquiries concerning the information on the form, but raised no point on Mr Panesar’s start date being too soon. A copy of his CV was requested. Further information was sought from various sources concerning the affairs of LIFAL. Queries were raised with BAL. Because of various miscommunications the FSA’s inquiries were long drawn out. One of the responses was Mr Bennett’s letter of 30 January 2009, received by the Authority on 23 February 2009. This referred to Mr Panesar’s having taken over responsibility as managing director in September 2008.
- 30 33. It should have been apparent to the FSA throughout that Mr Panesar had taken up his duties as director, but the penny only dropped at the end of
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May 2009. The Authority wrote on 1 June 2009 asking that he step down, which he did immediately following BAL's receipt of the letter. We noted that during his directorship there was also a compliance visit to BAL by a well-known compliance advisory firm, 360 Services, in March 2009. Mr Panesar's role and his lack of approval were queried by them, but Ms Jemma confirmed to them that the position was correct (as she related in her letter of 2 October 2009 to the Authority). Somehow 360 accepted her assurance and failed to advise that Mr Panesar should not be acting as director until the approval was received.

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34. Ms Knox's evidence was that, because of the very large numbers of applications dealt with, it would not be practicable for FSA to contact every firm that submitted a Form A with the effective start date box completed incorrectly, to tell them and the candidate not to carry out the function without approval. We would comment that the form seems poorly designed in asking for a date to be filled in, when the notes contain the somewhat contradictory and Delphic comment, which we have already cited, indicating that ordinarily a date should not be filled in.

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35. The length of time over which Mr Panesar acted as director without approval for the controlled function was regrettable but was the result of the particular events which we have outlined.

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36. Between the warning notice and the decision notice which we have referred to in paragraph 2 above there was a supervision visit by the FSA to BAL in late September 2009. We were shown the FSA's typed up visit notes, which were used by Ms Clarke as a basis for cross-examination. The notes contained a number of obvious inaccuracies, and we were not persuaded by the suggestions that there were adverse inferences to be drawn from inconsistencies between what Mr Panesar and Mr Bennett were reported to have said during the visit and the evidence which they gave to the Tribunal.

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CONCLUSION

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37. The relevant law and Handbook provisions were helpfully set out by the FSA in their Statement of Case. They are well-known and we need not repeat them here. The Authority's assessment of individuals as fit and proper before they take up a controlled function is an important element contributing to the statutory objectives of consumer protection, market confidence, and the prevention of financial crime.

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38. On the evidence we have no doubts about Mr Panesar's general honesty, integrity and reputation. In our judgment he did not set out to mislead the Authority at any stage.

39. There can be no real excuse for his signing the untrue declaration that he had read the notes on the form, but we take into account that he believed

that Ms Jemma had ascertained the correct procedure, in the course of which she would have read them carefully on his behalf, in fulfilment of her duties as a compliance assistant employed by BAL.

5 40. We cannot regard Mr Panesar as a fit and proper person unless he satisfies
us of his competence and capability. Having heard the evidence, and
having seen how he participated in the Tribunal process, he has so satisfied
us. In all the circumstances we consider it right to characterise his errors of
10 signing the declaration without personally reading the notes, and not
appreciating that he should not commence his new duties prior to approval,
as unfortunate instances of carelessness rather than indications of any lack
of honesty or integrity, or of the appropriate competence and capability to
perform the function of a director. We think it extremely unlikely that he
will make a similar mistake again.

15 41. We accordingly conclude that Mr Panesar satisfies the 'fit and proper' test
and direct the Authority to grant BAL's application that Mr Panesar be
approved to perform the controlled function of director (CF1).

42. Our decision is unanimous.

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ANDREW BARTLETT QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 21 October 2010

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