Case No: FIN/2010/0006

APPROVED PERSON – prohibition notice - withdrawal of approval – whether fit and proper - no

UPPER TRIBUNAL TAX & CHANCERY CHAMBER
FINANCIAL SERVICES

BARRY WILLIAMS **Appellant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondents**

Tribunal: **TERENCE MOWSCHENSON QC (Judge)**
MR C.H. BURBIDGE
MR P.V. BURDON

Sitting in public in London on 25 October 2010

The Appellant in person

Miss Clare McMullen for the Financial Services Authority

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DECISION

The Reference

1. By a Decision Notice dated 26 February 2010 the Financial Services Authority ("the Authority") informed the Applicant ("Mr Williams") of its decision to:

   (1) impose a financial penalty of £50,000 pursuant to section 66 of the Financial Services and Markets Act 2000 (the "Act") for failing to comply with Principle 1 of the FSA's Statements of Principle and Code of Practice for Approved Persons;

   (2) withdraw, pursuant to section 63 of Act, the approval given to Mr Williams to perform controlled functions; and

   (3) make an order pursuant to section 56 of the Act, prohibiting Mr Williams from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm on the grounds that he is not a fit and proper person,

   Mr Williams referred the matter to the Tribunal by a reference notice dated 23 March 2010.

2. The decision was based on findings of dishonesty made by Mr Justice Teare against Mr Williams in his judgment of 3 June 2008 in the case of Markel International Insurance Company Limited and others v Surety Guarantee Consultants Ltd and others [2008] EWHC 1135 (Comm) (the "High Court proceedings") in which Mr Williams was the third defendant. In those proceedings Mr Justice Teare found that three of Mr Williams' co-defendants had conspired to defraud the claimants, and that Mr Williams, while not a conspirator, deliberately closed his eyes to concerns about the business, lied to the claimants on some occasions, and did not act honestly or in the claimants' best interests.

3. Mr Williams referred the Decision Notice to the Tribunal on the grounds that the Authority had relied solely on the High Court judgment and had failed to take into account the fact that he had been granted permission to appeal that judgment (which appeal he subsequently abandoned), and that the Authority relied on some findings from the High Court judgment which he disputes.

4. At the hearing before the Tribunal Mr Williams did not give evidence but confined himself to relying upon the points made in his skeleton argument. In appearing before the Tribunal he was assisted by Mr Rob Maciver who acted as his friend.

Admissibility of Evidence

5. Section 133(5) of the Act provides that, on a reference, the Tribunal must determine what (if any) is the appropriate action for the Authority to take.

6. Section 133(4) of the Act provides that the Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.

7. Proceedings before the Tribunal are regulated by the Tribunal Rules (Upper Tribunal) Rules 2008 (SI 2008/2698 (L.15)). Rule 15(2)(a) provides that the Tribunal may admit evidence whether or not it would be admissible in a civil trial in the United Kingdom.

8. In Christopher Reginald Colin Henton v The Financial Services Authority, the Tribunal held that it may admit and consider any material which it may believe to be relevant. The Authority was entitled to rely on findings of the High Court against Mr Henton as evidence of the Applicant's lack of fitness and propriety, and the Applicant should be permitted to adduce any evidence and put forward any relevant argument. The Tribunal should then make its own decision as to whether the Applicant was a fit and proper person within the meaning of section 56 of the Act.

9. The approach adopted by the Tribunal in this matter was the same as the Tribunal in Henton albeit Mr Williams chose not to adduce any evidence in support of his reference. It is a matter for the Tribunal to decide what weight to attach to the findings of fact of Mr Justice Teare and consider them in the light of the submissions made by Mr Williams. The fact that leave to appeal from the decision had been obtained was a factor to take into account albeit the grounds of appeal appeared to be more directed to issues of law and many of the factual matters relied upon by the Authority were not the subject of appeal in any event or were the subject of admissions by Mr Williams.

10. In the light of the serious allegations made the Tribunal was conscious of the fact that it needed to be satisfied to a high standard (i.e., to be sure) before making any findings of fact leading to a conclusion of dishonesty.

The Regulatory background

11. Section 2 of the 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 its regulatory objectives. These

are defined in section 2(2) and include the protection of consumers, the reduction of financial crime and market confidence.

12. Section 56(1) of the Act provides:

> "Subsection (2) [i.e. the Authority's power to make a prohibition order] 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".

13. Section 63(1) of the Act provides:

> "The Authority may withdraw an approval given under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates".

14. Section 66(1) of the Act provides that:

> "The Authority may take action against a person under this section if (a) it appears to the Authority that he is guilty of misconduct; and (b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him".

15. Section 66(2) of the Act provides that:

> "A person is guilty of misconduct if, while an approved person, (a) he has failed to comply with a statement of principle issued under section 64 or (b) …".

16. The Statements of Principle and Code of Practice issued under section 64 state that an individual must act with integrity in carrying out his controlled function (APER 1). They contain as guidance examples of behaviour which fails to comply with this requirement, including the following:

    16.1. APER 4.1.3 E: Deliberately misleading (or attempting to mislead) by act or omission a client, or his firm (or its auditors or an actuary appointed by his firm under SIP 4 (Actuaries));

    16.2. APER 4.1.4 E: Falsifying documents, misleading a client about the risks of an investment, providing false or inaccurate documentation or information, including details of training, qualifications, past employment record or experience, providing false or inaccurate information to the firm;

16.3. APER 4.1.6 E: Deliberately failing to inform, without reasonable cause, a customer, his firm (or its auditors or an actuary appointed by his firm under SIP 4 (Actuaries)) or the FSA of the fact that their understanding of the material issue is incorrect, despite being aware of their misunderstanding;

16.4. APER 4.1.8 E: Deliberately preparing inaccurate or inappropriate records or returns in connection with a controlled function; behaviour of the type referred to in APER 4.1.8 E includes, but is not limited to, deliberately preparing inaccurate trading confirmations, contract notes or other records of transactions or holdings of securities for a customer, whether or not the customer is aware of these inaccuracies or has requested such records;

16.5. APER 4.1.12 E: Deliberately designing transactions so as to disguise breaches of requirements and standards of the regulatory system.

17. The Authority's Handbook contains guidance on the factors relevant to the assessment of an individual's fitness and propriety. At FIT 1.3.1 G this states that the most important considerations in this assessment will be the person's honesty, integrity and reputation, his competence and capability, and his financial soundness.

18. In assessing a person's honesty, integrity and reputation FIT 2.1.3(2) G states that the Authority will have regard to whether the person has been the subject of any adverse finding in civil proceedings, particularly in connection with investment or other financial business, misconduct, or fraud.

The background

Background

19. Like his father, Mr. Williams spent his working life in the insurance business as a broker. He worked in the aviation field and rose to become deputy managing director of the aviation division of Lowndes Lambert Aviation. He left that position in 1998 at the age of 48. From 2000-2002 he sought to run his own broking house but that business foundered in the aftermath of the events of September 11, 2001. He wished to continue broking aviation business and was looking to join a small broking house. Mr. Felstead introduced him to Legal Risks Management ("LRM") where he met Mr. Brunswick. LRM placed legal expense insurance with Templeton Insurance Company Limited ("Templeton"). Mr. Williams was offered a job at LRM to develop their general insurance account. He tried to develop an aviation account but without success. He therefore began to look at other classes of business, including the surety bond business in which Mr. Felstead was involved. Through Mr. Felstead he met Mr. Higgins.

20. Following the incorporation of Surety Guarantee Consultants Ltd ("SGC") and Godwin Higgins Insurance Brokers Ltd ("GHIBL"), Mr. Williams became a

director of each. He received a salary from GHIBL of approximately £60,000 per annum.. The latter was intended to provide and underwrite insurance for the construction industry on the strength of contacts made by SGC in arranging surety bonds in that industry. GHIBL was also to expand its book of general and aviation insurance. Mr. Williams described the surety bond business as being the "area" of Mr. Higgins and Mr. Felstead. He described them as specialists and said he "helped out when and where he was told".

21. Between 14 January 2005 and 21 August 2006 (“the Relevant Period”) Mr Williams was a director of SGC and was approved to hold the controlled functions of Director (CF1), Apportionment and Oversight (CF8), Systems and Controls (CF28), Significant Management responsible for Insurance Mediation (CF29), Finance (CF13), Risk Assessment (CF14), Internal Audit (CF15), Significant Management (Other Business Operations) (CF17) and Significant Management (Financial Resources) (CF19).

22. Mr Williams remained approved to hold the controlled functions of Director (CF1), Systems and Controls (CF28), and Significant Management responsible for Insurance Mediation (CF29) at Godwin Higgins Insurance Brokers Limited as at the date of the hearing.

23. SGC was an underwriting agent engaged in the surety bond business. From 14 January 2005, it was authorised to hold and control client money only in respect of non-investment insurance contracts. SGC ceased trading on 11 January 2007 when it varied its part IV permissions to remove all regulated activities. It has since been placed into liquidation.

24. In addition to Mr Williams, the following individuals were also involved in SGC’s surety bond business:

    Timothy Patrick Higgins, a director of SGC;

    Clifford Felstead, an employee of SGC; and

    Ralph Stephen Brunswick, who had a beneficial interest in SGC and was a director of Templeton, an insurance company incorporated in the Isle of Man, from June 1994 until June 2006.

25. Surety bonds are undertakings given at the request of a client by the surety (usually an insurance company or a bank) to pay the beneficiary a sum of money up to a stated limit in certain events, usually the failure by the client to discharge his contractual obligations to his customer, the beneficiary. A premium is paid by

the client to the surety as the surety's fee for bearing the risk implicit in issuing the surety bonds.

26. A binding authority is established when one party (usually an agent) is given the right and commensurate authority to represent another party (usually an insurer) in effecting or creating an insurance contract. The terms of the binding authority set limits on the authority granted to the agent.

27. A binding authority was granted to SGC by Markel International Insurance Company Limited ("Markel") commencing on 1 January 2005 authorising SGC to bind surety bonds for the account of Markel. Mr Williams was one of the people named in the agreement as being responsible for the operation and control of the agreement, for administering any surety bond business, and for issuing surety bonds. The binding authority was terminated by Markel on 1 October 2005.

28. SGC entered into an Underwriting Management Agreement with Amalfi Underwriting Limited ("Amalfi") to bind surety bonds for the account of QBE Insurance (Europe) Limited ("QBE") in line with a binding authority granted to Amalfi by QBE on the same day. Both of these agreements commenced on 1 October 2005. Mr Williams was one of the people named in the Underwriting Management Agreement as being responsible for the operation and control of the agreement, for administering any surety bond business, and for issuing surety bonds. The agreement between Amalfi and SGC was terminated by Amalfi on 21 August 2006.

29. Markel, QBE and Amalfi discovered that SGC had written bonds that exceeded the limits of the binding authorities, thus exposing them to greater liabilities than they had agreed to bear, and that SGC had thereby obtained premium which was not paid to Markel, QBE and Amalfi.

30. QBE, Amalfi and Markel issued proceedings against Mr Williams and others in the High Court of Justice, Commercial Court, in which the trial took place between 11 February 2008 and 13 March 2008. In the judgment handed down on 3 June 2008, Mr Justice Teare found that Mr Williams breached his fiduciary duty to QBE, Amalfi and Markel, and procured SGC's breach of its contracts with QBE, Amalfi and Markel, and stated that by doing so Mr Williams enabled secret profits to be made from the fraud by others.

31. Among the facts not disputed by Mr Williams was that on 17 February 2005 Mr Williams had taken advice as to whether the FSA would approve of Mr Felstead,

who had a conviction for fraud, carrying out controlled functions. He was advised that the FSA would not. He was further advised that even if he were carrying out non-controlled functions there had to be clear systems and controls to check and validate what he was doing: (judgment page 35, paragraph 25).

32. Mr Justice Teare found the following facts proved in relation to SGC's business with Markel:

32.1. "In December 2004 Markel decided to grant a Binding Authority to SGC subject to limits of £1M any one bond and £2.5M any one contractor" (judgment page 33, paragraph 14). Another document was subsequently agreed which "provided for reporting arrangements by means of monthly bordereaux to be provided by SGC to Markel and for ordered files to be kept by SGC" (judgment page 35, paragraph 21).

32.2. "SGC commenced to write bonds pursuant to the Binding Authority. Some were not within the financial limits of the Binding Authority… 33 bonds were written with values in excess of the agreed financial limits between 11 February and 14 November 2005" (judgment page 36, paragraph 28).

32.3. "The bordereaux produced over the period … did not show that the Markel exposure on any bond was in excess of the agreed financial limits (save for two which were shown as being slightly over…)" (judgment page 36, paragraph 29).

32.4. "The Markel Binding Authority was terminated by letter dated 1 November 2005 which gave 30 days notice. On 7 November 2005 Markel requested that no bonds be written during the notice period. However, on 14 November 2005 a bond was written …in the sum of Euros 4.7m signed by Mr Williams and Mr Felstead. It did not feature in the bordereaux. On 29 November Mr Williams … confirmed that no bonds had been written since 31 October" (judgment page 39, paragraph 44).

32.5. "In December 2005 Markel requested an audit of the risks which had been bound and arranged for this to be done on 15 December 2005. In the same month Mr Brunswick of Templeton signed documents ("the Templeton Bonds") that purported to be bonds in favour of beneficiaries of many of the Markel bonds for a sum equal to the difference between the value of the Markel bonds and the agreed limit of Markel's liability in the Binding Authority" (judgment page 41, paragraph 53).

32.6. "At about the same time copies of the Markel bonds in the bond files of SGC were replaced with copies of documents ("the Markel dummy bonds") that purported to be bonds written in Markel's name but for a sum which did not exceed the agreed limit of Markel's liability in the Binding

Authority. The debit notes referring solely to Markel were also replaced by debit notes making reference to Templeton also. Premium advice notes addressed to Templeton were also placed on the file" (judgment page 41, paragraph 54).

32.7. "Neither the Templeton bonds nor the Markel dummy bonds were delivered to the beneficiaries" (judgment page 41, paragraph 55).

32.8. "The Markel audit took place in December 2005. The bonds which had been issued for sums in breach of the limits were not discovered. They were not in the file. In their place were the Markel dummy bonds and the Templeton bonds" (judgment page 41, paragraph 56).

32.9. "In May 2006 Markel conducted a further audit of SGC's Markel files. As in December 2005, the bonds which had been issued for sums in breach of the limits were not discovered because they were not in the file. In their place were the Markel dummy bonds and the Templeton bonds" (judgment page 42, paragraph 61).

32.10. "SGC failed to account fully to Markel for the premium that was due to them. The extent of such failure has been assessed as being £963,304, $285,406 and Euros 73,281" (judgment page 47, paragraph 89).

33. Mr Justice Teare found the following facts proved in relation to SGC's business with QBE and Amalfi ("QBE/Amalfi"):

33.1. "On 22 and 23 September 2005 respectively, an Underwriting Management Agreement was entered into between Amalfi and SGC and a Binding Authority was entered into between QBE and Amalfi. The commencement date of each was 1 October 2005" (judgment page 37, paragraph 34).

33.2. Prior to this, "QBE required a New Proposal Questionnaire to be completed by SGC. One of the sections asked whether any of the "principle personnel (sic) have any criminal convictions for dishonesty or breach of trust." The reply which was returned … said "none"" (judgment page 37, paragraph 33).

33.3. "The Binding Authority between QBE and Amalfi authorised Amalfi to "bind surety bonds" for QBE. The limits were the same as in the Binding Authority between Markel and SGC" save as to timing. "The Management Agreement between Amalfi and SGC authorised SGC "to submit for approval Surety Bonds". Such bonds were subject to the same limits as those between QBE and Amalfi" (judgment page 37, paragraph 35 and page 38, paragraph 37).

33.4. "In late October 2005, QBE received information that an employee of SGC had a conviction for fraud… An email dated 27 October 2005 from Amalfi's underwriter states that he asked [Mr Higgins and Mr Felstead] "have

you ever been convicted of insurance fraud?" Both replied "no, never"" (judgment page 39, paragraph 43).

33.5. SGC subsequently confirmed that the report of Mr Felstead's conviction was true, and informed Amalfi that Mr Felstead would "leave SGC with immediate effect" and have "no further involvement with the issuance of bonds and/or the administration of our bond account." "Nevertheless Mr Felstead not only remained physically in the office … but continued to be involved in SGC's surety bond business" (judgment page 39, paragraphs 45 to 46).

33.6. "Bonds were … written in the name of QBE/Amalfi which exceeded the financial limits" (page 41, paragraph 57). There were 30 such bonds, as set out in Annex 2 to Mr Justice Teare's judgment.

33.7. "In late December 2005/January 2006 Templeton bonds were signed by Mr Brunswick in favour of certain of the beneficiaries of the QBE/Amalfi bonds (for a sum equal to the difference between the QBE/Amalfi bond and the agreed limit of QBE/Amalfi's liability under the Management Agreement) but were not delivered to the beneficiaries" (judgment page 41, paragraph 58).

33.8. "Throughout the life of the agreement between SGC and Amalfi monthly bordereaux were prepared for and presented. …there was not shown on any bordereaux a bond issued in the name of QBE/Amalfi which exposed QBE/Amalfi to liability for a sum in excess of the limits set out in the Management Agreement" (judgment page 42, paragraph 60).

33.9. "In June 2006 Amalfi began an audit of SGC. This did not reveal any bonds which had been written in excess of the agreed limits because the files contained copies of documents that purported to be bonds written within the limits ("the QBE Dummy Bonds"). However the audit was unsatisfactory because of the poor state of SGC's records. The Management Agreement between Amalfi and SGC was terminated by Amalfi by letter dated 21 August 2006" (judgment page 42, paragraph 62).

33.10. "SGC failed to account fully to QBE/Amalfi for the premium that was due to them. The extent of such failure has been assessed as being £864,170.53" (page 47, paragraph 90).

34. In the course of his judgment Mr Justice Teare made the following findings against Mr Williams:

34.1. That he was "aware of the limits in the Binding Authority with Markel and in the Management Agreement with QBE/Amalfi" (judgment page 70, paragraph 186(i));

34.2. That he was "involved in the writing of bonds in the name of Markel and QBE/Amalfi which were in breach of those limits" (judgment page 70, paragraph 186(ii));

34.3. That he was "aware of the information contained in the bordereaux" (page 70, paragraph 186(iii)) which misstated the details of the bonds written by SGC (judgment page 47, paragraphs 85-87);

34.4. That he "knew that Mr Felstead continued to be involved in the surety bond business, notwithstanding the discovery of Mr Felstead's conviction for fraud and that in consequence Mr Felstead was to have no further role in the operation of the Management Agreement". He "discovered that Mr Felstead was altering the contents of the bond files prior to the Markel audit in December 2005. Further, prior to the Markel audit in May 2006, he signed a document stating that no documents relevant to Markel had been removed from the files when he at least knew that Mr Felstead had been tampering with them" (judgment page 71, paragraph 187).

34.5. That, in the period of the Binding Authority with Markel, he "considered that so long as he raised the question and received an answer he had done enough to distance himself from the conduct in question and thereby live "a quiet life"" (page 74, paragraph 202); that he "could not honestly have believed that it was in order for Mr Felstead to perform a controlled function by signing bonds … [or] that signing bonds in excess of the limits was justified… It is very probable that he had doubts or suspicions about the legitimacy of SGC's business but let the matter rest" (judgment page 75, paragraph 203).

34.6. That, in the QBE/Amalfi period, his "suspicion that SGC's business was not being conducted in an honest or proper manner increased" (page 75, paragraph 204). He "became aware that the bond files had been tampered with and that the bonds in them were not the correct ones" (page 75, paragraph 205). He was "less than truthful when dealing with QBE/Amalfi" (judgment page 76, paragraph 206).

34.7. That he "did not honestly believe that his conduct in signing bonds in excess of the stated limits was justifiable… His failure to ask more questions … amounted to deliberately closing his eyes to the danger that he was unjustifiably … exposing Markel and QBE/Amalfi to a greater liability than they had agreed to bear… His conduct fell below the standards normally to be accepted in commerce. He was reckless as regards the rights and interest of Markel and QBE/Amalfi … Dishonesty can readily be inferred from these matters" (judgment page 76, paragraph 209).

34.8. That, "as the fraud began to unravel his desire for a "quiet life" was frustrated and he was forced … to do "a bit of fire fighting" which in fact meant lying to Markel and QBE/Amalfi" (judgment page 77, paragraph 210).

34.9. That he "was reckless as to the rights and interests of Markel and QBE/Amalfi […] He neither acted honestly nor in the best interests of Markel and QBE/Amalfi" (judgment page 78, paragraph 209 and page 82, paragraph 231).

35. In the course of his oral representations dated 17 December 2010 to the Warning Notice Mr Williams admitted that:

35.1. during the Markel tenure he had a "complete lack of day to day involvement with anything to do with Markel contact, apart from the fact that I was deemed to be signatory because Mr Higgins claimed to have a non-compete from his previous employer and couldn't sign any bonds for 12 months";

35.2. "I had absolutely no experience, I had no history in the bond market" ;

35.3. "I met numerous people that came to the office that might have had bonds to discuss but I would basically look at them and I was a mailbox, because often I would be the only person there because the rest of the parties were at lunch or in the pub";

35.4. "I agree I've been negligent, I think I probably …I think it's an FSA expression, I probably should have blown the whistle a month or so earlier when I started to think there was something…I was feeling very uncomfortable by…probably by June when I realised that Brunswick had left Templeton and that then it was unlikely that Templeton would actually provide co-insurance from the bonds written after that date. And I probably should have advised Smith at that stage, but I didn't and I hold my hand up to that. But I was being assured by Felstead …" ;

35.5. he had no expertise in relation to the bond market but that he signed 85% of the bonds because he was a director;

35.6. that he would sign whatever he was asked to sign based on a verbal assurance from Mr Higgins without "going through the procedures of reading the file";

35.7. "in title my function was director … realistically I felt I was making up the numbers";

35.8. that he was in the pub a lot of the time;

35.9. "everyone knew that Felstead ran the company for Higgins and Brunswick";

35.10. "you had Higgins as the chairman, you had me as almost like a sleeping director that's a signatory on virtually everything because of Higgins' non-compete, you had Felstead who was performing the role of always of a general manager";

35.11. "my involvement as far as I was concerned was very limited, but I signed a lot of the bonds, I signed nearly all the cheque requests for instance, I even unknowingly had diverted money I think off to the BVI and things like that I think" ;

35.12. "Mr Cowen [an external lawyer who Mr Williams had consulted] advised me and Mr Brady that Felstead was definitely performing a controlled function and I did raise this with Mr Higgins, Mr Ward and actually Mr Brunswick who happened to be in town that day, and they basically told me to mind my own business … certainly with a lot of hindsight, I should have pursued it … If you ever questioned anything, you would get the Cliff Felstead talking to, in which case it was, well you know the brokerage has been down this month, I don't know if we can keep you on. And this is why I've said, I mentioned in my evidence a quiet life, because if you rock the boat too much, you were out";

35.13. "In answer to your question [about Mr Felstead], yes I probably did close my eyes to it and went back to the pub I'm afraid"; and

35.14. "I was seriously considering, by sort of June/July time, I was seriously considering that…clearing out anyway, I was…just his [Mr Felstead's] attitude, he's not a particularly nice fella, but it was an easy number realistically and so…" (page 480, line 967).

36. In Mr William's Statement of Case dated 16 June 2010 Mr Williams admitted that:

36.1. he "had no prior knowledge of the bond market and made no decisions in the underwriting or administration process relating to bonds. I was technically unable to … not only did I have no knowledge of the bond market I was not even a paid employee of SGC and actually worked for the sister insurance company … I was … asked to join SGC primarily to strengthen the board";

36.2. "SGC and bond business was a minor part of my business life and I doubt if I devoted more that [sic] 30 minutes of any one day on their business. I had absolutely no knowledge, experience or ability to underwrite bond business and the suggestion that I was able to write bonds is frankly ludicrous. The underwriting process was solely undertaken by Mr Higgins and Mr Felstead and they never discussed the technicalities of bond business with me. Frankly I … had no interest in learning about a class of business I knew nothing about";

36.3. "there is no dispute as to whether I was aware that Mr Felstead continued to be involved with the QBE binder" (page 21);

36.4. "I was certainly aware that Mr Felstead was altering the contents of the files prior to the Markel audit in December 2005" (page 21);

36.5. "my involvement with SGC was secondary to my salaried role at GHIB … SGC was not my primary concern, whilst it was obviously Mr Higgins's' and Mr Felstead's" (page 21);

36.6. "I certainly did not feel it was in order for Mr Felstead to perform controlled functions within the rules of the FSA … Mr Higgins's response was however accepted by Mr Brady and myself and the issue was I do not think ever raised again" (page 21);

36.7. "I was beginning to have suspicions regarding SGC in the middle of 2006" (page 22); and

36.8. "It is now obvious that my request to not tamper with the files was ignored by Mr Felstead and his assistants" (page 22).

37. In his original witness statement in the High Court proceedings Mr Williams made statements to similar effect as some of the admissions set out above:

37.1. he was "in it for the quiet life" and had only a limited role (page 163, paragraphs 44 to 46);

37.2. he was aware of Mr Felstead's previous convictions being a barrier to him performing controlled functions (page 171, paragraphs 67 to 71); but that

37.3. he nonetheless allowed Mr Felstead to act as a director of the firm (for example, page 168, paragraph 65, page 188, paragraph 149, and page 191, paragraph 165); and

37.4. that he allowed Mr Felstead to conduct insurance business without challenge because his time at SGC would be "very short lived" if he did confront him (page 188, paragraph 149); and

37.5. he was aware that SGC employees were tampering with the bond files in advance of a Markel audit, in late 2005, but sought no satisfactory explanation and did nothing to bring this to Markel's attention (page 224, paragraphs 312 to 316).

Mr Williams' submissions

38. Mr Williams made three primary submissions. First the decision of Mr Justice Teare should not be relied upon as he had obtained leave to appeal from the decision. Secondly, Mr Justice Teare was in error in finding that he had written bonds and thirdly that Mr Justice Teare was in error in finding that he had been involved in the preparation of misleading bordereaux – the document which summarised the bonds which had been issued and provided details of them.

39. The primary grounds of appeal were that Mr Justice Teare was incorrect to hold that Mr Williams owed fiduciary duties to QBE and Amalfi or procured breaches of contract by SGC of its contract with Amalfi when he signed certain of the bonds as co-signatory and that the judge was wrong to find that Mr Williams was reckless in relation to the interests of QBE or Amalfi in signing the bonds which were in excess of the agreed limits and that the judge was wrong to conclude that dishonesty could readily be inferred from Mr Williams' failure to ask more questions of Mr Higgins.

40. The appeal was settled by Mr Williams paying the sum of £100,000.

41. Notwithstanding that leave was given to appeal from the decision of Mr Justice Teare, there was no appeal. In so far as the grant of leave to appeal has any relevance, the criteria applied by the Court of Appeal in granting leave to appeal (a real prospect of success) is much lower than that applied by the Judge in reaching his findings of fact. We also note that the Judge took into account the fact that Mr Williams was represented until shortly before the trial, and then unrepresented, and commented on Mr Williams' "extensive study of the documents" (judgment page 73, paragraph 195) and on the fact that Mr Williams has "sought to give as full an account as he could of his actions" (judgment page 73, paragraph 195) and kept in mind that he had not been represented during the course of the trial. Accordingly we consider that we can accept the findings of fact made by the Judge, if we consider it appropriate to do so, even though they were referred to in the Notice of Appeal.

42. It was also accepted by Mr Williams that he had signed many of the bonds which were in excess of the limits set by Markel and QBE/Amalfi and was aware of the limits. To that extent it is plain that he was involved in the writing of the bonds.

43. So far as the Bordereaux are concerned Mr Williams submitted that he had not been involved in the preparation of the bordereaux but admitted that he could not substantiate this assertion with any evidence. However what the Judge held was that, although Mr Williams was aware of the information contained in the bordereaux which misstated the details of the bonds written by SGC, he was not involved in the preparation of the bordereaux (judgment page 67, paragraph 79).

44. Mr Williams approach to his responsibilities at SGC was described by the Judge in the following terms at paragraph 196 of the Judgment:

> . . . on his own account, although he became a director of SGC and GHIBL, he was "in it for a quiet life". He was planning to retire within 2-3 years and he enjoyed what he regarded as the lax attitude in those companies. It suited him "sit back, keep my head down and keep quiet." Thus, whilst he had raised his concerns about Mr. Felstead's role in SGC (having regard to his criminal record) he did nothing more about it, notwithstanding that Mr. Felstead continued to have an important role. He "decided to be quiet, accept the free lunches, afternoon drinking sessions and laid back life style". He was very frank about his attitude. In cross-examination it was put to him that "in other words wherever there was a problem you chose to ignore it ?" He replied that "to a certain extent I would agree with that. I would raise an issue, but if I received a response which I guess satisfied me I would not raise it again".

45. In relation to the issue whether he knew that bonds were being written in excess of the agreed and prescribed limits the Judge accepted that he had asked Mr Higgins whether Mr Smith (who acted on behalf of Markel) had agreed to bonds being signed which exceeded the agreed limits. The Judge held that in the light of Mr Williams' extensive experience in the insurance industry and the importance of a Binding Authority, he could not accept that Mr Williams' believed Mr Higgins' answer to the effect that it was appropriate for bonds to exceed the limit. Rather as the Judge held

> 202. In my judgment it is very likely that, just as happened with the question whether it was in order for Mr. Felstead to be involved in the operation of the Binding Authority, Mr. Williams considered that so long as he raised the question and received an answer he had done enough to distance himself from the conduct in question and thereby live "a quiet life". Having received advice from Clyde and Co. that Mr. Felstead was performing a controlled function and could not be

accepted by the FSA he raised the issue at a board meeting. Nothing Mr. Higgins said could have persuaded Mr. Williams that it was in order for Mr. Felstead to sign and issue bonds yet he allowed the matter to rest. The question of his own signing of bonds in excess of the limits in the Binding Authority was dealt with in the same way. He knew from his own knowledge and understanding of such limits that such bonds could not properly be signed. He very properly raised the question with Mr. Higgins and received an answer but it was one which could not have persuaded him that it was truly in order to sign such bonds. Yet he allowed the matter to rest there and signed the bonds. Although he did not have meetings with Mr. Smith, he escorted him to meetings with Mr. Higgins and Mr. Felstead. If he really had believed that it was in order to sign bonds in excess of the limits as a result of what he had been told by Mr. Higgins it is surely likely, given that he was a signatory to many of the bonds and appreciated the importance of limits in a Binding Authority, that he would have raised the topic with Mr. Smith. Yet he never did. It is likely that he did not do so because he did not want to create issues between Mr. Higgins and Mr. Smith. His desire to distance himself from responsibility for signing the bonds is reflected in his description of himself as a "second signatory" notwithstanding that both signatures are of equal force and effect.

203. So, just as Mr. Williams could not honestly have believed that it was in order for Mr. Felstead to perform "a controlled function" by signing bonds so, in my judgment, Mr. Williams could not honestly have believed that signing bonds in excess of the limits was justified. It is very probable that he had doubts or suspicions about the legitimacy of SGC's business but let the matter rest. This is a serious finding to make against Mr. Williams and I have kept well in mind the high standard of proof required before making this finding. In making this finding I have rejected his evidence that he had "no doubt" during the Markel period that Mr. Smith had accepted the concept of a silent co-surety and that that was "an accepted way of doing business". The reason I have rejected his evidence, notwithstanding the frank, candid and attractive manner in which he gave most of his evidence, is that the probabilities are wholly against it. It is possible that he had persuaded himself in the run up to the trial that he had had no doubt as to the propriety of signing bonds in excess of the limits, at any rate during the Markel period.

46. The Markel Authority was terminated on 1 November 2005. Despite that Mr Williams signed a bond on 14 November 2005 in the sum of Euros 4.7 million and confirmed to Markel on 29 November 2005 that no bonds had been issued since 31 October 2005.

47. In relation to the QBE/Amalfi period the judge held:

> 204 It seems clear that during the QBE/Amalfi period Mr. Williams' suspicion that SGC's business was not being conducted in an honest or proper manner increased. He accepts that this happened but the process probably started earlier than he accepted in evidence. Although he said in evidence that he regarded the terms of the addendum to the Management Agreement dated 16 November 2005 with QBE/Amalfi as to the same effect as clause 4 of the modus operandi agreement with Markel he must have doubted whether they were consistent with the suggested silent co-surety agreement. The meeting on 24 November and the e-mail dated that day from Mr. Smith emphasising the agreed limits must have increased his doubts. The continued involvement of Mr. Felstead in the surety bond business notwithstanding the discovery of his conviction and the assurance given to QBE/Amalfi that he would not be involved must have fuelled his suspicions.
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> 205. Prior to the Markel audit in December 2005 he discovered that Mr. Felstead was tampering with the bond files. Similarly, in mid-2006 Amalfi carried out an audit. Mr. Williams accepted in cross-examination that in dealing with the audit queries he became aware that the QBE bond files had been tampered with and that the bonds in them were not the correct ones. These discoveries must have convinced him that the manner in which the surety bond business was being conducted was not proper. Indeed, he said in evidence that "at the time I thought there is something not right here". He said he raised the matter with Mr. Higgins but accepted that the answer he received was not satisfactory.
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> 206. By July 2006 Mr. Williams found it necessary to be less than truthful when dealing with QBE/Amalfi. He suggested that some bonds that had been queried could be cancelled and replaced with bonds issued by Templeton or another surety. Not only would there be obvious difficulties in SGC being able to "cancel" a bond issued to a beneficiary but he accepted that there was no replacement surety (since Templeton were not providing bonds after the resignation of Mr. Brunswick).
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> 207. By August 2006 he accepted that he knew the Templeton bonds required for the silent co-surety arrangement were missing yet he did not inform QBE/Amalfi of this. It seems more likely than not that, as submitted by Counsel on behalf of QBE/Amalfi, he did not do so because he knew that Mr. Smith had not authorised any such arrangement.

208. Mr. Williams' letter dated 20 September 2006 informed QBE/Amalfi that numerous bonds had been issued "outside the underwriting authority parameters". He said that these "special cases" were "always declared on the bordereaux" and any "special acceptance" was "always signed off by Peter." This is significant, firstly, because no attempt is made to justify what had happened by reference to an agreed silent co-surety arrangement and, secondly, because there was no warrant for saying that Mr. Smith had signed off the numerous bonds which had been written in excess of the financial limits.

209. For these reasons I have reached the conclusion that he did not honestly believe that his conduct in signing bonds in excess of the stated limits was justifiable. Moreover, his failure to ask more questions of Mr. Higgins or any questions of Mr. Smith amounted to deliberately closing his eyes to the danger that he was unjustifiably signing bonds in breach of the stated limits and so exposing Markel and QBE/Amalfi to a greater liability than they had agreed to bear. In this regard his conduct fell below the standards normally to be accepted in commerce. He was reckless as regards the rights and interests of Markel and QBE/Amalfi because the signing of bonds in excess of limits imposed by Markel and QBE/Amalfi exposed them to a greater risk than they had agreed to bear. Dishonesty can readily be inferred from these matters; see Royal Brunei v Tan [1995] 2 AC 378 at pp.389 and 390-1 per Lord Nicholls and Abou-Rahmah v Abacha [2007] 1 Lloyd's Rep. 115 at p.133 (pre Pill LJ).

48. Furthermore, the Judge held that it was apparent from Mr Williams' own evidence that he knew that Mr. Felstead continued to be involved in the surety bond business, notwithstanding the discovery of Mr. Felstead's conviction for fraud, and that involvement continued despite QBE being informed on 14 November 2005 that Mr. Felstead was to have no further role in the operation of the Management Agreement, he did continue to have some involvement. Mr. Williams discovered that Mr. Felstead was altering the contents of the bond files prior to the Markel audit in December 2005 and did nothing about it. Further, prior to the Markel audit in May 2006, he signed a document stating that no documents relevant to Markel had been removed from the files when he at least knew that Mr. Felstead had been tampering with them.

49. We also note that the Judge held that Mr Williams had not joined in the conspiracy against Markel and QBE/Amalfi and was not motivated by a desire for personal gain save in the indirect sense that he did not wish to rock the boat so as lose his salaried position with GHIBL.

50. Many of the findings of fact made by the Judge accord with admissions made by Mr Williams which are set out at paragraphs 35 and 36 above. Accordingly we accept the findings of fact made by Mr Justice Teare in his judgment as facts proved before the Tribunal.

51. As noted above Mr Williams was approved to hold various controlled functions including that of Director (C1), Apportionment and Oversight (CF8), Systems and Controls (CF28). However he admitted that he was prepared to sign bonds without having any understanding of the bond market and would sign bonds without reading the relevant file. He asserted that although he was a director of SGC, he did not consider that office carried any real responsibility but that he there to make "up the numbers", and that he knew Mr Felstead really ran SGC for Messrs Higgins and Brunswick; at the same time he knew that Mr Felstead had a criminal record and despite being advised that Mr Felstead should not be authorised to carry out controlled functions, and knowing that Mr Felstead was in fact carrying out controlled functions by signing bonds, he did nothing to stop him. He also knew that Mr Felstead was altering the contents of the files prior to the Markel audit in December 2005 and had interfered with the files prior to an audit by QBE/Amalfi in mid 2006. Notwithstanding his knowledge of these matters he was prepared to allow matters to continue without doing anything about them. As he admitted in cross examination, he chose to ignore problems when he saw them, considering it sufficient to raise a question and simply accept the answer without more, when he must have been aware from his own experience that the answer was unsatisfactory.

52. In effect Mr Williams failed to discharge his responsibilities as a director of SGC justifying his conduct on the basis that his salary of about £60,000 per year was not paid by that company and that he regarded himself as a "sleeping director". Mr Williams' submissions and evidence in the High Court proceedings showed that Mr Williams wholly failed to appreciate the responsibilities and duties attached to the office of director of SGC or his actions pursuant to his approvals to hold the various controlled functions he held. Despite regarding himself as a "sleeping director" he understood that he had been appointed to the board to strengthen it. The Tribunal infers that he was appointed to the board of SGC in order to impress third parties since within SGC it appears that those involved were content that he should not discharge any real function let alone question the manner in which it carried on business.

53. In lending his name and appearance to the board in the manner described above, and his actions described in the judgment of Mr Justice Teare, in simply closing his eyes to the manner in which SGC was acting in relation to the bonds and conducting itself with Markel and QBE/Amalfi Mr Williams showed a consistent course of recklessness in regard to the interests of Markel and QBE/Amalfi. As such he failed to act with integrity as on the evidence he knew or closed his eyes to the fact that the bonds were being written in excess of agreed limits. He misled Markel as to whether a bond had been written in excess of the agreed limits after 31 October 2005, despite signing a bond in late November, and he deliberately failed to inform Markel or QBE/Amalfi what was going on so that they did not appreciate the extent

of the liabilities to which they were being exposed and despite his knowing that files had been altered or interfered with prior to audits. He failed to take any steps to prevent conduct which he knew was in breach of the Management Agreements with Markel and/or QBE/Amalfi. In acting as he did Mr Williams' conduct was dishonest in relation to Markel and QBE/Amalfi. Furthermore his conduct exhibited a lack of competence to be expected of a director who held the controlled functions held by Mr Williams.

54. Mr Williams' failure to act with integrity in the respects outlined above is serious and justifies the course proposed by the Authority of making an order pursuant to section 56 of the Act prohibiting him from performing any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm on the ground that he is not a fit and proper person and the withdrawal of the approval given to Mr Williams to perform controlled functions.

55. We also consider that the Authority was correct to impose a fine. In circumstances as serious as this a substantial fine is normally appropriate. However in the light of Mr Williams' age (61), the serious consequences for him of what had occurred since the matters at SGC were discovered in that he has not worked four years, and that save for approximately £190,000 of equity in his house and a pension fund worth approximately £220, 000 he has no assets, we consider that the fine (which had already been reduced from that originally proposed of £150,000 on the basis of Mr Williams' means) should further be reduced to £25,000.

55. Accordingly, save for the reduction in the fine of £25,000 the reference is dismissed.

56. The Authority should proceed to make the an order pursuant to section 56 of the Act prohibiting Mr Williams from performing any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm on the ground that he is not a fit and proper person and withdraw the approval given to Mr Williams to perform controlled functions. It should also impose a fine of £25,000.

TERENCE MOWSCHENSON Q.C.
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 30 November 2011