[2021] UKUT 0222 (TCC)

Appeal number: UT/2020/000210

FINANCIAL SERVICES– independent financial adviser convicted of attempted sexual grooming of a child aged under 16 – whether adviser no longer fit and proper by reason of lacking the necessary integrity and reputation – whether decision to remove approval to perform senior management functions and impose a prohibition order reasonably open to the Authority - ss56, 63 & 133(6) FSMA 2000

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JON FRENSHAM	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington
Member Catherine Farquharson
Member Michael Hanson

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 14 and 15 June 2021

Emmanuel Sheppard, Counsel, instructed by Signature Litigation LLP, Solicitors, for the Applicant

Sarah Clarke QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction and decision referred

1. This decision concerns a reference by Mr Jon Frensham ("Mr Frensham") of a decision notice of The Financial Conduct Authority (the "Authority") dated 1 October 2020 (the "Decision Notice").

2. Pursuant to the Decision Notice the Authority decided to withdraw Mr Frensham's current approval pursuant to s 63 of the Financial Services and Markets Act 2000 ("FSMA") and make an order prohibiting him from performing any function in relation to any regulated activity carried on by an authorised person, or by an exempt person or exempt professional firm, in respect of any regulated activity pursuant to s 56 FSMA.

3. The basis for the Decision Notice was the Authority's view that Mr Frensham was not a fit and proper person to perform a function in relation to any regulated activity due to the fact that on 10 March 2017 he was convicted by a jury under section 1(1) of the Criminal Attempts Act 1981 for attempting to meet a child under the age of 16, following acts of sexual grooming contrary to section 15 of the Sexual Offences Act 2003. On 27 March 2017 Mr Frensham was sentenced to 22 months' imprisonment, suspended for 18 months with a 60 day rehabilitation requirement. He was made the subject of an indefinite Sexual Harm Protection Order ("SHPO") and added to the sex offenders register until 2027. These events occurred when Mr Frensham was an approved person.

4. The Authority contends that the nature and circumstances of Mr Frensham's offending show that he lacks integrity. It says that the Applicant sought to exploit a child for his own sexual gratification and at the time of committing the offence he was also in breach of pre-existing bail conditions. Consequently, the Authority contends that Mr Frensham's offending involved attempted exploitation of a minor, and abuse of a position of trust and a deliberate and criminal disregard for appropriate standards of behaviour.

5. In addition, the Authority contends that in order to maintain public confidence in the financial services industry, the Authority and the public are entitled to expect that approved persons and financial advisers are individuals with integrity and good reputation. Even though Mr Frensham's offence was not committed at work and did not involve financial dishonesty, it involved him deviating from legal and ethical standards and seeking to exploit those more vulnerable than himself, which the Authority considers is fundamentally incompatible with his role as a financial adviser. The Authority also considers that there is a risk of erosion of public confidence if individuals who committed such misconduct and do not have the requisite reputation are permitted to continue working in the financial services industry.

6. Furthermore, the Authority considers that Mr Frensham has not been open and transparent with it because he did not inform the Authority of a number of matters.

The matters on which the Authority relies in this respect include (i) Mr Frensham's earlier arrest in March 2016 which led to bail conditions being imposed (ii) his arrest and remand in custody in respect of the offence which led to his conviction (iii) his failure to tell the Authority that, whilst on remand, he was not for five weeks in a position to discharge his controlled functions or ensure compliance by the firm of which he was the sole approved person with its regulatory obligations and (iv) his failure to inform the Authority of the decision of the Chartered Insurance Institute ("CII") to refuse to renew his Statement of Professional Standing and its decision to expel him from membership.

7. Mr Frensham contends that the Authority has wrongly applied the fitness and properness test to the facts. In particular, Mr Frensham contends that the Authority allowed irrelevant considerations to affect its judgment and did not have sufficient or any regard to relevant factors. Among those factors are (i) Mr Frensham's conviction did not relate to his regulated activity (ii) the conviction was not for an offence of dishonesty and (iii) there are no indirect connections between the criminal offence and Mr Frensham's regulated activity, the criminal offence not being committed at Mr Frensham's place of work, and his work is not likely to bring him into contact with a minor or put him at risk of breaching the conditions of his SHPO. Further, Mr Frensham contends that the Authority erred in its findings of a lack of candour on Mr Frensham's part in relation to the matters referred to at [6] above

8. Mr Frensham says he is deeply remorseful for the actions which led to his conviction. He contends that a prohibition order is wholly disproportionate and should not be applied in circumstances where there has been no dishonesty finding in relation to conduct which, whilst very serious, took place outside the professional sphere. Mr Frensham contends that the Authority has not sufficiently explained why the criminal conviction in this case indicates unfitness and has not paid sufficient regard to the length of time since the occurrence of any matters indicating unfitness or the severity of the risk which Mr Frensham poses to consumers and confidence in the financial system.

9. This is the first time that the Tribunal has had to consider a case where the Authority is seeking a prohibition order against an individual based on that individual's conviction for a criminal offence not involving dishonesty in circumstances where the behaviour concerned was unrelated to the individual's regulated activity.

10. We have decided to dismiss Mr Frensham's reference, and we now set out the reasons for our conclusions.

11. We are grateful to both Counsel for their very clear and comprehensive submissions. We are particularly grateful to Mr Sheppard and his instructing solicitors, Signature Litigation LLP, who acted pro bono for Mr Frensham thus enabling the important issues raised by this case to be fully argued.

The Law

Applicable legal and regulatory provisions

12. Section 1B FSMA provides that in discharging its general functions the Authority must, so far as is reasonably possible, act in a way which, among other things, advances one or more of its operational objectives. The Authority's operational objectives include the consumer protection objective and the integrity objective.

13. Section 1C FSMA provides that the consumer protection objective is securing an appropriate degree of protection for consumers. Section 1D FSMA provides that the integrity objective is protecting and enhancing the integrity of the UK financial system.

14. Section 56 FSMA confers upon the Authority the power to make an order against an individual prohibiting that individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the Authority that the individual is not a fit and proper person to perform functions in relation to a regulated activity by an authorised person or certain other persons carrying on a regulated activity.

15. Section 63 FSMA provides that the Authority may withdraw a person's approval under s 59 FSMA to perform a controlled function if the Authority considers that the person is not a fit and proper person to perform the function.

16. In this case, the Authority seeks to withdraw Mr Frensham's approval to perform the current senior management functions relating to the firm of which he is the sole approved person and majority shareholder. The Authority also seeks a prohibition order against Mr Frensham pursuant to s 56 FSMA. The basis for the Authority's action is that Mr Frensham is no longer a fit and proper person to perform both his existing functions and any other function in relation to a regulated activity.

17. That part of the Authority's Handbook entitled "The Fit and Proper Test for Employees and Senior Personnel" ("FIT") sets out the criteria that the Authority will consider when assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

18. FIT 1.3.1G states that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will be the person's honesty, integrity and reputation, competence and capability and financial soundness.

19. Clearly, in relation to these references, because of the way in which the Authority presents its case, the relevant considerations are whether it can be demonstrated that Mr Frensham lacks integrity or the requisite reputation to work for a firm which undertakes regulated activities.

20. FIT 1.3.2G states that in assessing fitness and propriety, the Authority will also take account of the activities of the firm for which the controlled function is performed, the permission held by that firm and the markets within which it operates. As Ms Clarke submitted, this means that an assessment of fitness and propriety must always be made in the context of all relevant surrounding circumstances.

21. FIT 2.1.1G provides that in determining a person's honesty, integrity, and reputation, the Authority will have regard to all relevant matters, including, but not limited to, those set out in FIT 2.1.3G. This provision makes it clear, however, that the Authority will consider the circumstances only where relevant to the requirements and standards of the regulatory system. It is stated that conviction for a criminal offence will not automatically mean the person will be found not to be fit and proper. The Authority treats each situation on a case-by-case basis, taking into account the seriousness of, and circumstances surrounding, the offence, the explanation offered by the convicted person, the relevance of the offence to the person's role, the passage of time since the offence was committed and evidence of the individual's rehabilitation.

22. FIT 2.1.3G sets out the matters referred to in FIT 2.1.1G to which the Authority will have regard. It is specifically stated that the Authority's consideration is not limited to these matters which include, among other things:

> (1) whether the person has been convicted of any criminal offence; particular consideration will be given to offences of dishonesty, fraud, financial crime or an offence under legislation relating to companies, building societies, industrial and provident societies, credit unions, friendly societies, banking, other financial services, insolvency, consumer credit companies, insurance, consumer protection, money laundering, market manipulation and insider dealing;
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> (2) whether the person is or has been the subject of any proceedings of a disciplinary or criminal nature, or has been notified of any potential proceedings or of any investigation which might lead to those proceedings;
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> (3) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies;
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> (4) 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; and
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> (5) whether, in the past, the person has been candid and truthful in all their dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.

23. The Authority's policy in relation to withdrawals of approvals and prohibition orders is set out in Chapter 9 of the Enforcement Guide ("EG").

24. EG 9.1 states that the Authority may exercise this power where it considers that, to achieve any of its regulatory objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform. It is therefore clear that the Authority may exercise this power where it considers it necessary to do so in order to further the consumer protection objective or the integrity objective, as described at [12] and [13] above. The guidance also states that the effective use of the power under s 63 FSMA to withdraw approval from an approved person will help ensure high standards of regulatory conduct.

25. EG 9.2.3 provides that the scope of a prohibition order will depend on the range of functions that the individual performs in relation to regulated activities, the reasons why he is not fit and proper, and the severity of risk which he poses to consumers or the market generally.

26. EG 9.3.2 provides that, when deciding whether to make a prohibition order against an approved person, the Authority will consider all the relevant circumstances of the case which may include but are not limited to the ten matters listed in that provision. Those matters include:

> (1) The relevance and materiality of the matters indicating unfitness.
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> (2) The length of time since the occurrence of any matters indicating unfitness.
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> (3) The particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates.
>
> (4) The severity of the risk which the individual poses to consumers and to confidence in the financial system.

27. EG 9.3.3 states that the Authority may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is not fit and proper. It may also take account of the particular controlled function which an approved person is performing for a firm, the nature and activities of the firm concerned and the markets within which it operates.

28. EG 9.3.4 states that owing to the "diverse nature of activities and functions which the [Authority] regulates, it is not possible to produce a definitive list of matters which the [Authority] might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any, firm".

29. EG 9.3.5 gives examples of types of behaviour which have previously resulted in the Authority deciding to issue a prohibition order or withdraw approval. Among the examples given are "severe acts of dishonesty, e.g which may have resulted in financial crime" and failure to disclose material considerations such as details of criminal convictions.

30. Again, it is clear that these are merely examples rather than an exhaustive list. That follows from the wording of EG 9.3.6 which states that "certain matters that do not fit squarely or at all, within the matters referred to [at 9.3.5] may also fall to be considered. In these circumstances the Authority will consider whether the conduct or matter in question is relevant to the individual's fitness and propriety."

31. As regards a regulated firm's duty of candour and transparency in its relations with the Authority, Principle 11 of the Authority's Principles for Businesses provides that a firm must deal with its regulators in an open and cooperative way, and must disclose to the Authority appropriately anything relating to the firm of which that regulator would reasonably expect notice.

32. This provision is supported by a provision in that part of the Authority's Handbook known as SUP. SUP 10A.14.17R provides that if a firm becomes aware of information which would reasonably be material to the assessment of an approved person's fitness and propriety it must inform the Authority as soon as practicable.

Authorities

33. The authorities demonstrate that a person who is dishonest will always lack integrity and reputation, but it does not follow that a person who lacks integrity must also be dishonest.

34. The correct legal approach to the question of integrity has been considered in many cases before this Tribunal and its predecessor, the Financial Services and Markets Tribunal.

35. In *Tinney v FCA* [2018] UKUT 0435 (TCC) the Tribunal, having considered the cases of *Hoodless and Blackwell v FSA* (2003) and *Vukelic v FSA* (2009) at [10] and [11] set out the following guidance at [12] to [13] which we gratefully adopt:

> "12. The Tribunal in *First Financial Advisors Limited v FSA* [2012] UKUT B16 (TCC) agreed with the observation in *Vukelic* and endorsed the guidance in Hoodless and Atlantic Law. At [119], the Tribunal observed: "Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."
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> 13. We agree. A lack of integrity does not necessarily equate to dishonesty. While a person who acts dishonestly is obviously also acting without integrity, a person may lack integrity without being dishonest. One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements. Such behaviour was found to be evidence of a lack of integrity by the Tribunal in Vukelic at [119]:
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> "It may be that Mr Vukelic was not dishonest on this transaction in the sense of deliberately participating in a scheme to deceive and we are prepared to accept that he was not. But he turned a blind eye to what was obvious and failed to follow up obviously suspicious signs. We do not believe that an educated

> professional in a senior position could have been oblivious to the signs that the transaction depended on concealment for its success. It is possible, but unlikely, that Mr Vukelic simply failed to spot what should have been obvious to a person in his position. But if that had been so it would have resulted from an inexcusable failure to ask obvious questions."

36. We were also referred to the later Court of Appeal case of *Wingate v SRA* [2018] 1 WLR 3696. In that case Rupert Jackson LJ made the following observations at [95] to [103] as to the standard of conduct expected of a professional person acting with integrity:

> "95. Let me now turn to integrity. As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty. In this regard, I agree with the observations of the Divisional Court in ***Williams*** and I disagree with the observations of Mostyn J in ***Malins***.
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> 96.Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.
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> 97.In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in ***Williams*** at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.
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> 98.I agree with Davis LJ in ***Chan*** that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: "Well you can always recognise it, but you can never describe it."
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> 99.The broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer. The observations of the Financial Services and Markets Tribunal in ***Hoodless*** have met with general approbation.
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> 100.Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.
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> 101.The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity…
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> 102.Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public…

> 103.A jury in a criminal trial is drawn from the wider community and is well able to identify what constitutes dishonesty. A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly such a body is well placed to identify want of integrity. The decisions of such a body must be respected, unless it has erred in law."

37. *Wingate* concerned the standard of conduct expected of a solicitor. In our view, Mr Frensham, as the sole approved person in a firm acting as an independent financial adviser, would likewise be expected to adhere to higher standards than those expected from general members of the public because of the trust that the public rightly put in those who lead regulated financial services firms. This is one of the ways of distinguishing "integrity" from "honesty". The latter concept is a basic moral quality which is expected of all members of society. Honesty involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct: See *Wingate* at [93]. It follows that a person who is dishonest in his conduct is guilty of more serious misconduct than a person who acts without integrity. That is why regulators are usually astute in identifying whether they characterise the conduct of which they complain as demonstrating a lack of honesty as opposed to a lack of integrity.

38. There is no pleading of dishonesty in this case. In our view it would be widely recognised that an individual, whatever his profession or business, who committed a serious offence of the kind of which Mr Frensham was convicted would be regarded as having acted without integrity. Such behaviour demonstrates that the person either lacks an ethical compass, or their ethical compass to a material extent points them in the wrong direction.

39. However, as the authorities from the solicitors' field demonstrate, which in our view are equally applicable in the financial services context, that is not the end of the matter, as also illustrated by the Authority's own guidance which we have referred to above.

40. What those authorities and guidance show is that to justify regulatory action the behaviour concerned, when, as is the case here, it occurred in the person's private rather than professional life, must engage the standards of behaviour required of the individual concerned by the applicable regulatory provisions. It is not simply a question of assessing whether the behaviour concerned demonstrates a lack of integrity at large, but whether the behaviour engages the specific standards laid down by the relevant regulator.

41. As our summary of FIT 2.1.1G at [21] above shows, the Authority only considers how a criminal conviction impacts on a person's fitness and properness where that conviction is relevant to the requirements and standards of the regulatory system. As the Authority says in that guidance, a conviction for a criminal offence does not automatically mean the person will be found not to be fit and proper and the relevance of the offence to the person's role is a factor that must be taken into account. Likewise, EG 9.3.2 states that in considering whether to make a prohibition

order the Authority will consider the relevance and materiality of the matters indicating fitness.

42. At [100] of *Wingate*, Rupert Jackson LJ specifically linked the question of integrity to what was required by the standards of the profession concerned, where he said that integrity connotes adherence to the ethical standards of one's own profession. Therefore, failing to act without integrity in one's personal life in a manner which is not relevant to how the person concerned is required to conduct himself in his professional life should not in itself engage regulatory action. As Rupert Jackson LJ said at [102] of *Wingate*, in every instance professional integrity is linked to the manner in which that particular profession professes to serve the public. It is clear that a distinction is to be drawn between personal integrity and professional integrity. That does not mean that the two concepts must be treated as being entirely separate. The regulator concerned will have to consider whether in all the circumstances the failings of personal integrity also amount to failings of professional integrity.

43. This issue was considered in the High Court's recent judgment in *Ryan Beckwith v SRA* [2020] EWHC 3231 (Admin), an appeal from a decision of the Solicitors' Disciplinary Tribunal ("SDT").

44. The facts in this case were that the SDT found what it described as a "sexual encounter" had occurred between Mr Beckwith, a partner in a leading City law firm, and a female solicitor (Person A). Earlier in the evening, prior to the encounter taking place, Mr Beckwith and Person A had been part of a group drinking in a pub near the firm's London office. Person A was an associate solicitor at the firm in the same department that Mr Beckwith worked in. It was undisputed that Mr Beckwith was in a position of seniority and/or authority over Person A. The SDT found that Person A was heavily intoxicated at the time the encounter took place but rejected the allegation that Mr Beckwith acted in abuse of his position of seniority or authority. It found instead that by engaging in sexual activity with Person A he had acted "inappropriately". There was no allegation that the "encounter" took place without consent.

45. Based on those findings, the SDT concluded that Mr Beckwith's actions were a breach of Principle 2 of the SRA's Principles, the obligation to act with integrity and also a breach of Principle 6, the requirement to behave in a way that maintains the trust the public places in solicitors and in the provision of legal services.

46. The High Court held that the SDT had erred in applying Principle 2 and Principle 6 to the facts that it found. In essence, the Court held that the obligations to comply with those Principles attached only to matters that touch upon professional practice as a solicitor and the facts found by the SDT did not demonstrate that to be the case.

47. At [30] the Court summarised the principles to be drawn from Wingate as follows:

> "Three points of principle can be drawn from this summary. The first is that in the context of the regulation of a profession there is an association between the notion of having integrity and adherence to the ethical standards of the profession. This is consistent with the ordinary meaning of the word, namely adherence to moral and ethical principles. The second is that on matters touching on their professional standing there is an expectation that professionals may be held to a higher standard than those that would apply to those outside the profession. The third is that a regulatory obligation to act with integrity "does not require professional people to be paragons of virtue"."

48. As regards the application of Principle 2, the Court made it clear that the requirement to act with integrity must be applied within the context of the relevant statutory framework. It said at [31] that the extent that there are applicable ethical standards they must be found in or derived from those rules. In this case, the relevant rules are those in the Handbook, and in particular the 2011 Principles and the 2011 Code of Conduct prescribed by the Solicitors Regulation Authority ("SRA").

49. At [33] the Court said that when identifying lack of integrity the SDT cannot have *carte blanche* to decide what, for the purposes of the Handbook, the requirement to act with integrity means. It went on to say:

> "The requirement to act with integrity must comprise identifiable standards. There is no free-standing legal notion of integrity in the manner of the received standard of dishonesty; no off-the-shelf standard that can be readily known by the profession and predictably applied by the Tribunal. In these circumstances, the standard of conduct required by the obligation to act with integrity must be drawn from and informed by appropriate construction of the contents of the Handbook, because that is the legally recognised source for regulation of the profession."

50. At [34], the Court said that the SRA's Handbook gave effect to the second and third *Wingate* principles, that is the need in some matters to hold members of a profession to a higher standard on some matters, while not falling into the trap of requiring members of that profession to be paragons of virtue in all matters. The Court went on to say:

> "It does this because the contents of the Handbook, considered in the round, are the best guide to the occasions and contexts where members of the solicitors' profession ought to be held to a higher standard. Looking to the rules and the interpretation of those rules is also necessary to ensure the requirements of legal certainty are met. The Tribunal cannot and does not have liberty to act outside the rules made under section 31 of the 1974 Act. Those rules must be construed coherently; the standards that emerge must be sufficiently predictable. This approach to the meaning of the requirement to act with integrity facilitates a principled approach to the important point raised by the circumstances of this appeal: the extent to which it is legitimate for professional regulation to reach into personal lives of those who are regulated."

51. The Court found the relevant provision of the Handbook in this regard was Chapter 11, headed "Relationships with Third Parties". It said this at [36]:

> "The material obligation arising from Chapter 11, which on the facts of this case informs the content of the requirement to act with integrity, is the obligation, whether acting in a professional or personal capacity, not to take unfair advantage of others. The Tribunal's finding that the Appellant had not acted in abuse of his position of seniority or authority puts the present case outside that requirement. What the Appellant did was, as the Tribunal concluded, inappropriate. But it was not conduct which on a proper reading of the 2011 Principles was capable of being characterised as showing a lack of integrity."

52. At [40] to [45] the Court considered the application of Principle 6, the requirement to behave in a way that maintains the trust the public places in a solicitor and in the provision of legal services. In our view, this requirement is akin to the Authority's requirements as to the reputation of the person concerned. The question is not simply whether the behaviour concerned has affected the person's personal reputation, but also the reputation of the financial services industry and the trust that the public puts in those whom the Authority regulates.

53. At [40] the Court held that the SDT's finding that Mr Beckwith's conduct "affected not only his personal reputation but the reputation of the profession" was flawed, and could not stand.

54. At [42] and [43] the Court held that both Principle 2 and Principle 6 had to be approached in the same way. The obligation to act with integrity attached only to matters that touch upon professional practise as a solicitor. Likewise, the content of Principle 6 had to be closely informed by careful and realistic consideration of the standards set out in the provisions of the Handbook. It said:

> "There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. Whether that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of legal services or harm to the profession *per se* on the other hand has been crossed, will be a matter of assessment for the Tribunal from case to case, but where that line lies must depend on a proper understanding of the standards contained in the Handbook.

55. Applying that principle to the facts of the case, at [44] the Court accepted that seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession, is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally. However, the Court said [45] that the facts found by the SDT were not capable of supporting the conclusion that Mr Beckwith acted in breach of Principle 6. It said:

> "What the Appellant did affected his own reputation; but there is a qualitative distinction between conduct of that order and conduct that affects either his own reputation as a provider of legal services or the reputation of his profession. The Tribunal asserted that the Appellant's behaviour crossed this line but provided no explanation. At paragraphs

> 25.189 – 25.190 the Tribunal stated that "Members of the public would not expect a solicitor to conduct himself in the way the [Appellant] had. Such conduct … would attract the [dis]approbation of the public". However, the Tribunal had already concluded that the Appellant's conduct did not amount to an abuse of his seniority or authority over Person A. On the application of Principle 6 to the facts of this case, that conclusion is a critical conclusion and, as we have already said, on the facts of this case it was a conclusion that was clearly correct. Conduct amounting to an abuse by a solicitor of his professional position is clearly capable of engaging Principle 6. But, as the Tribunal concluded, that was not this case."

56. At [46] to [55] the Court considered whether the SDT's conclusions infringed Mr Beckwith's right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights ("ECHR").

57. At [50] the Court accepted that the requirements to act with integrity and to act so as to maintain public trust in the provision of legal services, are requirements which will, on occasions require the SRA or the Tribunal to adjudicate on a professional person's private life. The Court considered the extent to which Principle 2 and Principle 6 may reach into private life and whether, at the level of principle that is consistent with the required fair balance between the public interest and private rights. The Court said:

> "It is one thing to accept that any person who exercises a profession may need, for the purposes of the proper regulation of that profession in the public interest, to permit some scrutiny of his private affairs; to suggest that any or all aspects of that person's private life must be subject to regulatory scrutiny is something of an entirely different order."

58. The Court then said this [54]:

> "There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect private life and the public interest in the regulation of the solicitor's profession. Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit."

59. However, the Court did not need to consider Article 8 any further, given its conclusions on Principle 2 and Principle 6.

60. An example of where it was held that a solicitor's conduct in his private life did affect the maintenance of public confidence and public trust in the solicitors' profession is *SRA v Alistair Main* [2018] EWHC 3666 (Admin).

61. In that case, the High Court quashed a one year suspension imposed by the SDT and substituted a four year period where a solicitor had been convicted of sexual assault and racially aggravated assault by beating. The offences occurred outside of his professional life – at a rowing club dinner. He lifted up his ex-girlfriend's skirt and slapped her on the bottom and called her an "Aussie Slut". He was sentenced to a community order. Although he was not made subject to a SHPO he was entered on the sex offenders register for a period of 5 years.

62. Mr Main admitted that his conduct breached SRA Principles 2 and 6. The question on the SRA's appeal to the High Court was whether a one-year suspension from the right to practice as a solicitor was unduly lenient in the circumstances.

63. The High Court held that the SDT had erred in its approach to the question of public confidence. Holroyde LJ, who gave the only reasoned judgment, said this at [29] and [30]:

> "29.… Although the Tribunal were… entitled to regard the risk of reoffending as low, it was plainly necessary for them to consider the maintenance of public confidence and public trust in the solicitors' profession…. the Tribunal rightly identified the need to have regard to that aspect of the case. They also rightly reflected on whether it was necessary and/or appropriate the period of suspension to coincide with the period during which the respondent would be subject to the orders of the criminal court.
>
> 30. Having identified those important issues, however, it seems to me, with all respect to the Tribunal, that they then lost sight of them in the remainder of that paragraph of their reasons. Instead of focusing upon what period of suspension was necessary for the protection of the reputation of the profession and for the maintenance of public confidence in the profession, they referred only to the risk of reoffending, the fact that no sexual harm prevention order was made and the fact that the respondent had not practised professionally since his summary dismissal. What they failed to consider, in my judgment, was the simple but vital point made by Miss Carpenter: "Would public confidence in the profession be harmed if they found that a man recently convicted of offences such as these and still subject to the notification requirements as well as to a restraining order specifically directed to protect the complainant was currently practising as a solicitor?" If the Tribunal had focused on that question, I agree with Miss Carpenter's submission that there could only have been one answer to it. In reaching that conclusion, I bear very much in mind that the public, for this purpose, must be assumed to have knowledge of the relevant facts. It does not follow from that conclusion, and I do not suggest, that a period of suspension must always be coterminous with the term of orders imposed by a criminal court. Everything must depend on the circumstances of the individual case. In the present case, however, the Tribunal did, in my view, make an error of principle in failing properly to consider the issue and in therefore failing to conclude that a significantly longer period of suspension was necessary to allay public concern."

64. As we have said, in our view the principles derived from the solicitors' cases can by analogy be applied in the context of the activities that the Authority regulates. We can summarise the principles set out below. For convenience, we refer to professional activities, but in our view the same principles apply to the full range of activities that the Authority regulates, whether or not they could strictly be described as professional activities:

(1) Integrity in the context of this case means adherence to ethical standards of the profession concerned, in this case acting as an independent financial adviser.

(2) In matters touching on their professional standing there is an expectation that professionals may be held to a higher standard than those that would apply to those outside the profession. Nevertheless, a regulatory obligation to act with integrity does not require professional people to be paragons of virtue.

(3) The need for public trust in the provision of professional services means that some scrutiny of a person's private affairs is permitted.

(4) Provisions requiring professional persons to act with integrity or to be of sufficient repute may reach into private life only when conduct that is part of a person's private life realistically touches on their practice of the profession concerned. The conduct must be qualitatively relevant because it engages the standard of behaviour set out in the regulatory code concerned.

(5) In considering that question, the decision-maker should consider whether public confidence in the profession would be harmed if the public, assumed to have knowledge of the facts, found that a person who behaved in a manner under scrutiny was able to continue to practice his profession.

65. In this case, the Authority's guidance in FIT clearly indicates that conduct in an approved person's private life has to be qualitatively relevant in the manner that the authorities that we have analysed above suggest.

66. However, as Ms Clarke submitted, there are differences between how the Code of Conduct for solicitors was structured at the time that Mr Beckwith's behaviour occurred and the Authority's framework for assessing fitness and propriety. The SRA's Handbook at the time set out principles of behaviour and a series of outcomes with indicative behaviours showing how outcomes can be achieved or not. It is therefore understandable that in *Beckwith* the Court tested the relevance of Mr Beckwith's behaviour to his practice as a solicitor by reference to those standards of behaviour set out in the Handbook.

67. In relation to the Authority's regulatory framework, the starting point must be its statutory objectives, the relevant objectives in this case being the consumer protection objective, that is securing an appropriate degree of protection for consumers and the integrity objective, that is protecting and enhancing the integrity of the UK financial system. It is clear from the provisions of EG 9.1 and EG 9.3.2 that we refer to at [24] and [26] above, that in deciding whether to make a prohibition order a key consideration is the severity of the risk which the individual poses to consumers and to confidence in the financial system, thus providing a direct link to

the statutory objectives. Therefore, in our view, when considering the relevance of behaviour that takes place in a person's private life, the key issue is whether the behaviour concerned realistically engages the question as to whether the individual poses a risk to consumers and to confidence in the financial system.

68. In that regard, it would also be helpful to bear in mind when considering the issue of consumer protection, the provisions of Principle 6 of the Authority's Principles for Businesses. That requires a firm to have due regard to the interests of its customers and treat them fairly. That short principle is supported by a considerable number of more detailed regulatory provisions, but it would be relevant to consider whether the individual's behaviour in question has realistically undermined the confidence that properly informed and fair-minded members of the public can place on the firm concerned complying with this Principle when carrying on its business.

69. In relation to the requirement to be open and transparent with the Authority we were referred to *Eversure Financial Services Limited and Frederick George Young v FSA* (2006), a decision of this Tribunal's predecessor, the Financial Services and Markets Tribunal. That case related to a failure by the Applicants to disclose relevant information on the application forms for authorisation of the firm and approval of Mr Young, namely the fact that Lloyd's had issued a "minded to refuse" letter in response to the Applicant's application for membership. The Tribunal upheld the Authority's decision to refuse to authorise the firm and Mr Young's application to perform control functions at the firm. It said this at [58]:

> "We start by observing that the Authority's regulatory function generally and its statutory approval function in particular is entirely dependent on its being provided with full and accurate information by the individuals seeking approval. Mr Honey's evidence is in point here. The Authority cannot carry out its statutory approval responsibility without having the information to assess the candidate's integrity and willingness to be open and honest with it. If it fails to insist on absolute disclosure, it will not be fulfilling its public function……. ……. Understandably the Authority, as Mr Honey explained, places a great deal of importance on an open and co-operative relationship with firms. Because small firms do not have regular contact with supervisory staff at the Authority, it is important that the Authority can rely on them to bring to its attention voluntarily any matters relating to their ability to comply with relevant rules and requirements."

70. In our view, this observation is equally applicable to a case such as this where the Authority seeks to support its decision to withdraw Mr Frensham's approval and prohibit him from working in the industry by reference to his alleged lack of candour in his dealings with the Authority. This observation does, in our view, correctly identify the policy behind provisions such as Principle 11 of the Authority's Principles for Businesses and SUP 10A.14.17, as referred to at [31] and [32] above.

Issues to be determined and the role of the Tribunal

71. The powers of the Tribunal on a reference are set out in s 133 of FSMA. Since this reference does not involve a "disciplinary reference" or a reference under s

393(11) of FSMA, the Tribunal's powers are as set out in the following provisions of s 133:

> "(4) 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
>
> ….
>
> (6) In any other case [i.e. one not involving a disciplinary reference or a reference under s393(11) of FSMA], the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision."

The scope of the Tribunal's powers under s 133(6) and s 133(6A) has been considered in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) and later cases including *Dr Saim Koksal T/A Arcis Management Consultancy v Financial Conduct Authority* [2016] UKUT 478 (TCC) *Chickombe and others v FCA* [2018] UKUT 0258 TCC *North London Van Centre Limited v FCA* [2019] UKUT 0233 and *Financial Solutions (Euro) Ltd v FCA* [2020] UKUT 0139 (TCC). The general principles derived from those cases, as applicable to this case, can be summarised as follows:

> (1) The Tribunal may consider evidence relating to the "subject-matter of the reference" that was not available to the Authority when it made its decision (s133(4) of FSMA). Section 57(5) FSMA permits a person against whom a decision to make a prohibition order is made to refer "the matter" to the Tribunal and there is a corresponding power in relation to a withdrawal of approval under s 63 FSMA. In that context "the matter" in question in this case and therefore the "subject-matter of the reference" is whether it appears that Mr Frensham is not a fit and proper person to perform functions in relation to a regulated activity. Consequently, the extent of what the Tribunal may examine in considering the matter referred will be prescribed by the issues raised in the pleadings and the evidence sought to be adduced to support the competing

contentions made by the parties in those pleadings. (see [30] and [31] of *Koksal*).

(2) If, having reviewed all the relevant evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other determinations of law as are relevant, the Tribunal considers that the Authority's decision was one that was reasonably open to it, then the correct course is to dismiss the reference (see [27] of *Koksal*).

(3) If the Tribunal is not satisfied, in the light of its findings, that the Authority's decision was within the range of reasonable decisions, the correct course is to remit the matter back to the Authority under s133(6)(b) FSMA ([28] of *Koksal*).

(4) The Tribunal would be entitled to conclude that the Authority's decision was outside the range of reasonable decisions if it were to make findings of fact that were clearly at variance with findings made by the Authority, and which formed the basis of the Authority's decision (see [29] of *Koksal*).

(5) If the Authority fails to take into account a relevant factor, or takes into account irrelevant factors in making its decision, then its decision will be flawed with the result that the decision will not be within the range of reasonable decisions open to the Authority (see [33] of *Chickombe).*

(6) However, even if the Tribunal were to find flaws in the Authority's decision-making process it should not remit the reference if it were of the view that despite such failings, it was inevitable that if the matter were remitted the Authority would come to the same conclusion: see on this point *Palmer v FCA* [2017] UKUT (TC) 0313 at [270].

72. As is well established in references of this nature, the burden of proof lies with the Authority and the standard of proof to be applied is the ordinary standard of the balance of probability, namely whether the alleged events more probably occurred than not.

73. It appears to us from the parties' pleadings that the issues that we need to consider in this case in order to assess whether the Authority's decision is one that could reasonably have been arrived at are as follows:

(1) The relevance of Mr Frensham's conviction to the performance of his functions as an independent financial adviser and whether or not the Authority has erred in its approach to that issue.

(2) Whether the question of the relevance of the conviction is affected by the fact that in committing the offence Mr Frensham acted in breach of the bail conditions to which he was subject at the time.

(3) The extent to which the Authority was entitled to place weight on the following matters:

(i)the fact that Mr Frensham did not inform the Authority of the fact that he was arrested on two occasions and had been remanded in custody;

(ii)the fact that Mr Frensham carried on the business of his firm whilst he was on remand before a locum was appointed without reporting the matter to the Authority; and

(iii)the failure of Mr Frensham to inform the Authority of the decision of the CII to refuse to renew Mr Frensham's Statement of Professional Standing and its decision to expel him from membership.

(4) The extent to which the Authority has given appropriate weight to the length of time since the offence occurred and the evidence of Mr Frensham's rehabilitation.

(5) Whether a prohibition order is in all the circumstances disproportionate, taking into account Mr Frensham's right to a private life under Article 8 of the ECHR.

74. We shall therefore proceed by making our findings of fact and then considering the issues set out above in the light of our findings and the submissions of the parties.

Evidence

75. For the Authority, Ms Anna Couzens, a manager in a department in a sub-division of the Authority's Enforcement and Market Oversight Division ("Enforcement") and Mr David Blunt, the Head of the Conduct Specialists Department within the Supervision Division ("Supervision") of the Authority filed witness statements on which they were cross-examined by Mr Sheppard and answered questions from the Tribunal.

76. Ms Couzens manages the team within Enforcement that deals with straightforward Threshold Conditions cases. She explained that these were cases where it was not normally the case that facts needed to be established, beyond, for instance, a criminal conviction having taken place or a firm failing to comply with its obligations to pay fees or file returns, which could found proceedings for the cancellation of a firm's authorisation or the withdrawal of approval of an individual. Accordingly, the team did not normally undertake investigations or have to look at anything other than routine cases.

77. As will become readily apparent, this was certainly not a routine case as far as the Authority was concerned. As we refer to later, this case was one of a number brought by the Authority against individuals guilty of non-financial misconduct following a lengthy period during which the Authority was deciding on how to deal with cases of that kind.

78. Ms Couzens was therefore not the appropriate person to come to the Tribunal to give evidence on such non-routine matters. Furthermore, for a long time during the period which is relevant to this case, Ms Couzens was on career leave. Neither had she endeavoured to speak to other colleagues who might have more knowledge of

these matters so as to put herself in a position where she could have given evidence based on those conversations.

79. Consequently, Ms Couzens was unable to deal with basic questions in cross examination from Mr Sheppard or from the Tribunal as to the impact of matters which went beyond the fact of the criminal conviction, such as whether the fact of Mr Frensham' difficulties with the CII had led the Authority to consider whether it should exercise its supervisory powers to prevent his firm from trading or why it was thought appropriate not to exercise those powers when Mr Frensham was in prison. Those matters are clearly relevant to our consideration as to the extent to which Mr Frensham poses a risk to consumers, as the Authority contends.

80. It has therefore not been helpful that we have not heard from those who made the relevant supervisory decisions or those who were responsible for the development of the Authority's policy regarding non-financial misconduct not related to the performance of the individual's role in financial services or, at the very least, for Ms Couzens to have ascertained the position.

81. In addition, Ms Couzens' evidence in her witness statement did not give the full picture on one significant issue and the full position only came out during cross examination and a lengthy re-examination during which Ms Clarke was able to tease out evidence that should properly have been dealt with in the Authority's evidence in chief. We regret to say that in this respect the Authority has not shown the degree of candour which the Tribunal should reasonably expect and which the Authority would expect from the firms and individuals which it regulates, which, ironically, the Authority maintains was not provided by Mr Frensham in this case..

82. In her witness statement, Ms Couzens said that there was a legitimate question as to whether action could have been taken sooner by the Authority after Mr Frensham's conviction to prevent him from carrying out regulated activities. She said that such delay "can be most appropriately be attributed to the Authority's thorough assessment of [Mr Frensham's] conduct rather than something which confers or indicates an assessment that [Mr Frensham] was considered a fit and proper person."

83. However, in her oral evidence it emerged that a large part of the delay in bringing regulatory proceedings against Mr Frensham between the Authority being aware of Mr Frensham's conviction in 2016 and a Warning Notice being given to Mr Frensham in May 2020 was that discussions were taking place internally, at a senior level, as to how to proceed with cases of this kind.

84. Ms Couzens said that the Authority's thinking was evolving during this period, taking into account the public's view of such matters. Therefore, although Ms Couzens mentioned in her witness statement that it was always open to the Authority to take into account convictions for non-financial misconduct unrelated to a person's role, she did not mention that the Authority had not previously taken action in relation to such matters and at the time that Mr Frensham's offence was notified to the Authority it had not decided how to deal with such cases.

85. Mr Blunt is clearly a more senior figure within the Authority based within Supervision, but as with Ms Couzens, he did not deal with some of the matters which we have referred to above. He said that the purpose of his witness statement was to explain the Authority's approach and policy towards assessing individuals' fitness and propriety and the questions raised on this reference by Mr Frensham as to whether his conduct was sufficiently relevant to his professional fitness and propriety to justify a prohibition order.

86. However, at no point in his witness statement did Mr Blunt refer to the policy discussions that Ms Couzens referred to in her oral evidence, He referred to the fact that a criminal conviction does not automatically mean that a person is not fit and proper and that the Authority will look at each conviction on a case by case basis and may have regard to criminal convictions for non-financial misconduct but did not explain that the Authority had not taken any such cases until comparatively recently until the point was raised in cross examination. Therefore, when Mr Blunt said in his witness statement that the Authority considers that convictions for non-financial misconduct are indicative of an individual's lack of integrity and impact that individual's reputation, that did not appear to be the settled position at the time the Authority became aware of Mr Frensham's conviction. That only became apparent after a long period of reflection, and it appears that the Authority was reluctant for it to be known that that was the position.

87. We regard it as unsatisfactory that the Authority did not put forward appropriate witnesses and that those witnesses who did attend were not properly prepared. We make no allegation of any lack of honesty or integrity on the part of either Ms Couzens or Mr Blunt.

88. We understand that the proceedings in this Tribunal are largely based on the adversarial tradition and that it is normally a matter of choice on the part of a party as to which witnesses it will choose to call. However, regulatory proceedings of this kind do have important differences from the usual adversarial processes of civil litigation. Tribunal proceedings are designed to be more informal and flexible than traditional court proceedings. It will be sometimes necessary for the Tribunal to perform a more inquisitorial role. That follows from the fact that the Tribunal is part of the regulatory process and in many respects stands in the shoes of the Authority when considering the subject matter of references.

89. In relation to a non-disciplinary reference, the powers of the Tribunal are more limited, and, as envisaged by s133 (6A) (c) FSMA, the Tribunal needs to consider the procedural and other steps taken in connection with the making of the Authority's decision. Consequently, the Tribunal's proceedings in such cases are very similar in character to judicial review proceedings. It is well established in such proceedings that a duty of candour on the part of a public authority is expected, it having been recognised that in such circumstances a public authority is not engaged in ordinary litigation but in a common enterprise with the court to fulfil the public interest in upholding the rule of law. That means that the Authority should assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide.

90. Mr Frensham filed a witness statement and was cross examined by Ms Clarke at length. We found Mr Frensham to be highly articulate and intelligent. He gave clear and comprehensive answers and did not shirk from dealing with the circumstances that led to his conviction. No allegations of dishonesty have been made against Mr Frensham and one particular matter, in our view, indicates that Mr Frensham gave what he believed to be honest answers in his cross-examination.

91. He was asked whether, when attempting to meet the female who he believed was a 15 year old girl, he intended to have sex with her. His answer was that he did not but accepted that he was guilty of an offence and accepted the jury's verdict. He said he pleaded not guilty not because he was being dishonest, but he did not think that the threshold for criminality had been passed. Mr Frensham clearly realises that the question of remorse and rehabilitation is a highly relevant factor in this case. It would have been very easy for him to have said in his evidence, in the light of the fact that he was found guilty of attempting to meet a 15 year old girl with the intention of engaging in illegal sexual activity, to accept the jury's verdict unreservedly and express disgust with himself and remorse and explain how he was now rehabilitated. That would clearly help his case more than his clear evidence that he does not believe that he intended to have sex with a 15 year old girl, notwithstanding the jury's verdict.

92. We deal with that point below as well as other matters where we have not accepted that Mr Frensham had good explanations for his behaviour, in particular in relation to the matters of non-disclosure on which the Authority relies. In that regard, we do not question Mr Frensham's credibility. We have accepted his evidence as to what he did or did not do and the motivations for his behaviour without accepting that what he did was appropriate in the circumstances.

93. In addition to the witness evidence, we had a bundle of correspondence and other documentation. As indicated in this decision, we have relied on a significant amount of this documentation in making our findings, even where it was not specifically drawn to our attention by the parties during the hearing.

94. **Findings of fact**

95. From the evidence that we heard, and the documents we read, we make the following findings of fact.

Background to Mr Frensham's career

96. Mr Frensham has worked in the financial services industry for over 30 years and has been an independent financial adviser and approved person since 2001. In October 2009 Mr Frensham founded the firm now known as Frensham Wealth Limited ("the Firm") which received authorisation from the Authority in 2009 with permission granted under Part 4A of FSMA to advise on pensions, mortgages and investments. Mr Frensham is the sole director and approved person for the Firm. Mr Frensham owns 80% of the share capital of the Firm, the remainder being held by his ex-wife. He says that in the course of his career, he has never had a regulatory complaint made against him or against any product he recommended. He says he has

only had five complaints against him in his whole career about service issues or fees and none of those, to his knowledge, were escalated to the Financial Ombudsman Service or the Authority.

97. The Authority does not dispute that evidence and accordingly we accept it. Indeed, the Authority accepts that there have been no regulatory concerns regarding the manner in which Mr Frensham has conducted his activities as an independent financial adviser ("IFA") through the Firm, either before or after his conviction.

98. As we refer to later, the adverse publicity around Mr Frensham's conviction led to the loss of about 30 clients from a total of 93. As of now, Mr Frensham has around 64 clients from 43 households. He relies on his clients working with him over the long term and recommending him to other people. His business model is to keep its charges low and maintain long-term relationships with his clients. It is clear that he has kept a considerable number of his clients who are willing to continue to use his services notwithstanding his conviction and the adverse publicity that it generated.

99. Mr Frensham accepted that his clients were ordinary members of the public with varying degrees of financial sophistication, vulnerability, economic circumstances, and health issues. He does not deal with children, although some of his clients have children under the age of 18 and some advice he gives may involve financial planning for children.

100. As the sole approved person at the Firm, Mr Frensham is responsible for compliance. He accepted that he had overall responsibility for knowledge of the Handbook requirements, although from time to time he obtained outside assistance. He said that he had knowledge in broad terms of the provisions of FIT and some knowledge of the requirements of SUP, but as he said that knowledge was not "encyclopaedic". He was also aware of the requirement to be open and cooperative with the Authority and the broad requirements of the fitness and properness test.

Mr Frensham's conviction and sentencing

101. In March 2016 Mr Frensham sought to make contact with a young female through a website. That website required its users to be at least 18 years old, and the female represented to Mr Frensham that she was 18 years old. Following a meeting between them, he arranged a hotel room for her to use but did not go to the hotel himself. The female's father made a complaint to the police which resulted in Mr Frensham being arrested and interviewed following which he was released on conditional bail. It later transpired that the female concerned was 16 years old and Mr Frensham was not charged with any criminal offence in relation to his encounter with the female.

102. However, at the time of the later incident which led to his conviction Mr Frensham was still under investigation for the matter referred to above and his bail conditions remained in place. Those conditions were (i) not to contact the female referred to above by any means (ii) not to go to her hometown and (iii) not to have

unsupervised contact with any person under 18 years without parental consent given in the knowledge of the investigation.

103. Mr Frensham fully understood these bail conditions and in particular that he should not commit an offence while he was on bail. He accepted that the purpose of the conditions was to reduce the risk of committing a sexual offence similar to the one for which he was being investigated whilst he was still under investigation.

104. As set out by the Judge in her sentencing remarks following Mr Frensham's conviction, in September 2016 Mr Frensham set up a profile on a free website the purpose of which was to enable men to meet and, on occasion, form intimate relationships with young women over the age of 18. Mr Frensham contacted a number of females in whom he was interested but only one responded. Her profile said that she was an 18 year old girl, called "Holly". In almost her first message to Mr Frensham she told him that she was, in fact only 15.

105. The Judge went on to say:

> "Between the 8 and 14 September you communicated with her on a number of occasions. Many of your messages were sexual in tone. You wanted a photo of her in her school uniform, and you wanted to watch her undress in a changing room. You offered to buy her clothes, and you offered to buy her a new phone. You told her that she could tell her mother that she had got the new clothes really cheaply in a sale, encouraging her to lie to her mother.
>
> On the 13th September, at about 11 pm, you engaged in a graphic series of messages. You described, in terms, that you would perform oral sex on H, and that you would then penetrate her vagina with your penis, withdrawing before ejaculation. Your evidence was that you had been drinking before sending these messages, and that you were simultaneously messaging another person over the age of 18 in a similarly graphic manner. Whether or not that was, in fact, the case, and whilst alcohol may have been a dis-inhibitor, it by no means excuses what you were doing. You knew that you were sending sexually graphic messages to a person who you believed to be a 15 year old female. There is no excuse and there is no justification for that.
>
> The next morning you messaged the person you thought was H again, saying "I shouldn't have suggested last night that we had sex today. You're only 15. It would be a crime. Do you want to meet anyway?" H agreed to meet you. You travelled two hours to where she lived. She was, in fact, an adult woman, and you had been tricked into the meeting. The police were called and you were arrested. You have been convicted of travelling to meet H, intending to have sexual activity with her."

106. Although Mr Frensham did not actually meet a person under the age of 18, it is clear that he intended to do so and if he had had regard to the bail conditions, he would not have committed the offence for which he was subsequently convicted. This was sufficient for Mr Frensham to be remanded in custody after his arrest rather than released again on bail. In her sentencing remarks, the Judge confirmed that the commission of the offence was a breach of his bail. That was considered by the Judge

to balance out the mitigation factor of Mr Frensham having had no previous convictions.

107. Mr Frensham said in his evidence to the Tribunal that he knew that he should not commit an offence whilst released on bail but appeared to justify seeking to meet "Holly" in breach of the bail conditions because he thought that he had not committed a criminal offence in relation to the incident that resulted in the imposition of the bail conditions. He said, however that he regretted what he did and was ashamed of it at the time.

108. Mr Frensham did not inform the Authority of either of his arrests or his subsequent remand in custody. He said that with the benefit of hindsight he should have done so, bearing in mind the provisions of FIT 2.1.3(3)G which indicate that whether a person is or has been the subject of any proceedings or potential proceedings of a criminal nature or of any investigation which might lead to those proceedings is a matter of interest to the Authority. He was also aware of the provisions of Principle 11 and SUP 10A.14.17R referred to at [31] and [32] above.

109. Mr Frensham confirmed in his evidence that at the time of his first arrest and the imposition of the bail conditions, he had considered the relevant requirements and the need to be candid with the Authority. However, he concluded at the time that as this was a personal matter relating to his personal conduct, did not interfere with his ability to carry on business and he did not believe he had committed a criminal offence, he did not believe that he had to tell the Authority. He accepted that now it had been put to him, that it was an error not to have reported the matter and he regretted it. He said that he was not meaning to avoid the rules, but his assessment at the time was that it was not an issue that the rules covered. He accepted that he could have taken advice on the matter but believed that he had come to the right conclusion. He could not recall whether he had specifically looked at the relevant provisions of FIT at the time and it had only become apparent to him that it was an issue when it was raised before his meeting with the Authority's Regulatory Decision Committee ("RDC").

110. As regards Mr Frensham's second arrest and his remand in custody, Mr Frensham confirmed that he knew that those matters were relevant to the question of his fitness and propriety. He accepted that he knew that he had an obligation to tell the Authority of those matters. He also knew that once he was in custody the Firm had nobody to fulfil any regulatory role because he was the sole approved person, and he could not continue to provide advice to clients or run the business himself from prison.

111. As we mention below, the Authority became aware of Mr Frensham's arrest and remand through contact made with the Authority by a member of the public.

112. Mr Frensham's position is that it was not practicable for him to have informed the Authority of his situation before November 2016 and that matters had been stabilised by the time the Authority had been informed of the position.

113. Mr Frensham's evidence was that following his remand he was unable to communicate by telephone with people outside of the prison for five weeks. He explained the big upheaval in his life caused by his remand in prison. His first priority was to secure his own safety, bearing in mind that he said he was initially put in a cell with a psychopath. He had difficulty in adapting to prison life, surrounded by people who were not seeking to assist him. His access to a telephone was restricted because he was under suspicion of committing a sexual offence. He was allocated a PIN which would enable him to use a telephone, but he said it did not work and the problem was not solved for five weeks.

114. In that initial period, the only communication he was able to have was with his wife who visited him in prison. Unsurprisingly, Mr Frensham's wife was traumatised by Mr Frensham's behaviour and the situation he found himself in. He said that the circumstances of their early contact after the remand did not lend themselves to the discussion of business matters as Mr Frensham's wife was not in the mood to be helpful to him. It was necessary for Mr Frensham to repair that damage before he could move on to engage his wife on business matters. For that reason, it was not at the top of his agenda to notify the Authority. He accepts that with the benefit of hindsight he should have made efforts to contact the Authority directly, but he said he did not know the physical address as he had always communicated with the Authority online.

115. Once his relationship with his wife had improved, he was able to engage her in assisting in running the business. His wife was not told to contact clients generally to inform them of the position, although a small number were informed. Mr Frensham explained that few of his clients required matters to be dealt with in short order as most had long-term arrangements so that it was only necessary to inform those who required urgent assistance.

116. Arrangements for a locum were put in place. However, that locum only played a limited role in the business and only saw about 4 or 5 clients during Mr Frensham's period on remand. In practice, once he was in a better position to communicate with the outside world, Mr Frensham continued to act as the sole adviser of the Firm from prison with the locum delivering the advice. He was able to write out emails which a co-operative prison officer would arrange to be sent to Mr Frensham's wife or the locum for delivery to the client.

117. Mr Frensham was asked why at this time, once the position with his wife had improved and he was able to communicate more easily with people outside the prison, he had not informed the Authority of the position. Mr Frensham explained that during this period on remand, his legal team were trying to get him released. He said at this time that his wife had become aware of the need to communicate with the Authority and, as it seems, it did not happen because he perhaps failed to impress upon her the importance of doing that.

118. The Authority became aware of Mr Frensham's arrest and remand through contacts with members of the public. On 15 September 2016 a member of the group which confronted Mr Frensham when he sought to meet "Holly" informed the

Authority's Contact Centre of Mr Frensham's arrest and subsequent charge and raised concerns as to whether Mr Frensham continued to be a fit and proper person to be a director of a regulated firm. It was not however, until 14 November 2016 that Mr Uddin of the Authority wrote to Mr Frensham in prison informing him that the Authority was aware of the position and that as Mr Frensham was the sole director of the Firm the Authority no longer considered that the Firm was able to meet the Threshold Conditions. The letter then asked Mr Frensham for an explanation as to what arrangements had been made to provide an ongoing service to the Firm's customers.

119. Mr Frensham received that letter in prison on 30 November 2016. He replied to Mr Uddin on 5 December 2016. Following receipt of that letter, it became easier for Mr Frensham to open a channel of communication between himself and the Authority as he had a direct line for Mr Uddin and could also arrange for his wife to communicate with him via email in respect of the matter.

120. In his reply to Mr Uddin, Mr Frensham explained that he was in touch daily with his wife and administrator by phone, email, and post. He explained that his wife was handling all incoming correspondence and general administrative matters and she was able to keep him abreast of all the relevant matters in respect of which he could provide direction and instructions. As regards ongoing advice, he explained that there was a locum agreement in place and that the locum was providing an appropriately qualified and authorised adviser to meet with any and all clients who require a review and they can undertake any business arising from such a review.

121. Mr Frensham expressed the hope that these steps illustrated that he was doing everything he could to provide an ongoing service to clients and to be compliant with the Authority's requirements and asked the Authority to contact him if there were further steps that he should take. He explained that he had asked the prison to add Mr Uddin's phone number to the list of the approved numbers that he could call so that they could then discuss the situation directly.

122. On 9 December 2016 Mr Frensham's wife called Mr Uddin to check whether he had received the letter from her husband, which Mr Uddin confirmed that he had. Mr Uddin did not respond until 10 February 2017. In an email of that date to Mr Frensham's wife Mr Uddin said that the Authority had considered making a recommendation for formal action against the Firm but having reviewed the actions taken by the Firm in appointing a locum the Authority had decided to allow the Firm to maintain authorisation until the matter had been resolved by the courts.

123. Mr Uddin reminded Mr Frensham of the requirements of Principle 11 and the importance of ensuring that regulated firms maintain clear communication with the Authority disclosing appropriately anything relating to the Firm of which the regulator would reasonably expect notice. It is therefore clear that the Authority were satisfied with the arrangements for the continuation of the Firm's business because they chose not to exercise any of their supervisory powers to restrict the way the Firm operated in any way. However, it was clear from Mr Frensham's letter that he did not explain the difficulties that he had encountered when he was first remanded or

provide any explanation as to why he had not informed the Authority of the position before.

124. We accept that there would undoubtedly have been difficulties in Mr Frensham informing the Authority of the position immediately after his remand. We accept it would have taken a period of time for him to come to terms with being in prison and coping with the many challenges that he would have to face. We also understand the difficulties he was likely to be experiencing with his wife at the outset.

125. However, it was clear that the position did improve by the latest five weeks after his remand when he was better able to communicate by telephone. There must have been an opportunity at that point for Mr Frensham to have informed his wife of the importance of notifying the Authority of the position and following up with her whether that had happened. Alternatively, it appears that he was in frequent contact with his legal advisers, who would have been in a position to inform the Authority of the position if so instructed. Neither do we accept that it would not have been possible for Mr Frensham to have sent a letter to the Authority informing them of the position before he was able to communicate more freely by telephone. Even if he did not know the exact address, he would have known that the Authority was based in Canary Wharf at the time and therefore a letter with an incomplete address would most likely have been received by the Authority.

126. In our view, the evidence points to the conclusion that Mr Frensham chose not to inform the Authority until he was able to give them a positive account as to the way the business was being run. That was achieved, it appears to the satisfaction of the Authority, through the arrangements Mr Frensham described in his letter to Mr Uddin.

127. The offence with which Mr Frensham was charged was attempting to meet a child following sexual grooming contrary to s 1(1) of the Criminal Attempts Act 1981. The indictment states that the particulars of the offence were travelling with the intention of meeting "Holly" not reasonably believing that "Holly" was 16 years or older, intending to do anything to, or in respect of "Holly" during or after the meeting, which, if done, would amount to the commission by him of a relevant offence.

128. It was therefore clear that in order for Mr Frensham to be convicted of this offence the jury would have to have been satisfied that Mr Frensham travelled with the intention of meeting a child and with the intention of having sexual contact with the child either at that meeting or subsequently.

129. As the Judge's sentencing remarks quoted at [105] above confirmed, the jury were so satisfied, and Mr Frensham was convicted on 10 March 2017 and sentenced on 27 March 2017.

130. Mr Frensham pleaded not guilty at his trial. He explained in his cross examination with considerable frankness his state of mind at the time that he decided to pursue a meeting with "Holly" and his reasons for doing so. Mr Frensham said that he knew that it was wrong at the time, but he was in a state of turmoil in his private life. He does not seek to excuse his behaviour, but he observed that the initial contact

was made late at night when he was drunk and sent the graphic messages referred to in the Judge's sentencing remarks reproduced at [105] above. The following day he recognised that he should not have had the discussion he had the night before but nevertheless still intended to meet "Holly".

131. Mr Frensham's explanation as to why he did that was as follows. He considered that if he met "Holly" it would not result in a crime being committed because the photographs he saw were of a girl who looked more than 15. He said that he had "a warped idea" that if she was 15 and was soon to be 16, he did not consider that sexual relations with her would be a crime because she was over 15. He said that his thinking was that his intentions did not extend to having sex with a 15 year old girl and that is why he pleaded not guilty. He said he thought it was fundamentally wrong to meet the girl and was thinking of pulling out, but she had said that she had gone out of her way to meet, and he felt an obligation not to let her down resulting in him taking a terrible decision at the time. His defence was that he did not intend to have sex but because his evidence in chief was limited due to the way his barrister conducted his case, he did not fully expand on that at the trial.

132. Nevertheless, he says that he fully accepts that he was found guilty and that his behaviour warranted a conviction. Mr Frensham did not directly answer Ms Clarke's question as to whether he intended to have sex with "Holly". He said that he accepted that his behaviour was thoroughly wrong, accepted that it was open to the jury to find him guilty but at the time he pleaded not guilty because he did not see his own guilt, in the way that he does now. However, he went on to say that it was not his intention when going to the initial meeting to have sex with "Holly". He says he does not know now what his intentions might have been had there been a subsequent meeting and he looks back with abhorrence at his behaviour at that time. He would not accept that if he met "Holly" he intended to engage in sexual activity with her but accepted that he was guilty of the offence and accepts the jury's verdict but that is as far as he will go. When he pleaded not guilty, it was not dishonest to do so because he did not believe at the time that the threshold of criminality had passed, due to his warped sense of mind at the time.

133. It is difficult for us to rationalise what Mr Frensham is saying in his evidence as set out above. Mr Sheppard submitted that Mr Frensham had repeatedly expressed regret and remorse for his actions and Mr Frensham had given honest evidence about his intentions at the time of the meeting. He had accepted the jury verdict but prior to that time he did not think that he had the requisite intent to be guilty but now accepts that he intended to engage in sexual activity, but not at the initial meeting. It would therefore be wrong to place weight on the fact that he pleaded not guilty at his trial.

134. Ms Clarke submits that we cannot be satisfied as to the genuineness of Mr Frensham's expressions of remorse. Accepting the verdict of the jury is not the same as accepting that he was guilty of the offence. Ms Clarke submits that Mr Frensham still refuses to accept that he actually committed the offence.

135. In our view the only reasonable inference to draw from the evidence that we have seen is that Mr Frensham did intend to have sexual activity with "Holly" at some

point, even if not at the first meeting and whether or not she had attained the age of 16 at the time. We cannot see that there could be any other reason why a man of his age, 51 at the time, would seek to meet a young girl when the meeting resulted from arrangements made through a website which was designed to enable people to enter into intimate relationships. The meeting had also been preceded by promises by Mr Frensham to make gifts to the girl, which clearly must be regarded as an inducement to engage in sexual activity and other communications of a particularly graphic sexual nature. We do not find Mr Frensham's explanation that he only went through with a meeting because he did not want to let the girl down at all convincing or credible in the circumstances.

136. Mr Frensham appears to have convinced himself that that was not his intention at the time, and we find it difficult to understand why he has come to that conclusion, although it appears to be a belief that he genuinely holds. As the Judge said in her sentencing remarks, the communications that he had with "Holly" indicate that penetrative sexual activity was intended.

137. Mr Frensham says that he now completely accepts that any communications with a 15 year old girl from someone such as himself was totally inappropriate whether it led to a criminal act or not. He acknowledged the economic and other damage to his wife (now his ex-wife), expressed regret regarding the impact his behaviour had on his clients and the Authority and what it thinks of him. He now accepts that he should have expressed more remorse at the time and would have done so had he had a greater chance of giving evidence in chief. He now feels remorse every day and the matter remains as a stain against his life.

138. However, the fact that Mr Frensham cannot at this stage accept that he intended to have sexual relations with a 15 year old girl is highly relevant to our assessment as to whether he genuinely shows remorse at having committed a criminal offence as opposed to remorse at his actions that led up to the meeting and the subsequent effect that his behaviour has had on him and the others who have been affected by it. We note in that regard the Judge in her sentencing remarks said that Mr Frensham had shown limited remorse, which attached to the graphic content of the messages rather than to the decision to meet a 15 year old girl.

139. The Judge considered that the offence crossed the custody threshold. However, she took into account that Mr Frensham had acknowledged that there was something wrong in the way that he was approaching life and his sexual attitudes, and the pre-sentence report stated that he posed a low risk of committing further offences. Consequently, Mr Frensham received a suspended sentence of imprisonment for 22 months with a requirement that he take part in a rehabilitation requirement, which was 60 days of one-to-one work to address his sexual offending and attitudes. The terms of the SHPO that was imposed, and which remains in force until further order, include restrictions on how Mr Frensham can access the Internet and store digital images. The order also prevents him in general from having any unsupervised contact with any child under the age of 16 without the written consent of the child's parent or guardian who has knowledge of his conviction and the express written approval of Social Services for the area.

Events following the conviction

140. Mr Frensham's conviction attracted considerable publicity in the national and specialist financial press which referred to his status as a financial adviser.

141. As a result of the publicity and what Mr Frensham says was the effect that the conviction had on his life, he changed both his name (from his previous name of Jon Hunt) and that of the Firm and moved himself and the business to a different area. In so doing, Mr Frensham sought to put distance between his name and the conviction. He was fully entitled to take that course and we make no criticism of it.

142. As regards his clients, as we have found, approximately 30% of his clients left after the conviction. Mr Frensham did not proactively inform clients of the fact of the conviction but if it was raised with him, he would be fully open about it. The same is true of prospective new clients. Some were aware of the conviction at the time they agreed to use Mr Frensham's services and others were not.

143. On 13 March 2017 Mr Frensham's wife wrote to Mr Uddin informing him of Mr Frensham's conviction and the fact that he would be sentenced on 27 March 2017.

144. On the day of Mr Frensham's sentencing hearing, a member of staff in Supervision sent an email to the manager of Enforcement's Threshold Conditions Team informing him of the fact that Mr Frensham had been convicted, providing a link to the relevant press coverage. The author of the message said that he believed that the conviction would impact on fitness and properness, thereby implicitly suggesting that this was something that the Threshold Conditions Team should look at.

145. On 1 April 2017 Mr Frensham wrote to Mr Uddin explaining the outcome of his trial and the fact that he was now out of prison following the imposition of the suspended sentence. Mr Frensham expressed his desire to continue his career as a financial adviser, confirming that over the past few months with the help of his wife he had continued to offer an ongoing service to his clients while on remand awaiting trial with the services of a locum where face-to-face meetings were required.

146. Mr Frensham stated in his letter that he was aware that the Authority must consider whether or not he posed any risk if he remained authorised and then set out his reasons why he considered that his continuing authorisation did not pose a risk to any members of the public.

147. Mr Frensham did not receive a reply to that letter and the next time he heard from the Authority on the question of whether steps were to be taken to remove his authorisation was when Enforcement wrote to him on 11 January 2019 to inform him of Enforcement's recommendation to the RDC to make a prohibition order.

148. In the meantime, the CII took action in relation to Mr Frensham's status as a holder of a Statement of Professional Standing ("SPS"). Although the Authority failed to deal with the relevance of a SPS in its evidence and the consequences if an individual approved person who wishes to provide financial advice does not possess

one, it appears that the position is as follows. The Authority's Training and Competence Sourcebook (TC) requires individuals providing personal recommendations on retail investment products to retail clients to hold appropriate qualifications and a valid SPS. That requirement would therefore apply to Mr Frensham who it appears held a valid SPS at the time of his conviction, issued by the CII which is an accredited body recognised by the Authority for the purposes of TC. As explained by the CII on its website, the SPS confirms that an adviser adheres to ethical standards, holds appropriate qualifications for their role and has undertaken appropriate professional development during the year. The SPS is renewable on an annual basis.

149. On 18 April 2017 the CII wrote to Mr Frensham advising him that potential breaches of the CII's Code of Ethics had been brought to their attention and they were investigating the matter. The letter set out the allegations against him, namely that his criminal conviction is evidence that he was in breach of the Code as a result of (i) his failure to comply with all relevant laws and regulations and (ii) failing to act with the highest ethical standards and integrity, and in particular in breach of a particular provision of the Code bringing the financial services industry or the CII into disrepute through his actions outside work. In addition, it was alleged that Mr Frensham had failed to report these breaches of the Code to the CII within a reasonable time in breach of the requirement to deal with the CII in an open, clear, and cooperative manner and in breach of the requirement to report any breaches of the Code to the CII.

150. On 19 April 2017 Mr Frensham responded to that letter. He explained in detail the background to his offence and conviction. He accepted that he was in breach of the Code by virtue of his conviction and made a plea for clemency. As regards the allegation of failure to report, he apologised for his failure to report the breach to the CII which he said was not done with any intent not to be open, clear, and cooperative with the CII but was simply down to failing to recognise that he had that responsibility at this juncture. He informed CII that he had been in contact with the Authority and was waiting for their decision as to whether he could continue as an approved person.

151. As a result of the continuing investigation, Mr Frensham's SPS was not renewed when it expired in September 2017.

152. On 9 October 2017 Mr Frensham wrote to the CII at their request giving further details in relation to the matters under investigation. Mr Frensham sought to explain why he had not previously reported breaches of the Code. In relation to the requirement to report breaches of "relevant" laws and regulations he said that he did not regard it as a matter relating to his profession. Likewise, as regards the allegation of bringing the financial services industry into disrepute, he had not linked his personal failures to that of the reputation of the profession as a whole. He apologised for failing to connect how his actions could reflect upon the profession. As regards the question as to whether he should have reported the matter to the CII when he was charged, his position was that if he had done so but was found not guilty, then no offence would have been committed and the Code would not have been breached

either through lack of compliance with the law or bringing the industry into disrepute. Mr Frensham confirmed that to be his position in his cross examination and he also said that whilst he was in prison, the question of whether he needed to talk to the CII was never paramount in his thinking bearing in mind that he was pleading not guilty to the offence.

153. Mr Frensham was aware at this time that having a SPS was a fundamental requirement. In his letter of 9 October 2017, he referred to the fact that his SPS was currently refused pending the outcome of the investigation and "without this I will lose my ability to practice by the end of October, which will obviously be extremely damaging to the survival prospects of my business." He therefore asked CII to attend to the outstanding matters in the near future.

154. When cross-examined on that point, Mr Frensham said that despite the SPS being removed, it was his understanding that it was up to the Authority to decide what to do in those circumstances and he expected the Authority to come back to him and take action at that point.

155. Mr Frensham was referred to the Frequently Asked Questions ("FAQs") which are on the CII's website regarding the SPS. FAQ 21 and 22 deal specifically with the position where the CII refuses to issue an SPS or withdraws an existing SPS. The answers state that if the person concerned cannot obtain an SPS he should notify the Authority and the reader was warned that the CII was required to notify the Authority if the CII refused to issue an individual with an SPS. As regards a withdrawal, in that situation the CII was required to notify the Authority who would, in conjunction with the relevant employer, decide what action needs to be taken. The answer to FAQ 23 confirmed that the Authority retained all control of regulated individuals and is the only body that can grant or invoke a person's authorisation to trade and the SPS provided evidence that the holder was adhering to the professional standards required of him.

156. When asked by Ms Clarke why he carried on giving investment advice after the SPS had expired and when he knew it was not going to be renewed, Mr Frensham's response was that the SPS had been refused pending the outcome of a disciplinary investigation. The Authority had not come back with any suggestion that the Firm's permission was going to be revoked and therefore he took the view that he still had permission to operate as a retail investment adviser. Mr Frensham said that it would not have been in the interests of his clients simply to stop working at that point, bearing in mind that it was up to the Authority to take the decision as to whether he should be able to continue to trade and he had had no contact from the Authority at that point.

157. Mr Frensham did, however, accept that he should have kept the Authority informed as to the position with his SPS. He accepted that he should have told them about the lapse of the SPS but the ongoing investigation by the CII added nothing to the position as he was still waiting for the Authority to come back. He did not recall reading the relevant provisions of FIT at that time which make it clear that it is the

duty of a regulated firm to inform the Authority of any ongoing investigations, which would include the investigation being carried out by the CII.

158. It appeared, however that the CII did inform the Authority of the fact that it had not renewed Mr Frensham's SPS. On 10 November 2017 Mr Uddin emailed Mr Frensham informing him that the Authority's records indicate that he did not currently hold a valid SPS. He was asked to ensure that it was renewed with immediate effect. He was also asked for information relating to any disclosures that he had made to the CII regarding his conviction and any action taken by the CII in the light of the conviction disclosures made.

159. On 22 November 2017 Mr Frensham responded giving full details of his correspondence with the CII. He confirmed that he had no current SPS and that he was awaiting the results of the CII's investigation. Mr Uddin replied that the Authority would consider the information provided and would be in contact in due course.

160. In fact, the Authority took no action in relation to the absence of the SPS. We asked Ms Couzens what the Authority's policy was when it came across a regulated firm that was continuing to operate without its sole approved person having an SPS, but she was unable to answer that question. From the Tribunal's own specialist knowledge, it appears that it would have been open to the Authority to place restrictions on the ability of the firm to conduct business using its supervisory powers. As we consider later, Mr Frensham can clearly be criticised for failing to inform the Authority as to the CII's investigation and the CII's decision not to renew his SPS, but we do not think that it would be fair to criticise him for continuing to operate his business and advise his clients in the absence of any regulatory action being taken by the Authority. As the FAQs clearly show, what should happen as regards the continuation of business when an SPS is withdrawn or refused is entirely a matter for the Authority. As we have said, we have no information from the Authority in this regard and it is clear that the Authority did not decide to take any action before it instituted enforcement proceedings.

161. It was not until 8 April 2020 that Mr Frensham was informed that the CII had decided to expel him from the CII on the basis that his conviction is such that it was wholly incompatible with membership of a professional body. The letter informing Mr Frensham of the decision stated that he had a right of appeal against the determination and that the effect of the notification would be that the sanction will be reversed, and the matter referred to a Disciplinary Panel as if the Case Examiner had made no determination on the matter.

162. Mr Frensham did not inform the Authority of the CII's decision. The Authority only found out about it when it asked the CII for an update on the position in June 2020. In his cross-examination Mr Frensham said that because he had decided to appeal against the decision the effect of the CIA's rules was that no determination had been made so any notification to the Authority would not be notification of a decision taken by the CII. He said it would have been misleading to notify the Authority that he had been expelled when no decision to that effect had been made as a result of his

decision to appeal. When challenged as to whether the Authority could reasonably expect to be informed of the decision even though it was being appealed, Mr Frensham said that there was no intent to mislead. He said that the Authority knew about the investigation, and it did not occur to him that there was any need to notify the Authority of something which had no material effect on his business.

163. Mr Frensham has now in fact withdrawn his appeal to the CII because he was concerned that if he lost his case, he would be at risk of incurring further costs.

The regulatory proceedings

164. On 11 January 2019 the Authority wrote to Mr Frensham informing him that the serious nature of the offence for which he had been convicted and the fact that he had carried on regulated activities without an appropriate SPS led the Authority to consider that he posed a risk to consumers and confidence in the financial system. The Authority also noted that Mr Frensham was currently under investigation by the CII. The letter went on to say therefore that Enforcement was preparing to recommend to the RDC that the Authority should make a prohibition order against Mr Frensham. Mr Frensham was invited to comment on the matters in the letter.

165. Mr Frensham's solicitors responded to Enforcement's letter on 11 February 2019. The solicitors contended that Mr Frensham's offence had no relevance to the role which he currently practices. As regards the SPS, the solicitors set out the chronology of events and stated that it would be unfair to punish Mr Frensham for continuing to practice when at no time was he informed that his authorisation by the Authority was in question.

166. It was clear that this matter was at this stage being treated as a routine Threshold Conditions case, based primarily on the mere fact of Mr Frensham's conviction, as a result of which the Authority had not felt it necessary to carry out any formal investigation.

167. However, it appears to be recognised that this was not a routine case because it was well over a year before regulatory proceedings were instituted with the issue of a Warning Notice on 5 May 2020. We now know the reason for that delay; as we have referred to above, Ms Couzens told us that there were policy discussions going on at a senior level within the Authority as to the approach to be taken as regards cases of this kind.

168. The Warning Notice shows that at that stage the Authority's case was based solely on the fact of the conviction. The allegations regarding continuing to provide advice without an SPS were not pursued.

169. However, in responding to Mr Frensham's written representations to the RDC, Enforcement then sought to rely on the fact that Mr Frensham had committed a breach of his bail conditions, his failure to notify the Authority of the circumstances related to his arrest and imprisonment and his failure to notify the Authority of the non-renewal of his SPS. Mr Frensham's solicitors objected to those matters being raised at this late stage, but they were considered by the RDC when they heard Mr Frensham's

oral representations. However, the Decision Notice did not seek to rely on those additional matters, although they were mentioned in the Annex to the Decision Notice which dealt with Mr Frensham's representations and the Authority's response to them.

170. It is well established that the Authority is not obliged to run in the Tribunal exactly the same case as it ran before the RDC. It may seek to rely on additional matters as long as they fall within the scope of the subject matter of the reference, which in this case is the question as to whether it is appropriate to issue a prohibition order against Mr Frensham and withdraw his approvals. That follows from the fact that the proceedings start afresh in the Tribunal and are not an appeal against the Decision Notice. The additional matters on which the Authority now relies regarding the circumstances of Mr Frensham's arrest and imprisonment and his communications with the Authority are squarely within the scope of this reference because they are pleaded in the Authority's Statement of Case and Mr Frensham does not argue to the contrary.

171. However, we do not regard it is entirely satisfactory that these matters did not form part of the regulatory proceedings bearing in mind that all the relevant facts were known to the Authority at the time of those proceedings. It is clearly desirable where it is possible to do so, the same case should be pleaded by the Authority before the Tribunal as it ran before the RDC.

172. It may be the case that the situation has arisen because of the decision of the Authority to proceed with this matter as a routine Threshold Conditions case without a formal investigation. It should have been apparent to the Authority that once it was clear that there were other matters beyond the mere fact of the conviction on which the Authority wished to rely and which involved some investigation of the facts that the matter should have been dealt with as a mainstream Enforcement case.

173. We therefore think that Mr Frensham has a point when he complains about the fairness of the regulatory proceedings in this case, not only because of the long delays in proceeding with the matter without explanation but also because the Authority sought to rely on additional matters once the regulatory proceedings commenced without amending the Warning Notice. However, any unfairness in that regard is not a matter on which we should place much reliance bearing in mind the fact that, as we have said, the proceedings in the Tribunal proceed by way of a de novo hearing.

Discussion

174. Our overall conclusion is that whilst we are not satisfied that a decision to make a prohibition order against Mr Frensham based solely on the fact of his conviction could have been reasonably arrived at by the Authority, we are satisfied that when the offence is considered in the light of (i) the circumstances in which it came to be committed and (ii) Mr Frensham's failure to be open and cooperative with the Authority in a number of different respects following his initial arrest, the decision is one that was reasonably open to the Authority.

175. We now set out our reasons for that conclusion by reference to the issues we identified at [73] above.

The relevance of the conviction

176. Mr Sheppard submitted that the Authority had failed to demonstrate the qualitative relevance of Mr Frensham's extra professional conduct to his practice as an IFA. He submitted:

> (1) The facts of the offence were not related to Mr Frensham's role in any direct or indirect way. It was not a financial offence. It did not involve financial dishonesty. It did not require the prosecution to prove dishonesty of any form. It was not committed at work. It was not committed using work equipment or by involving firm staff in any way. It did not involve any clients. In the context of this case, it is not an offence which Mr Frensham had better opportunity to commit by virtue of his role as a financial adviser. The person with whom Mr Frensham communicated in commission of the offence was not someone he had met via his work or in any work-related capacity. The offence was not committed on "work premises" or during work hours. Mr Frensham's specialism in pensions, investments, mortgages, and insurance products makes it inherently unlikely that he will work with those under 16.
>
> (2) The guidance in FIT and EG indicates that peril which the regulatory regime is designed to prevent primarily relates to issues of dishonesty, misleading clients and failing to provide important information. By contrast, s.15 of the Sexual Offences Act 2001 seeks to regulate against a very different type of peril, namely the protection of those underage from abuse facilitated via online communications. Consequently, the qualitative relevance of the offence to the approved person's role is unclear. There is considerable distance between Mr Frensham's conduct and his professional work.
>
> (3) The Authority's attempt to bridge that distance is unconvincing. It relies on an "abuse of trust" parallel on the basis that the offence involved an abuse of trust and being a financial adviser requires client trust. This attempted parallel is misconceived. The Authority has failed to engage analytically with the very different contexts at stake. In particular:
>
> > (i)The type of trust placed in a financial advisor by a client is very different from the type of trust referred to in the context of the offence. For example, a person under the age of consent with access to the internet has a very different profile of vulnerability from a financial advisor's adult client.
> >
> > (ii)The Authority's attempt to draw a simple link between them highlights the differences between the types of trust and possible abuse involved. It is an extremely speculative argument.
> >
> > (iii) Mr Frensham has never abused the trust of his clients. The Authority has not argued otherwise and there is no evidence to suggest that he has.

(4) Beyond the abuse of trust parallel, the Authority has provided little material to forge the necessary link. It relies on a general statement that Mr Frensham shows a willingness to disregard ethical and legal standards that poses an unacceptable risk to consumers and the integrity of the financial services industry more generally without explanation of that risk or how it links the offence and his role. The Authority also relies on the need to maintain public confidence but only on the basis of a bare assertion that the public are entitled to expect that approved persons are individuals of the utmost integrity and reputation. Insofar as the Authority appears to rely on public concerns as a means of demonstrating the link, that cannot compensate for the absence of an independent, analytical justification of relevance.

177. In essence, Mr Sheppard's submissions are based on his analysis that there is a clear parallel between Mr Frensham's situation and that in *Beckwith* where the SDT failed to demonstrate the qualitative relevance of Mr Beckwith's behaviour to his role as a solicitor and the reputation of the profession.

178. As far as Mr Sheppard's submissions on the factual plane are concerned, in our view they merely support the conclusion that the facts of the offence were not related to Mr Frensham's role in a direct way, for example, because they did not involve an act of dishonesty and did not take place in a work environment. However, the fact that the specific examples in EG and FIT are directed primarily to issues of dishonesty and dealings with clients does not in our view dilute the general principle that the Authority is fully entitled to take into account non-financial misconduct which occurs outside the work setting. The lack of examples in EG and FIT in that regard is simply a reflection of the fact that the Authority has chosen not to bring cases based on non-financial misconduct occurring outside the workplace until recently.

179. We do, however, agree with Mr Sheppard that the basis on which the Authority seeks to link Mr Frensham's lack of personal integrity to his professional role on the basis of the nature of the offence alone is speculative and unconvincing.

180. In her evidence, Ms Couzens stated that irrespective of whether Mr Frensham was likely to commit the same offence in his professional dealings, his willingness to disregard ethical and legal standards poses "an unacceptable risk to consumers and the integrity of the financial services industry more generally." She went on to say that Mr Frensham's serious disregard for legal and ethical standards of behaviour is incompatible with an individual holding senior management positions within a regulated firm, particularly where the individual is, like Mr Frensham, unsupervised.

181. In his evidence, Mr Blunt stated that were an individual's lack of integrity and reputation to manifest itself in the (attempted) exploitation of others, this poses a particularly serious risk to financial services consumers because it means that there is an increased risk that an individual may seek to exploit the trust and power he or she has, relative to their customers. Mr Blunt says that this is so, even where (as here) there is no direct connection between the criminal offence committed, and the individual's role within the financial services industry. Mr Blunt goes on to say that

because financial advisers advise customers on matters which are fundamental to their lives they are in a position of power and trust regarding their customers. He says that the Authority and financial services consumers are entitled to expect that those who advise on such important matters are individuals of integrity and reputation who will comply with ethical and legal standards. In particular, that they will not abuse positions of trust that they hold, nor exploit their relative power over others.

182. However, those statements appear to be bare assertions and no evidence has been offered to support them. They seek to establish a link between Mr Frensham's behaviour and the consumer protection objective, but such evidence as we do have in relation to Mr Frensham's activities in the four years since his conviction suggests that there has been no cause for concern that Mr Frensham has acted without integrity in relation to any dealings with his clients. The Authority itself appears not to have had any concerns in practice because, as we have found, it chose not to exercise any of its supervisory powers to prevent Mr Frensham from carrying on his business whilst it considered whether or not to bring enforcement action.

183. Therefore, insofar as the Authority seeks to establish a link between the offence and the consumer protection objective based on Mr Frensham's serious failure to act with personal integrity, we do not find that to be made out as a matter of fact in this case. The assertions referred to above seem to be based only on the awfulness of the offence itself, which we readily accept to be the case. It would have been helpful had the Authority's assertions been backed up by criminological or psychological evidence which could support the view that the serious failure to act with integrity in one's personal life in the manner that Mr Frensham did, by seeking to exploit for his own sexual gratification a young girl, runs a significant risk that he would likewise seek to exploit vulnerable clients (such as the elderly) who seek to rely on him putting his client's interests before his own when giving them advice on how to deal with their investments, mortgages and pensions.

184. The Authority also seeks to establish a link between the offence and the integrity objective. We accept that objective embraces public confidence in the financial services industry and in that context whether there is a significant risk that the confidence of consumers will be impaired if it is known that a person guilty of an offence of this nature is allowed to work as a financial adviser.

185. Here, we think that the Authority is on sounder ground. Mr Frensham's offence will undoubtedly have resulted in revulsion on the part of right-thinking members of the public who will have read about the offence in the national press and specialist media. The Authority is clearly entitled to take into account the nature of the offence in considering the effect it has had on both Mr Frensham's reputation and the reputation of the industry as a whole. Mr Frensham's personal reputation has clearly been severely damaged as a result of the offence. But the question is whether the offence affects the reputation of Mr Frensham as a financial adviser and therefore potentially has an impact on the Authority's integrity objective. Furthermore, as was said at [54] of *Beckwith*, popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit.

186. Mr Frensham's offence was committed because he put his own interests before those of a person he believed to be a 15 year old girl who he sought to exploit for his own sexual gratification. In those circumstances the Authority is clearly entitled to consider whether that kind of behaviour would seriously affect his professional reputation and that of the industry as a whole.

187. We think the case of *Main*, as discussed at [60] to [63] above is helpful in this regard. The disgraceful behaviour of Mr Main which must also have been humiliating for the victim, was nevertheless much less serious than Mr Frensham's offending. It did not carry a custodial sentence and, as far as the sanction from the SRA was concerned, although the Court considered that the SDT's sanction was too lenient it did not consider that it merited anything more than a suspension rather than total expulsion from the profession. The answer to the question posed by Holroyde LJ at [30] was to the effect that public confidence in the legal profession would be harmed if they found that a man only recently convicted of offences of this kind was currently allowed to practice. In this case, the question would be whether public confidence in the financial services industry would be harmed if a person convicted of a serious sexual offence over four years ago and where there had been no complaints about the manner in which he had conducted his business since was able to continue to work in the industry. The fact that we have adapted the question to the circumstances of this case is an illustration of how each case must depend on its own facts.

188. Again, the Authority has not clearly linked the facts of the case to the relevant regulatory provision, in this case the integrity objective. They deal with the public confidence question simply by reference to an assertion that the public are entitled to expect that approved persons are individuals of the utmost integrity and reputation. That simply amounts to saying that the offence must be regarded as being so awful and would be regarded as such by fair-minded members of the public with knowledge of the facts, that the only answer to the question posed must be that the person concerned must be prohibited from working in the industry. That is presumably because public confidence in the industry would be significantly harmed if such a person was allowed to continue to work in the industry. However, the Authority's guidance does not make it clear that particular offences are considered by the Authority to be so serious that without more they would automatically disqualify the person concerned from working in the industry.

189. In those circumstances, the Authority's assertions must be supported by evidence. In this case, the evidence could be said to be equivocal. A considerable number of Mr Frensham's clients left after the fact of his conviction became known to them. They clearly did not think it was appropriate to deal with a financial adviser with a conviction of this kind. However, a significant majority of his clients have stayed with him, some of whom will know of the conviction. It is of course difficult to say whether Mr Frensham's client base is representative of the client base of financial advisers as a whole but it cannot be said that Mr Frensham's reputation as a financial adviser amongst his client base has been completely undermined. As with the consumer protection issue, the Authority's case would, as Mr Sheppard submitted, benefit from a more independent, analytical justification of the link between the offence and public confidence.

190. Consequently, had we been asked to decide this case on the basis of the conviction alone, then in the light of our findings of fact, it is likely that we would have asked the Authority to reconsider its decision.

191. However, as we have indicated, there are other factors which point in the other direction and to which we now turn.

The breach of the bail conditions

192. The Decision Notice made it clear that as well as the offence, the Authority placed considerable weight on the fact that the offence was committed in breach of Mr Frensham's bail conditions and that resulted in him being remanded in custody when the offence was committed.

193. In our view Ms Couzens was right in her evidence when she said that for several days before the commission of the offence Mr Frensham had consciously disregarded the conditions of his bail in attempting to groom a child. That is clear evidence of a willingness to place his own desires above all other considerations. In those circumstances, the commission of the attempted grooming offence cannot be regarded as a single isolated incident. It follows a pattern of behaviour and must therefore be regarded as a serious aggravating factor when considering the offence itself.

194. In our view, this factor provides evidence on which the Authority was entitled to rely in considering whether there is a significant risk of Mr Frensham disregarding his regulatory obligations. We think this question is more relevant to the integrity objective rather than the consumer protection objective. The reason for that is that Mr Frensham took a deliberate decision to disregard the law in order to satisfy his own interests. That is directly relevant to the question as to whether Mr Frensham would put his own interests above those of complying with his duty of candour and his obligation to be open and transparent with his regulator and, as we shall see, in our view Mr Frensham has in a number of other respects failed to comply with that obligation.

195. It is also worth mentioning in that regard that the Judge thought that the fact that the offence resulted in a breach of the bail conditions a serious enough factor to balance out the mitigation factor of Mr Frensham having had no previous convictions.

196. Mr Frensham's own evidence in the hearing of his reference also gave further cause for concern. His justification for breaching the bail conditions was that he thought he had not committed a criminal offence in relation to the incident that resulted in the imposition of the bail conditions. That clearly demonstrates he took it upon himself to make a judgment as to what the appropriate course of action was to take when he thought it was in his own interest to do so rather than accept that it was for those in a position of authority to impose conditions on his behaviour and expect that he would comply with them. Instead, he sought to rationalise in his own mind why it was acceptable in the circumstances for those conditions to be ignored. As we shall see later that approach has a parallel in the way that Mr Frensham dealt with his reporting obligations.

Failure to be open and transparent with the Authority

197. Mr Frensham did not dispute in his evidence that he failed in his obligations to report the following matters to the Authority:

(1) The fact of his first arrest and the imposition of the bail conditions.

(2) His second arrest and his remand in custody.

(3) The fact that his SPS was not renewed and that he was under investigation by the CII.

(4) The fact that the CII decided to expel Mr Frensham from membership of that body.

198. In our view, the reasons why those failures occurred follow a similar pattern. They all provide evidence that in his dealings with the Authority Mr Frensham decided to put his own interests and those of the Firm before the need to comply with the clear obligations to be open and transparent with the Authority. It matters not that the Authority did in fact find out about some of the matters concerned from other sources nor that the Authority was not as diligent as it should have been in following up with Mr Frensham after it became aware of those matters.

199. As far as the first arrest is concerned, as we have found, Mr Frensham considered whether he should inform the Authority but concluded that he did not need to do so because it was a personal matter relating to his personal conduct, did not interfere with his ability to carry on business and he did not believe he had committed a criminal offence.

200. That is similar to the reason he gave as to why he attempted to meet "Holly" in breach of his bail conditions. He took it upon himself to decide what it was appropriate for the Authority to know and did not give the Authority the opportunity of assessing whether the matters concerned impacted upon his fitness and properness. He may well have genuinely believed at the time of his first arrest that he had not committed a criminal offence and therefore the matter would be of no relevance to an assessment of his fitness and properness. But the fundamental point, which Mr Frensham did not appear to understand, and which his evidence shows he may still not even understand, is that it is the role of the Authority to make those judgments and not a matter that he should take upon himself.

201. As the quote from *Eversure* set out at [69] above demonstrates, the Authority is dependent upon smaller firms being fully open and cooperative with the regulator because it does not have the resources to have a continuously proactive relationship with the firm and have regular contact with it. A person of integrity would not seek to keep such matters back from the Authority but would recognise that it is much better if one is up front with difficulties. In the circumstances, the person concerned will get off on the right foot with the Authority and should get much credit for doing so.

202. As far as the second arrest and the remand in custody is concerned, Mr Frensham seeks to justify the failure to report on the difficulties he had in communication during the early weeks that he spent in prison. However, as we have

found, we do not believe that those difficulties would have prevented him getting some kind of message to the Authority as to what was going on, either through his wife, his lawyers, or a simple letter to the Authority. We think the true position is that Mr Frensham wanted to get his business back on an even keel before he made any contact with the Authority because he feared that it might be closed down immediately if he told the truth, which was that in the early stages there was nobody available to deal with clients or any other pressing issues. This was another example of Mr Frensham putting his own interests first, as further demonstrated by the fact that by getting prison officers to send emails relating to his clients' affairs, as described at [116] above he was compromising client confidentiality.

203. It is clearly an unacceptable position for a firm to be left with absolutely nobody to run it without the Authority being made aware of that fact as soon as it was possible to do so. Even after Mr Frensham's communication difficulties improved, he did not communicate with the Authority until Mr Uddin contacted him. Neither did Mr Frensham explain to the Authority that there had been a hiatus before the locum was appointed.

204. As far as the failure to report his difficulties with the CII are concerned, his explanation to the CII in his letter of 9 October 2017, as referred to at [152] above, repeats the pattern identified above. He had decided himself what was meant by a "relevant" law and therefore did not report the matter to the CII with the result that the CII were deprived of the opportunity of making an assessment as to what was "relevant". Again, a person of integrity would have put the matter on the table and then entered into a dialogue with the CII if this position was not accepted.

205. He was also aware that the SPS was a fundamental requirement for him to be able to carry on his business. He also knew that at the end of the day it was a matter for the Authority as to whether action should be taken against him in the absence of an SPS. It is therefore difficult to escape the conclusion that the reason that Mr Frensham did not inform the Authority about the problem with the SPS was because he was concerned that it would take action to restrict him from carrying on business if they knew about the matter.

206. The same pattern emerges in relation to his failure to notify the Authority of the CII's decision to expel him from membership. He rationalised in his own mind that because the decision was of no effect because he was appealing against it, it had not in fact happened. Again, a person of integrity would not have taken that course of action. The decision of the CII was clearly a matter of considerable relevance to the Authority, and it was not good enough to say that the Authority would have found out about it in any event because they knew of the investigation.

Rehabilitation

207. It is clearly to Mr Frensham's credit that he has continued to deal with his clients in what appears to be a compliant fashion and there is no evidence that there is a risk of him reoffending. That has now continued for a period of over 4 years.

208. However, as we indicated [138] above, in the light of the answers that Mr Frensham gave in his cross examination as to his intentions at the time of the offence, we cannot accept that he has shown genuine remorse in relation to the commission of the offence. He still cannot accept that he committed a criminal offence.

209. Furthermore, we see no evidence of rehabilitation in relation to his failures to comply with his duty of candour to the Authority. He still seeks to justify the actions he took at the time by explanations which we do not find convincing or appropriate. We do have serious concerns that Mr Frensham will continue to put his own interests above his duty of candour and that he therefore continues to demonstrate a lack of integrity in this respect.

210. We therefore do not consider that on balance much weight can be placed on the steps that Mr Frensham has taken to rehabilitate himself after the offence.

Proportionality

211. As an alternative basis of challenge to the Authority's decision, Mr Sheppard submitted that prohibition was not a proportionate response to Mr Frensham's conduct. In particular, he submitted that prohibition is disproportionate because of:

> (1) The failure to demonstrate sufficient qualitative relevance between the conduct and Mr Frensham's professional role.
>
> (2) The absence of dishonesty findings.
>
> (3) The length of time since the occurrence.
>
> (4) The seriousness of the offence which was an attempted offence which did not in fact result in Mr Frensham meeting a 15 year old girl which is reflected in the fact that the prison sentence was suspended.
>
> (5) The remorse and rehabilitation shown by Mr Frensham.
>
> (6) Mr Frensham's otherwise clean disciplinary record.
>
> (7) The failure to consider the impact on Mr Frensham's right to a private life under Article 8 ECHR, given the extra-professional context. This is especially so given the need for the application relevant rule to be sufficiently certain to be Article 8 compliant.

212. However, in those submissions Mr Sheppard fails to engage with the serious matters regarding non-disclosure that we have identified and the breach of the bail conditions. We accept that had the Authority relied on the nature of the offence alone then the issue of qualitative relevance and the impact on Mr Frensham's right to a private life then the issue of proportionality would have been engaged.

213. Neither do we accept Mr Sheppard's submission regarding the seriousness of Mr Frensham's offence. The Judge made it clear in her sentencing remarks that the suspended sentence was a reflection of the fact that Mr Frensham posed a low risk of committing further offences and, as the Judge said, there was no excuse in Mr

Frensham sending sexually graphic messages to a person who he believed to be a 15-year-old female.

214. However, it is our experience that it is often the case that it is not the fact that a criminal offence has been committed that is fatal to an applicant's case but the manner in which he deals with the consequences that follow. In this case, we have found that the way Mr Frensham dealt with those consequences demonstrated a lack of integrity which entitles the Authority to exercise the prohibition power in order to further its statutory objectives.

Conclusion

215. Although we have found some flaws in the Authority's approach to the relevance of the conviction, in our view those flaws do not justify us asking the Authority to reconsider its decision.

216. On the basis of the facts that we have found, and the assessment that we have made of all of the circumstances surrounding Mr Frensham's conviction and his subsequent conduct, in our view it would be inevitable that if the matter was remitted to the Authority, then the same decision to withdraw Mr Frensham's approvals and make a prohibition order would be made. In our view, the Authority would be fully entitled to take that course.

217. The reference is dismissed. Our decision is unanimous.

Directions

218. In accordance with s 133 (6) FSMA we have dismissed the reference. It is therefore open to the Authority to withdraw Mr Frensham's approvals and make a prohibition order against Mr Frensham in the terms set out in the Decision Notice.

219. We remit the reference to the Authority with a direction that effect be given to our determination.

Signed on Original

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 31 August 2021