APPLICATION FOR PERMISSION — non-investment insurance activities — application refused on grounds that controlling shareholder whose approval as Director (CF1) was included in application was not fit and proper (Threshold Condition 5) and because in consequence the company would not have the requisite resources (Threshold Condition 4) — Tribunal finding that director not fit and proper but no other reason to refuse application — whether resignation of director and disposal of his shares sufficient to distance himself from company — whether company then able to satisfy Threshold Condition 4 — jurisdiction of Tribunal to direct granting of permission in response to application in changed circumstances — reference allowed in part

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

NDI INSURANCE BROKERS LIMITED
PETER IVAN GREENGRASS
JONATHAN BRITTON

Applicants

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: Colin Bishopp (Chairman)
Keith Palmer
Peter Burdon

Sitting in public in London on 21 and 22 December 2005 and 12 January 2006

Craig Gaunt, accountant, for the Applicants
Aidan Christie, counsel, instructed by the Authority for the Respondent

DECISION

Introduction

1. The first applicant, NDI Insurance Brokers Limited ("NDI"), as its name indicates, carries on the business of insurance broking. It does not deal in personal lines, but in insurance and reinsurance products suitable for clients engaged in business activities. It does not deal in investment products. It has, or at the material time had, three directors: the second applicant, Peter Greengrass, the third applicant Jonathan Britton and Nathan Parke. Mr Greengrass owned 63% of the issued shares, Mr Britton 27% and Mr Parke 5%; the residue were owned, we understand, by a non-director. NDI was incorporated in January 2002 and began trading in October 2002. It is based in Norwich.

2. In May 2004 NDI applied to the respondent Authority for permission to carry out various regulated activities relevant to its insurance broking business. The application was made in accordance with section 40 of the Financial Services and Markets Act 2000 ("FSMA") and at the same time it applied, in accordance with sections 59 and 60 of FSMA, for the approval of Mr Greengrass and Mr Britton; Mr Greengrass, if approved, was to perform the controlled function of Director (CF1) and Mr Britton of Director and Apportionment and Oversight (CF1 and CF8 respectively). One consequence of NDI's making those applications was that it gained interim approval to carry on the activities for which it had sought permission: see article 2 of the Financial Services and Markets Act 2000 (Transitional Provisions) (General Insurance Intermediaries) Order 2004 (SI 2004/3351), a provision to which we will need to return.

3. On 14 January 2005 the Authority, acting through the Regulatory Decisions Committee ("RDC"), issued Warning Notices, informing the applicants that it proposed to refuse each of the applications, but that they might make representations. Written submissions were made in February, and in March 2005 Mr Greengrass and Mr Britton appeared before the RDC to make oral submissions and answer questions. However, the Authority decided to refuse all the applications, and issued Decision Notices to that effect on 16 March 2005. The applicants referred the Decision Notices to the Tribunal on 29 March 2005.

4. The reference came before us on 21 and 22 December 2005, when the applicants were represented by Craig Gaunt, an accountant who has been associated with NDI for some time, and the Authority by Aidan Christie of counsel. We heard oral evidence from Mr Greengrass, Mr Britton and Joan Bailey, who was the Authority's assigned case officer until she moved to other duties in December 2004, and had a substantial volume of documentation, with written submissions from both representatives.

5. After hearing the parties' evidence and submissions, we reached preliminary conclusions about the manner in which we thought the reference should be resolved, and we convened a further hearing on 12 January 2006, conscious that NDI's interim authorisation would expire, without the possibility of renewal or extension, on 14 January: see article 2(3) of the 2004 Order. The purpose of the

hearing was to hear further submissions by the parties, in particular about the extent of our jurisdiction and, if possible, to make a direction which would come into effect before the interim authorisation expired. We are pleased to say that, with the help of the parties, we were able to do so.

The facts

6. There was little between the parties about the essential facts of the matter which is central to the case, namely Mr Greengrass's and, through him, NDI's relationship with Motorcare Warranties Limited ("Motorcare"), although there were significant differences between them about the detail. We should make it clear that Motorcare and the other participants in the arrangements considered below were not represented before us, that we heard no evidence from any of them or their officers, and that we had no written or other observations from them about the evidence and representations which we heard and read. We have borne those factors in mind in reaching our conclusions. Our findings of fact are based on the material available to us, and are findings in the context of this reference; they should not be taken to imply either criticism or approval by the Tribunal of Motorcare or the other participants, on whose actions we are not required to adjudicate.

7. In about 2001 Mr Greengrass, who was at the time trading by means of another company controlled by him, was introduced to Motorcare, which sold what was described as motor vehicle breakdown warranties to members of the public. He established a working relationship with Motorcare, and particularly its majority shareholder and managing director, Tony Thomas. The relationship continued after NDI began to trade in October 2002. Mr Greengrass's dealings with Motorcare were explored in great detail at the hearing, but we do not think it necessary for the purposes of this decision to give more than an outline. Indeed, we do not think we learnt the whole story, in part because, we have concluded, Mr Greengrass himself was not altogether sure of some of the facts. We did learn that the relationship between NDI and Motorcare had broken down, in some acrimony. It was accepted that Mr Britton had little or no contact with Motorcare at any time.

8. Motorcare was not an authorised insurer. During the earlier part of the period with which we are concerned it acted as agent for, initially, various Lloyd's underwriters and, latterly, Pinnacle Insurance plc which was, and we understand still is, an authorised insurer. The latter relationship seems not to have been a happy one as notice to terminate was served (we did not learn why) only six months after the relationship began, and overall it lasted only from April 2002 until January 2003. It seems that in addition to acting as an agent of the successive insurers, Motorcare may have offered some cover itself; whether what it offered amounted to insurance, and whether in consequence it required authorisation, were issues explored before us but they were not resolved and are of only incidental relevance to the matters we must decide.

9. In November 2001, apparently following lengthy discussions, Mr Greengrass placed a stop loss policy on behalf of Motorcare with International Unity Insurance Company Limited of Ireland. If a stop loss policy was

appropriate, it necessarily follows that Motorcare was itself offering an insurance product (or, at least, something closely akin to insurance); if it was not itself offering insurance or something very similar (and was therefore not at risk of loss) it had no need of stop loss protection. Mr Greengrass's evidence was that the arrangements for the cover were made by a colleague, John Randall, who had a contact at International Unity, but that he was well aware of what was being done. He was, in fact, so concerned about International Unity's ability to meet claims that he expressed serious reservations about the worth of the cover in his own communications with Motorcare. The earlier documents available to us do not altogether bear out that assertion, but the nature of Mr Greengrass's reservations was spelt out in clear terms on the cover note which his then company issued and we accept from the contemporaneous exchange of correspondence that, if not before then certainly soon after the cover was placed, Motorcare was aware of Mr Greengrass's concerns but elected to continue with the policy. However, for reasons which did not emerge (and of which we think Mr Greengrass too was ignorant) Motorcare did not pay any part of the premium due under the policy.

10. Mr Greengrass's concerns did not diminish and in January 2002 he had further discussions with Motorcare about its stop loss policy. For the time being, however, the cover remained with International Unity. Eventually, in July 2002, he introduced Mr Thomas to a Texan General Managing Agent, Norwich International Resource Management Inc ("NIRM") whose underwriter, James Miller, he had known for some years. Mr Miller arranged (Mr Greengrass told us) with Motorcare's agreement to place its stop loss cover with United Assurance Company SA ("UAC") of Nicaragua. Mr Greengrass considered that Motorcare had achieved greater protection by this arrangement as it could look not only to the insurer but also to NIRM to cover any losses it might suffer, since Texan General Managing Agents are responsible for the underwriters they represent. A "placement slip" (the US equivalent of a cover note) issued by NIRM shows that the cover was to take effect from 1 January 2002—thus replacing the International Unity policy from inception—but this seems to have been a mistake, and a further cover note was later issued showing that cover under the UAC policy began on 1 September 2002. Motorcare had still made no payments of premium to International Unity, but it did make the payments due under the UAC policy. We did not learn quite how Motorcare, or Mr Greengrass on its behalf, managed to terminate the International Unity policy, and avoid the payment of any premium.

11. At about the same time notice to determine the Pinnacle agreement was served and Mr Greengrass, by then with NDI, became actively involved in discussions with Motorcare about how it might promote its business in the future. From January 2003, it appears, Motorcare was no longer acting as the agent of any authorised insurer, but instead sold the same product as principal, and was itself bearing the risk of loss.

12. There was some dispute at the hearing about whether the business Motorcare undertook amounted to insurance, requiring authorisation, or the granting of warranties, which may not. On this issue we were referred to the Authority's Consultation Paper 150, published in August 2002, relating to the

draft of the guidance on the identification of contracts of insurance, intended to appear in the Authorisation Manual. At section 3, paragraph 1.6.6, it is said:

> "Contracts under which the provider undertakes to provide periodic maintenance of goods or facilities, whether or not any uncertain or adverse event (in the form of, for example, a breakdown or failure) has occurred, are unlikely to be contracts of insurance."

13. Mr Greengrass told us that he was conscious that Motorcare was not authorised to sell its own insurance but, in the light of the comment in the draft guidance, he took the view that Motorcare in fact provided no more than a warranty. However, the printed material it gave to its customers, at the time when Mr Greengrass first became involved, referred to the product it offered as "insurance" and the customer as the "assured". No doubt for reasons of economy Motorcare intended to use the same documentation as it had used when acting as Pinnacle's agent, making only the minimum necessary changes, but Mr Greengrass attempted, he said, to ensure that Motorcare's new documentation was redrawn, in order to eliminate references to insurance and related terms (save to the extent that Motorcare was acting as an agent promoting an authorised insurer's product, as it did in respect of some subsidiary elements, such as legal expenses insurance, of the cover it offered). In the event he was not entirely successful, since Motorcare did not follow his advice in every respect. Nevertheless, he was satisfied, he said, that Motorcare was not doing business for which it required, but did not have, authorisation.

14. It is not strictly necessary, for the purposes of this reference, for us to determine whether or not he was correct in that view but we must record the Authority's contentions on the point. It is argued on their behalf that the Motorcare product is properly categorised as insurance; when Motorcare was acting as Pinnacle's agent it was so described, on any reasonable view that is what it was, and Mr Greengrass, as an experienced insurance professional, should have had no difficulty identifying it as insurance. At the very least he should have realised that it was capable of being insurance, and that it was imprudent to allow Motorcare to proceed as it did without first ensuring, by enquiry of the regulatory bodies, that no authorisation was necessary. We will comment on this point later.

15. The arrangement with UAC, too, did not last for very long, and as soon as February 2003 another change was made. Mr Miller then indicated that he was no longer satisfied with the ability of UAC to meet claims; at about the same time Mr Greengrass himself made enquiries of the Texas Department of Insurance which led him to the same conclusion. Mr Miller suggested that cover should instead be obtained from International Reinsurance Limited which, as its name implies, was a reinsurer; it did not have authorisation to write primary insurance business. Mr Greengrass had a financial interest in it. Norfolk Insurance Limited, a newly formed company in which Mr Greengrass also had an interest and which was incorporated on the island of Nevis, was used to "front" the arrangement—that is, it accepted the risk, but it was wholly reinsured with International Reinsurance Limited. Norfolk Insurance Limited had no assets and could not have met any claims should the reinsurance turn out to be inadequate.

16. The nature of Mr Greengrass's, and NDI's, dealings with Motorcare came to the attention of the Authority when a Motorcare customer made a complaint. That complaint did not itself reflect in any way on NDI, but it set the Authority on a line of enquiry which, incidentally, revealed the nature of the arrangements Motorcare had made through NDI and its predecessors. By this time, relations between Motorcare and NDI, and between Mr Greengrass, Mr Thomas and Mr Miller were no longer cordial (we did not altogether learn why). The Authority was, understandably, concerned about the arrangements. In particular, it took the view that if Motorcare was not undertaking insurance business on its own account, it had no need of the stop loss policies which Mr Greengrass had procured; alternatively, if stop loss policies were appropriate Mr Greengrass was assisting Motorcare to conduct insurance business without authorisation; and it might be that NDI was itself undertaking regulated activities without the necessary authorisation.

17. The investigation, so far as it is material to this reference, began with a visit made by Mrs Bailey and a colleague to Motorcare in January 2004, followed by a visit to NDI in the following month. That visit lasted for about two hours. Various documents were provided and, in response to written requests by Mrs Bailey, NDI provided further documents and information over the succeeding months. Mrs Bailey's evidence was that she suspected a breach by NDI of section 19 of FSMA (the "general prohibition"), an offence punishable by fine or imprisonment (see section 23 of FSMA), and it is clear that the investigation was conducted upon the basis that prosecution was a possibility; indeed, the Authority wrote to NDI soon after the investigation began informing it that prosecution for a breach of section 19 was being actively considered.

18. The Authority's enquiries showed that UAC had no insurance business authorisation and had fallen foul of the Texan authorities and that Norfolk Insurance Limited had no authorisation in Nevis (though it accepts that at the time the Nevis insurance industry was unregulated) or elsewhere. The investigating officers were concerned not only that the cover obtained by NDI for Motorcare was inappropriate for its needs, but that the cover was of dubious value, that the documentation relating to the placed contracts was of poor quality, that the assessment of the premiums appeared to be haphazard or worse and that Mr Greengrass's interest in the two companies had not been disclosed to Motorcare. They also took the view that NDI's replies to their enquiries were lacking in candour.

19. On 2 March 2005 Mr Greengrass and Mr Britton attended before the Authority's Regulatory Decisions Committee ("RDC"). Although they were given the opportunity of putting their case to the RDC, it is apparent from the transcript of the proceedings with which we were provided that the RDC meeting amounted, at least in part, to a continuation of the investigation itself. The Applicants complained to us about the fact that the manner in which the RDC meeting was conducted seemed to them to be hostile, and about the Authority's refusal to discuss with them either its investigation or the pending application for approval—they were told, as it seems the Authority agrees, that if NDI wished to put in a revised application it could do so but it would be required to withdraw the

application which it had already made, the consequence of which would be that it would immediately lose its interim authorisation. We will comment on these points, too, later in this decision.

The relevant criteria

20. Before setting out our conclusions about the facts we think it appropriate to put them in context by dealing with the criteria, so far as they are presently relevant, which the Authority must respect when considering an application such as that made by NDI. The overriding consideration is to be found in section 5 of FSMA:

> "**5 The protection of consumers**
>
> (1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.
>
> (2) In considering what degree of protection may be appropriate, the Authority must have regard to—
>
> (a) the differing degrees of risk involved in different kinds of investment or other transaction;
>
> (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
>
> (c) the needs that consumers may have for advice and accurate information; and
>
> (d) the general principle that consumers should take responsibility for their decisions.
>
> (3) 'Consumers' means persons—
>
> (a) who are consumers for the purposes of section 138; or
>
> (b) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons."

21. Applications for authorisation must be considered in the light of that requirement. Specifically, the Authority must be satisfied, before it grants any permission for which an application is made, that the applicant will satisfy the "threshold conditions"; this requirement is found at section 41:

> "**41 The threshold conditions**
>
> (1) 'The threshold conditions', in relation to a regulated activity, means the conditions set out in Schedule 6.
>
> (2) In giving or varying permission, or imposing or varying any requirement, under this Part the Authority must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all of the regulated activities for which he has or will have permission.
>
> (3) But the duty imposed by subsection (2) does not prevent the Authority, having due regard to that duty, from taking such steps as it

considers are necessary, in relation to a particular authorised person, in order to secure its regulatory objective of the protection of consumers."

22. Thus while an applicant must satisfy the relevant threshold conditions, its doing so is not, alone, enough; the Authority has still to consider the protection of consumers, carrying out the balancing exercise which section 5 prescribes. Here, however, its primary case is that the threshold conditions are not met. Only Conditions 4 and 5 are currently relevant. Condition 4 reads, so far as material:

> "The resources of the person concerned must, in the opinion of the Authority, be adequate in relation to the regulated activities that he seeks to carry on, or carries on."

In the context of this case, "the person" is NDI. Condition 5 reads:

> "The person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances including—
>
> his connection with any person;
>
> the nature of any regulated activity that he carries on or seeks to carry on; and
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> the need to ensure that his affairs are conducted soundly and prudently."

23. The Authority's position (which is not controversial on this point) is that "resources" in Condition 4 include not only financial but also human resources, and it is only with human resources that we are concerned in this reference. Its case, shortly put, is that Mr Greengrass, by reason of his dealings with Motorcare, is not fit and proper, that if the application for approval of him to perform the controlled function of director is refused NDI does not have the requisite resources and, if he is to remain a director and the controlling shareholder of NDI, its connection with him means that it too is not fit and proper. Although there is no direct concern about Mr Britton personally (his only involvement in the Motorcare relationship, as the Authority accepts, consisted of the writing of a few letters to the Authority during the course of the investigation) it must follow, if NDI's application in respect of itself fails, that its application for approval of Mr Britton must fail with it. The essential question, therefore, and the focus of the debate before us, is whether the character of Mr Greengrass's dealings with Motorcare was such that the Authority could not and cannot be satisfied that he is a fit and proper person. We should add, if only for clarity, that the burden is on NDI to persuade us that the Authority's conclusion that Mr Greengrass is not fit and proper is wrong, and that it should have been satisfied, on the evidence available to us (and therefore not only the evidence available to it at the time the decision was made), that he is indeed fit and proper. If we are so persuaded we may, in effect, direct the Authority to approve him. The Authority has no obligation to satisfy us that it was right to refuse the application, or any part of it, though naturally Mr Christie sought to justify its position.

Our conclusions on the facts

24. As we indicated at the reconvened hearing on 12 January 2006, we are not persuaded that Mr Greengrass is fit and proper; indeed, we are satisfied that the Authority was right to conclude the contrary. To his credit, he acknowledged that

there were serious shortcomings in his dealings with Motorcare, and that his conduct was not of the standard which is properly to be expected of those offering financial services to the public, including other businesses. It was plain to us that the documentary audit trail of his dealings with Motorcare was of lamentable quality and there remain several questions about the utility and worth of the arrangements into which he caused or permitted Motorcare to enter. Appropriate due diligence was almost wholly absent. We will deal with the Authority's argument that there was a lack of candour later; at this stage we set out our conclusions on the substantive matters.

25. Mr Greengrass's argument was that he was duped by Mr Thomas and misled, if not worse, by Mr Miller. We do not need to make any finding on that contention since in our view it is immaterial even if true; Mr Greengrass is, by his own account, an experienced insurance professional and he should have realised, at an early stage, that what was being done did not accord with normal business practice. He should not have suggested that Motorcare enter into some of the arrangements, either because they were unnecessary or because the organisations with which the business was placed were not properly authorised or able to meet claims; he should have warned Motorcare against them to the extent that they were suggested by Motorcare itself or by Mr Miller; and if his warnings were not heeded he should have refused to continue to act for Motorcare. We are concerned, also, that he was too willing to accept that Motorcare was not itself offering insurance for which it needed authorisation when either Motorcare or he could have made further enquiries if he was in any doubt. Instead, as the contemporaneous documentation and his own evidence made clear, Mr Greengrass believed that his relationship with Mr Thomas would lead to Mr Thomas's, or Motorcare's, making substantial investments from which he would benefit. There is nothing inherently wrong in that; Mr Greengrass's error was to allow the prospect of significant financial advantage to lead him into recommending, or failing to warn Motorcare against, arrangements which, as he now accepts, were ill-advised, in concept or execution. It is no answer to say that Mr Thomas or Mr Miller duped him; the arrangements were self-evidently of a character to put Mr Greengrass on enquiry. We have concluded too that he did not recognise, and for much the same reason, that when Mr Miller became involved he (Mr Greengrass) lost control of the relationship with Motorcare and was assisting it to enter into arrangements which he did not fully understand himself.

26. These cannot be regarded as minor or isolated errors, such as anyone might make in an otherwise exemplary career, but serious lapses of judgment which it is impossible to ignore. It is, however, to Mr Greengrass's credit that he has recognised his failings and has begun to come to terms with them. There was no suggestion at the hearing that Mr Greengrass's conduct had fallen below the requisite standard, save in his dealings with Motorcare, and we are satisfied that this was one episode, relating to a single business customer, which Mr Greengrass now bitterly regrets. As we indicated at the reconvened hearing, we see no reason why, after the passage of time, a further application for approval of him might not succeed (but, and without wishing to restrict the Authority in any way as to how it might respond to a further application by Mr Greengrass, we would not encourage

him to submit a further application for at least 3 years from the date of this decision) . At this stage, however, we can only agree with the Authority that it could not be satisfied that he is fit and proper. Thus the reference, so far as it relates to Mr Greengrass's approval, must fail.

27. Despite that conclusion about Mr Greengrass, we took the view that it might not be necessary for us to give directions to the Authority which would have the effect of closing NDI down—since without authorisation it could not continue to trade—or which would stigmatise Mr Britton, since, as we have said, the Authority's decisions were based entirely, or almost entirely, on their conclusions about Mr Greengrass. There was some concern about perceived factual inaccuracies in one letter written by Mr Britton, but Mr Christie laid little emphasis on that letter and accepted that it was not a matter which would lead, without more, to the conclusion that Mr Britton is not fit and proper. Moreover, we are not persuaded that there was any material inaccuracy in the letter (or, if there was, that Mr Britton can be blamed for it). There was no suggestion, nor any evidence, before us which cast doubt on the propriety of NDI's or Mr Britton's, actions, except in relation to Motorcare and by reason of their connection with Mr Greengrass. The closure of NDI would lead to the loss of their livelihood by a number of employees, as well as Mr Greengrass and Mr Britton, and we concluded that it was a result to be avoided if possible, provided there was no infringement of FSMA and we did not exceed our jurisdiction in making directions to the Authority.

28. Despite initially resisting our intended outcome, Mr Christie and the Authority soon accepted that they should assist us in achieving that outcome, and we must express our gratitude to him and the officers of the Authority who accompanied him at the hearing for their considerable assistance in our finding a means to realise our intentions without exceeding our powers; if, nevertheless, we have exceeded those powers the blame is entirely our own. It was essential that we find a practical solution which could be put into effect immediately if NDI were not to be forced to close since, as we have mentioned, we do not have the power to extend the interim authorisation. For convenience we set out the directions which we did make, and the reasoning behind them, at the end of this decision.

The investigation

29. We have mentioned NDI's concerns about the (as it was perceived) hostile RDC meeting, and the Authority's refusal to enter into discussions, despite numerous requests, while the investigation was in progress and, indeed, during the course of this reference. It complains too that the threat of a prosecution for breach of section 19 of FSMA was not removed until a very late stage, and that threat coloured both the investigating officers' approach and NDI's responses. It believes that the investigating officers decided at an early stage in the enquiry that Motorcare was the victim of NDI's misconduct, and were not willing to consider any other possibility.

30. We should start by saying that we are conscious of the difficulty faced by the Authority by reason of its being both the authorising and the investigating body. Separating those roles is not always an easy task and the Authority should

not be criticised too readily (and we are aware that it has changed its procedures since the events with which we are concerned), but we have concluded that in this case there is some merit in NDI's arguments. We were left with little doubt that the officers closed their minds rather too soon—even though, in substance, they were right in their view that Mr Greengrass's conduct was inappropriate—and that the investigation was conducted almost from the outset in a hostile manner, with the possibility of a section 19 prosecution withdrawn only at a late stage, shortly before the hearing before us began. It is not altogether surprising, against that background, that some of NDI's replies to their enquiries were guarded, and appeared to the Authority to be lacking in candour. Mr Greengrass, who was responsible for most of the correspondence even if he did not write it all himself, told us that he did not always understand the requests. It might be said that, where there was doubt in his mind, he should have volunteered information even if it was not clearly requested; but faced with hostile investigators who refused, despite numerous requests, to meet him we can understand why he was rather less forthcoming. It is right that those who seek authorisation by the Authority should be wholly open and truthful in their dealings with it but by the same token the Authority should not adopt an excessively confrontational approach, as we think it did here, and be surprised when those whom it is investigating give cautious replies.

Conclusions

31. As we have indicated, we came to the conclusion that while the reference so far as it related to Mr Greengrass must fail, there was no reason why it should fail in relation to NDI and Mr Britton if that outcome could be avoided without offending FSMA. The principal difficulty was NDI's connection with Mr Greengrass; as long as he remained a director and the holder of more than ten per cent of the shares (see FSMA section 179) he would not merely be connected with NDI but, for the purposes of the Act, controlling it. Secondly, assuming Mr Greengrass ceased to be connected with NDI, within the meaning of FSMA, we needed to be satisfied that we could properly direct the Authority that it should itself be satisfied that the threshold condition of adequate resources would be met if NDI had only one approved director, Mr Britton. Although we were told that further directors could and would be appointed, it would clearly be quite impossible to appoint them and have applications for their approval lodged with the Authority and processed before the interim authorisation expired; nor could one be certain that any such application would be approved. These problems could more readily have been dealt with if we had the power to extend the period of interim authorisation but, whether by accident or design we do not know, FSMA contains no mechanism by which the Authority or the Tribunal may extend it, in any circumstances.

32. We heard evidence from Mr Britton about his own experience and were satisfied from that evidence that he is fit and proper, and that, albeit with assistance from others (not including Mr Greengrass), he is capable of managing NDI and of ensuring that its affairs are conducted in accordance with the requirements of FSMA and the regulatory regime. Mr Greengrass undertook to resign from his position as director and to dispose of sufficient of his shares in

NDI to reduce his holding to less than ten per cent by 4 pm on the following day, 13 January 2006. We accordingly directed that if appropriate evidence, satisfactory to the Authority, of his having done so were produced to it by that time, the Authority should grant NDI's applications in respect of itself and Mr Britton. If the evidence should not be produced, or should be deficient or late, the reference must fail. We later learnt that satisfactory evidence was produced before the expiry of the time limit we set.

33. The reference therefore succeeds in part. Our conclusions are unanimous.

COLIN BISHOPP
CHAIRMAN
Release Date:

FIN/2004/0027